

paragraph (1) and the reasons for the determination. The Secretary shall submit such notice, if at all, not later than January 1, 2003.

(d) SECRETARY CONCERNED DEFINED.—In this section, the term “Secretary concerned” means the Secretary of each military department and the Secretary of Defense with respect to the Defense Agencies.

(Added Pub. L. 105–85, div. A, title III, §350(a), Nov. 18, 1997, 111 Stat. 1691.)

§ 2379. Requirement for determination by Secretary of Defense and notification to Congress before procurement of major weapon systems as commercial items

(a) REQUIREMENT FOR DETERMINATION AND NOTIFICATION.—A major weapon system of the Department of Defense may be treated as a commercial item, or purchased under procedures established for the procurement of commercial items, only if—

(1) the Secretary of Defense determines that—

(A) the major weapon system is a commercial item, as defined in section 103 of title 41; and

(B) such treatment is necessary to meet national security objectives; and

(2) the congressional defense committees are notified at least 30 days before such treatment or purchase occurs.

(b) TREATMENT OF SUBSYSTEMS AS COMMERCIAL ITEMS.—A subsystem of a major weapon system (other than a commercially available off-the-shelf item as defined in section 104 of title 41) shall be treated as a commercial item and purchased under procedures established for the procurement of commercial items if either—

(1) the subsystem is intended for a major weapon system that is being purchased, or has been purchased, under procedures established for the procurement of commercial items in accordance with the requirements of subsection (a); or

(2) the contracting officer determines in writing that the subsystem is a commercial item, as defined in section 103 of title 41.

(c) TREATMENT OF COMPONENTS AND SPARE PARTS AS COMMERCIAL ITEMS.—(1) A component or spare part for a major weapon system (other than a commercially available off-the-shelf item as defined in section 104 of title 41) may be treated as a commercial item for the purposes of section 2306a of this title if either—

(A) the component or spare part is intended for—

(i) a major weapon system that is being purchased, or has been purchased, under procedures established for the procurement of commercial items in accordance with the requirements of subsection (a); or

(ii) a subsystem of a major weapon system that is being purchased, or has been purchased, under procedures established for the procurement of commercial items in accordance with the requirements of subsection (b); or

(B) the contracting officer determines in writing that the component or spare part is a

commercial item, as defined in section 103 of title 41.

(2) This subsection shall apply only to components and spare parts that are acquired by the Department of Defense through a prime contract or a modification to a prime contract (or through a subcontract under a prime contract or modification to a prime contract on which the prime contractor adds no, or negligible, value).

(d) INFORMATION SUBMITTED.—(1) To the extent necessary to determine the reasonableness of the price for items acquired under this section, the contracting officer shall require the offeror to submit—

(A) prices paid for the same or similar commercial items under comparable terms and conditions by both Government and commercial customers;

(B) if the contracting officer determines that the offeror does not have access to and cannot provide sufficient information described in subparagraph (A) to determine the reasonableness of price, information on—

(i) prices for the same or similar items sold under different terms and conditions;

(ii) prices for similar levels of work or effort on related products or services;

(iii) prices for alternative solutions or approaches; and

(iv) other relevant information that can serve as the basis for a price assessment; and

(C) if the contracting officer determines that the information submitted pursuant to subparagraphs (A) and (B) is not sufficient to determine the reasonableness of price, other relevant information regarding the basis for price or cost, including information on labor costs, material costs, and overhead rates.

(2) An offeror may not be required to submit information described in paragraph (1)(C) with regard to a commercially available off-the-shelf item and may be required to submit such information with regard to any other item that was developed exclusively at private expense only after the head of the contracting activity determines in writing that the information submitted pursuant to paragraphs (1)(A) and (1)(B) is not sufficient to determine the reasonableness of price.

(e) DELEGATION.—The authority of the Secretary of Defense to make a determination under subsection (a) may be delegated only to the Deputy Secretary of Defense, without further redelegation.

(f) MAJOR WEAPON SYSTEM DEFINED.—In this section, the term “major weapon system” means a weapon system acquired pursuant to a major defense acquisition program (as that term is defined in section 2430 of this title).

(Added Pub. L. 109–163, div. A, title VIII, §803(a)(1), Jan. 6, 2006, 119 Stat. 3370; amended Pub. L. 110–181, div. A, title VIII, §815(a)(1), Jan. 28, 2008, 122 Stat. 222; Pub. L. 113–291, div. A, title X, §1071(a)(7), Dec. 19, 2014, 128 Stat. 3504; Pub. L. 114–92, div. A, title VIII, §852(a)–(d), Nov. 25, 2015, 129 Stat. 917, 918.)

AMENDMENTS

2015—Subsec. (a). Pub. L. 114–92, §852(a), inserted “and” at end of par. (1)(B), redesignated par. (3) as (2),

and struck out former par. (2) which read as follows: “the offeror has submitted sufficient information to evaluate, through price analysis, the reasonableness of the price for such system; and”.

Subsec. (b). Pub. L. 114-92, §852(b)(1), substituted “if either” for “only if” in introductory provisions.

Subsec. (b)(2). Pub. L. 114-92, §852(b)(2), substituted “writing that” for “writing that—”, struck out subpar. (A) designation before “the subsystem is a”, substituted “title 41.” for “title 41; and”, and struck out subpar. (B) which read as follows: “the offeror has submitted sufficient information to evaluate, through price analysis, the reasonableness of the price for such subsystem.”

Subsec. (c)(1). Pub. L. 114-92, §852(c)(1), substituted “title if either” for “title only if” in introductory provisions.

Subsec. (c)(1)(B). Pub. L. 114-92, §852(c)(2), substituted “writing that” for “writing that—”, struck out cl. (i) designation before “the component or”, substituted “title 41.” for “title 41; and”, and struck out cl. (ii) which read as follows: “the offeror has submitted sufficient information to evaluate, through price analysis, the reasonableness of the price for such component or spare part.”

Subsec. (d). Pub. L. 114-92, §852(d), amended subsec. (d) generally. Prior to amendment, text read as follows: “To the extent necessary to make a determination under subsection (a)(2), (b)(2), or (c)(1)(B), the contracting officer may request the offeror to submit—

“(1) prices paid for the same or similar commercial items under comparable terms and conditions by both government and commercial customers; and

“(2) if the contracting officer determines that the information described in paragraph (1) is not sufficient to determine the reasonableness of price, other relevant information regarding the basis for price or cost, including information on labor costs, material costs, and overhead rates.”

2014—Subsec. (a)(1)(A). Pub. L. 113-291, §1071(a)(7)(A), substituted “section 103 of title 41” for “section 4(12) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(12))”.

Subsec. (b). Pub. L. 113-291, §1071(a)(7)(B), substituted “section 104 of title 41” for “section 35(c) of the Office of Federal Procurement Policy Act (41 U.S.C. 431(c))” in introductory provisions.

Subsec. (b)(2)(A). Pub. L. 113-291, §1071(a)(7)(A), substituted “section 103 of title 41” for “section 4(12) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(12))”.

Subsec. (c)(1). Pub. L. 113-291, §1071(a)(7)(B), substituted “section 104 of title 41” for “section 35(c) of the Office of Federal Procurement Policy Act (41 U.S.C. 431(c))” in introductory provisions.

Subsec. (c)(1)(B)(i). Pub. L. 113-291, §1071(a)(7)(A), substituted “section 103 of title 41” for “section 4(12) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(12))”.

2008—Subsec. (a)(2), (3). Pub. L. 110-181, §815(a)(1)(A), added par. (2) and redesignated former par. (2) as (3).

Subsec. (b). Pub. L. 110-181, §815(a)(1)(B), added subsec. (b) and struck out former subsec. (b). Former text read as follows: “A subsystem or component of a major weapon system shall be treated as a commercial item and purchased under procedures established for the procurement of commercial items if such subsystem or component otherwise meets the requirements (other than requirements under subsection (a)) for treatment as a commercial item.”

Subsecs. (c) to (f). Pub. L. 110-181, §815(a)(1)(C), (D), added subsecs. (c) and (d) and redesignated former subsecs. (c) and (d) as (e) and (f), respectively.

EFFECTIVE DATE

Pub. L. 109-163, div. A, title VIII, §803(b), Jan. 6, 2006, 119 Stat. 3371, provided that: “The amendments made by subsection (a) [enacting this section] shall take effect on the date of the enactment of this Act [Jan. 6, 2006], and shall apply to contracts entered into on or after such date.”

§ 2380. Commercial item determinations by Department of Defense

The Secretary of Defense shall—

(1) establish and maintain a centralized capability with necessary expertise and resources to oversee the making of commercial item determinations for the purposes of procurements by the Department of Defense; and

(2) provide public access to Department of Defense commercial item determinations for the purposes of procurements by the Department of Defense.

(Added Pub. L. 114-92, div. A, title VIII, §851(a)(1), Nov. 25, 2015, 129 Stat. 916.)

§ 2380A. Treatment of goods and services provided by nontraditional defense contractors as commercial items

Notwithstanding section 2376(1) of this title, items and services provided by nontraditional defense contractors (as that term is defined in section 2302(9) of this title) may be treated by the head of an agency as commercial items for purposes of this chapter.

(Added Pub. L. 114-92, div. A, title VIII, §857(a), Nov. 25, 2015, 129 Stat. 921.)

CHAPTER 141—MISCELLANEOUS PROCUREMENT PROVISIONS

<p>Sec. 2381. [2382. 2383. 2384. 2384a. 2385. 2386. 2387. [2388. 2389. 2390. 2391. 2392. 2393. [2394, 2394a. Renumbered.] 2395. 2396. [2397 to 2398a. Repealed or Renumbered.] 2399. 2400. 2401. 2401a.</p>	<p>Contracts: regulations for bids. Repealed.] Contractor performance of acquisition functions closely associated with inherently governmental functions. Supplies: identification of supplier and sources. Supplies: economic order quantities. Arms and ammunition: immunity from taxation. Copyrights, patents, designs, etc.; acquisition. Procurement of table and kitchen equipment for officers' quarters: limitation on. Renumbered.] Ensuring safety regarding insensitive munitions. Prohibition on the sale of certain defense articles from the stocks of the Department of Defense. Military base reuse studies and community planning assistance. Prohibition on use of funds to relieve economic dislocations. Prohibition against doing business with certain offerors or contractors. Availability of appropriations for procurement of technical military equipment and supplies. Advances for payments for compliance with foreign laws, rent in foreign countries, tuition, public utility services, and pay and supplies of armed forces of friendly foreign countries. Operational test and evaluation of defense acquisition programs. Low-rate initial production of new systems. Requirement for authorization by law of certain contracts relating to vessels, aircraft, and combat vehicles. Lease of vehicles, equipment, vessels, and aircraft.</p>
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