

(d) APPROPRIATE USE OF AUTHORITY.—(1) The Secretary of Defense shall ensure that no official of an agency enters into a transaction (other than a contract, grant, or cooperative agreement) for a prototype project under the authority of this section unless one of the following conditions is met:

(A) There is at least one nontraditional defense contractor participating to a significant extent in the prototype project.

(B) All significant participants in the transaction other than the Federal Government are small businesses or nontraditional defense contractors.

(C) At least one third of the total cost of the prototype project is to be paid out of funds provided by parties to the transaction other than the Federal Government.

(D) The senior procurement executive for the agency determines in writing that exceptional circumstances justify the use of a transaction that provides for innovative business arrangements or structures that would not be feasible or appropriate under a contract, or would provide an opportunity to expand the defense supply base in a manner that would not be practical or feasible under a contract.

(2)(A) Except as provided in subparagraph (B), the amounts counted for the purposes of this subsection as being provided, or to be provided, by a party to a transaction with respect to a prototype project that is entered into under this section other than the Federal Government do not include costs that were incurred before the date on which the transaction becomes effective.

(B) Costs that were incurred for a prototype project by a party after the beginning of negotiations resulting in a transaction (other than a contract, grant, or cooperative agreement) with respect to the project before the date on which the transaction becomes effective may be counted for purposes of this subsection as being provided, or to be provided, by the party to the transaction if and to the extent that the official responsible for entering into the transaction determines in writing that—

(i) the party incurred the costs in anticipation of entering into the transaction; and

(ii) it was appropriate for the party to incur the costs before the transaction became effective in order to ensure the successful implementation of the transaction.

(e) DEFINITIONS.—In this section:

(1) The term “nontraditional defense contractor” has the meaning given the term under section 2302(9) of this title.

(2) The term “small business” means a small business concern as defined under section 3 of the Small Business Act (15 U.S.C. 632).

(f) FOLLOW-ON PRODUCTION CONTRACTS OR TRANSACTIONS.—(1) A transaction entered into under this section for a prototype project may provide for the award of a follow-on production contract or transaction to the participants in the transaction.

(2) A follow-on production contract or transaction provided for in a transaction under paragraph (1) may be awarded to the participants in the transaction without the use of competitive

procedures, notwithstanding the requirements of section 2304 of this title, if—

(A) competitive procedures were used for the selection of parties for participation in the transaction; and

(B) the participants in the transaction successfully completed the prototype project provided for in the transaction.

(3) Contracts and transactions entered into pursuant to this subsection may be awarded using the authority in subsection (a), under the authority of chapter 137 of this title, or under such procedures, terms, and conditions as the Secretary of Defense may establish by regulation.

(g) AUTHORITY TO PROVIDE PROTOTYPES AND FOLLOW-ON PRODUCTION ITEMS AS GOVERNMENT-FURNISHED EQUIPMENT.—An agreement entered into pursuant to the authority of subsection (a) or a follow-on contract or transaction entered into pursuant to the authority of subsection (f) may provide for prototypes or follow-on production items to be provided to another contractor as Government-furnished equipment.

(h) APPLICABILITY OF PROCUREMENT ETHICS REQUIREMENTS.—An agreement entered into under the authority of this section shall be treated as a Federal agency procurement for the purposes of chapter 21 of title 41.

(Added Pub. L. 114-92, div. A, title VIII, § 815(a)(1), Nov. 25, 2015, 129 Stat. 893.)

UPDATED GUIDANCE

Pub. L. 114-92, div. A, title VIII, § 815(e), Nov. 25, 2015, 129 Stat. 896, provided that: “Not later than 180 days after the date of the enactment of this Act [Nov. 25, 2015], the Secretary of Defense shall issue updated guidance to implement the amendments made by this section [enacting this section, amending section 2302 of this title, amending provisions set out as a note under section 2358 of this title, and repealing provisions set out as a note under section 2371 of this title].”

§ 2372. Independent research and development costs: allowable costs

(a) REGULATIONS.—The Secretary of Defense shall prescribe regulations governing the payment by the Department of Defense of expenses incurred by contractors for independent research and development costs. Such regulations shall provide that expenses incurred for independent research and development shall be reported independently from other allowable indirect costs.

(b) COSTS TREATED AS FAIR AND REASONABLE, AND ALLOWABLE, EXPENSES.—The regulations prescribed under subsection (a) shall provide that independent research and development costs shall be considered a fair and reasonable, and allowable, indirect expense on Department of Defense contracts.

(c) ADDITIONAL CONTROLS.—Subject to subsection (d), the regulations prescribed under subsection (a) may include the following provisions:

(1) Controls on the reimbursement of costs to the contractor for expenses incurred for independent research and development to ensure that such costs were incurred for independent research and development.

(2) Implementation of regular methods for transmission—

(A) from the Department of Defense to contractors, in a reasonable manner, of timely and comprehensive information regarding planned or expected needs of the Department of Defense for future technology and advanced capability; and

(B) from contractors to the Department of Defense, in a reasonable manner, of information regarding progress by the contractor on the independent research and development programs of the contractor.

(d) LIMITATIONS ON REGULATIONS.—Regulations prescribed under subsection (a) may not include provisions that would infringe on the independence of a contractor to choose which technologies to pursue in its independent research and development program if the chief executive officer of the contractor determines that expenditures will advance the needs of the Department of Defense for future technology and advanced capability as transmitted pursuant to subsection (c)(3)(A).

(e) EFFECTIVE DATE.—The regulations prescribed under subsection (a) shall apply to indirect costs incurred on or after October 1, 2017.

(Added Pub. L. 101-510, div. A, title VIII, § 824(a)(1), Nov. 5, 1990, 104 Stat. 1603; amended Pub. L. 102-25, title VII, § 701(c), Apr. 6, 1991, 105 Stat. 113; Pub. L. 102-190, div. A, title VIII, § 802(a)(1), Dec. 5, 1991, 105 Stat. 1412; Pub. L. 102-484, div. A, title X, § 1052(27), Oct. 23, 1992, 106 Stat. 2500; Pub. L. 103-35, title II, § 201(c)(5), May 31, 1993, 107 Stat. 98; Pub. L. 104-106, div. D, title XLIII, § 4321(b)(11), Feb. 10, 1996, 110 Stat. 672; Pub. L. 114-328, div. A, title VIII, § 824(a)(1), Dec. 23, 2016, 130 Stat. 2277.)

AMENDMENTS

2016—Pub. L. 114-328 amended section generally. Prior to amendment, section related to payments to contractors for independent research and development and bid and proposal costs.

1996—Subsec. (i)(1). Pub. L. 104-106 substituted “2324(l)” for “2324(m)”.

1993—Subsec. (g)(5). Pub. L. 103-35 substituted “section 2506” for “section 2522”.

1992—Subsec. (e)(1). Pub. L. 102-484 substituted “on December 4, 1991” for “on the day before the date of the enactment of the National Defense Authorization Act for Fiscal Years 1992 and 1993”.

1991—Pub. L. 102-190 substituted section catchline for one which read “Independent research and development” and amended text generally, substituting present provisions for provisions authorizing payment of independent research and development or bid and proposal costs, encouraging contractors to engage in research and development activities, and authorizing advance agreements regarding the manner and extent in which the Department of Defense may pay independent research and development costs or bid and proposal costs.

Subsec. (d)(2)(B). Pub. L. 102-25 substituted “subsection (b), including” for “subsection (b) or”.

EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104-106, see section 4401 of Pub. L. 104-106, set out as a note under section 2302 of this title.

EFFECTIVE DATE OF 1991 AMENDMENT

Pub. L. 102-190, div. A, title VIII, § 802(e), Dec. 5, 1991, 105 Stat. 1414, provided that: “The amendments made by this section [amending this section and section 2330 of this title] shall take effect on October 1, 1992, and

shall apply to independent research and development and bid and proposal costs incurred by a contractor during fiscal years of that contractor that begin on or after that date.”

REGULATIONS

Pub. L. 102-190, div. A, title VIII, § 802(b), Dec. 5, 1991, 105 Stat. 1414, provided that: “The Secretary of Defense shall prescribe proposed regulations to implement the amendment made by subsection (a)(1) [amending this section] not later than April 1, 1992, and shall prescribe final regulations for that purpose not later than June 1, 1992.”

STUDY BY OFFICE OF TECHNOLOGY ASSESSMENT

Pub. L. 102-190, div. A, title VIII, § 802(c), Dec. 5, 1991, 105 Stat. 1414, directed Director of the Office of Technology Assessment to conduct a study to determine effect of regulations prescribed under this section on the achievement of policy stated in former subsec. (g) of this section and submit a report containing results of such study to Committees on Armed Services of Senate and House of Representatives not later than Dec. 1, 1995, prior to repeal by Pub. L. 103-160, div. A, title II, § 266, Nov. 30, 1993, 107 Stat. 1611.

§ 2372a. Bid and proposal costs: allowable costs

(a) REGULATIONS.—The Secretary of Defense shall prescribe regulations governing the payment by the Department of Defense of expenses incurred by contractors for bid and proposal costs. Such regulations shall provide that expenses incurred for bid and proposal costs shall be reported independently from other allowable indirect costs.

(b) COSTS ALLOWABLE AS INDIRECT EXPENSES.—The regulations prescribed under subsection (a) shall provide that bid and proposal costs shall be allowable as indirect expenses on covered contracts, as defined in section 2324(1) of this title, to the extent that those costs are allocable, reasonable, and not otherwise unallowable by law or under the Federal Acquisition Regulation.

(c) GOAL FOR REIMBURSABLE BID AND PROPOSAL COSTS.—The Secretary shall establish a goal each fiscal year limiting the amount of reimbursable bid and proposal costs paid by the Department of Defense to an amount equal to not more than one percent of the total aggregate industry sales to the Department of Defense. To achieve such goal, the Secretary may not limit the payment of allowable bid and proposal costs for the covered year.

(d) PANEL.—(1) If the Department of Defense exceeds the goal established under subsection (c) for a fiscal year, within 180 days after exceeding the goal, the Secretary shall establish an advisory panel. The panel shall be supported by the Defense Acquisition University and the National Defense University, including administrative support.

(2) The panel shall be composed of nine individuals who are recognized experts in acquisition and procurement policy appointed by the Secretary. In making such appointments, the Secretary shall ensure that the members of the panel reflect diverse experiences in the public and private sector.

(3) The panel shall review laws, regulations, and practices that contribute to the expenses incurred by contractors for bids and proposals in the fiscal year concerned and recommend changes to such laws, regulations, and practices