

Sec.  
2380B. Treatment of items purchased prior to release of prime contract requests for proposals as commercial items.<sup>2</sup>

AMENDMENTS

2016—Pub. L. 114-328, div. A, title VIII, §§ 833(b)(3)(B), 877(b), 878(b)(2), Dec. 23, 2016, 130 Stat. 2284, 2312, added items 2380a and 2380B and struck out items 2378 “Procurement of copier paper containing specified percentages of post-consumer recycled content” and 2380A “Treatment of goods and services provided by nontraditional defense contractors as commercial items”.

2015—Pub. L. 114-92, div. A, title VIII, §§ 851(a)(2), 857(b), Nov. 25, 2015, 129 Stat. 916, 921, added items 2380 and 2380A.

2006—Pub. L. 109-163, div. A, title VIII, § 803(a)(2), Jan. 6, 2006, 119 Stat. 3371, added item 2379.

1997—Pub. L. 105-85, div. A, title III, § 350(b), Nov. 18, 1997, 111 Stat. 1692, added item 2378.

**§ 2375. Relationship of commercial item provisions to other provisions of law**

(a) **APPLICABILITY OF GOVERNMENT-WIDE STATUTES.**—(1) No contract for the procurement of a commercial item entered into by the head of an agency shall be subject to any law properly listed in the Federal Acquisition Regulation pursuant to section 1906(b) of title 41.

(2) No subcontract under a contract for the procurement of a commercial item entered into by the head of an agency shall be subject to any law properly listed in the Federal Acquisition Regulation pursuant to section 1906(c) of title 41.

(3) No contract for the procurement of a commercially available off-the-shelf item entered into by the head of an agency shall be subject to any law properly listed in the Federal Acquisition Regulation pursuant to section 1907 of title 41.

(b) **APPLICABILITY OF DEFENSE-UNIQUE STATUTES TO CONTRACTS FOR COMMERCIAL ITEMS.**—(1) The Defense Federal Acquisition Regulation Supplement shall include a list of defense-unique provisions of law and of contract clause requirements based on government-wide acquisition regulations, policies, or executive orders not expressly authorized in law that are inapplicable to contracts for the procurement of commercial items. A provision of law or contract clause requirement properly included on the list pursuant to paragraph (2) does not apply to purchases of commercial items by the Department of Defense. This section does not render a provision of law or contract clause requirement not included on the list inapplicable to contracts for the procurement of commercial items.

(2) A provision of law or contract clause requirement described in subsection (e) that is enacted after January 1, 2015, shall be included on the list of inapplicable provisions of law and contract clause requirements required by paragraph (1) unless the Under Secretary of Defense for Acquisition, Technology, and Logistics makes a written determination that it would not be in the best interest of the Department of Defense to exempt contracts for the procurement of commercial items from the applicability of the provision or contract clause requirement.

(c) **APPLICABILITY OF DEFENSE-UNIQUE STATUTES TO SUBCONTRACTS FOR COMMERCIAL ITEMS.**—

(1) The Defense Federal Acquisition Regulation Supplement shall include a list of provisions of law and of contract clause requirements based on government-wide acquisition regulations, policies, or executive orders not expressly authorized in law that are inapplicable to subcontracts under a Department of Defense contract or subcontract for the procurement of commercial items. A provision of law or contract clause requirement properly included on the list pursuant to paragraph (2) does not apply to those subcontracts. This section does not render a provision of law or contract clause requirement not included on the list inapplicable to subcontracts under a contract for the procurement of commercial items.

(2) A provision of law or contract clause requirement described in subsection (e) shall be included on the list of inapplicable provisions of law and contract clause requirements required by paragraph (1) unless the Under Secretary of Defense for Acquisition, Technology, and Logistics makes a written determination that it would not be in the best interest of the Department of Defense to exempt subcontracts under a contract for the procurement of commercial items from the applicability of the provision or contract clause requirement.

(3) In this subsection, the term “subcontract” includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractor or subcontractor. The term does not include agreements entered into by a contractor for the supply of commodities that are intended for use in the performance of multiple contracts with the Department of Defense and other parties and are not identifiable to any particular contract.

(4) This subsection does not authorize the waiver of the applicability of any provision of law or contract clause requirement with respect to any first-tier subcontract under a contract with a prime contractor reselling or distributing commercial items of another contractor without adding value.

(d) **APPLICABILITY OF DEFENSE-UNIQUE STATUTES TO CONTRACTS FOR COMMERCIALLY AVAILABLE, OFF-THE-SHELF ITEMS.**—(1) The Defense Federal Acquisition Regulation Supplement shall include a list of provisions of law and of contract clause requirements based on government-wide acquisition regulations, policies, or executive orders not expressly authorized in law that are inapplicable to contracts for the procurement of commercially available off-the-shelf items. A provision of law or contract clause requirement properly included on the list pursuant to paragraph (2) does not apply to Department of Defense contracts for the procurement of commercially available off-the-shelf items. This section does not render a provision of law or contract clause requirement not included on the list inapplicable to contracts for the procurement of commercially available off-the-shelf items.

(2) A provision of law or contract clause requirement described in subsection (e) shall be included on the list of inapplicable provisions of law and contract clause requirements required by paragraph (1) unless the Under Secretary of Defense for Acquisition, Technology, and Logistics makes a written determination that it

<sup>2</sup> So in original. Does not conform to section catchline.

would not be in the best interest of the Department of Defense to exempt contracts for the procurement of commercially available off-the-shelf items from the applicability of the provision or contract clause requirement.

(e) COVERED PROVISION OF LAW OR CONTRACT CLAUSE REQUIREMENT.—A provision of law or contract clause requirement referred to in subsections (b)(2), (c)(2), and (d)(2) is a provision of law or contract clause requirement that the Under Secretary of Defense for Acquisition, Technology, and Logistics determines sets forth policies, procedures, requirements, or restrictions for the procurement of property or services by the Federal Government, except for a provision of law or contract clause requirement that—

- (1) provides for criminal or civil penalties;
- (2) requires that certain articles be bought from American sources pursuant to section 2533a of this title, or requires that strategic materials critical to national security be bought from American sources pursuant to section 2533b of this title; or
- (3) specifically refers to this section and provides that, notwithstanding this section, it shall be applicable to contracts for the procurement of commercial items.

(Added Pub. L. 103-355, title VIII, §8102, Oct. 13, 1994, 108 Stat. 3390; amended Pub. L. 105-85, div. A, title X, §1073(a)(51), Nov. 18, 1997, 111 Stat. 1903; Pub. L. 107-107, div. A, title X, §1048(a)(18), Dec. 28, 2001, 115 Stat. 1223; Pub. L. 111-350, §5(b)(21), Jan. 4, 2011, 124 Stat. 3844; Pub. L. 114-328, div. A, title VIII, §874(a), Dec. 23, 2016, 130 Stat. 2308.)

#### AMENDMENTS

2016—Pub. L. 114-328 amended section generally. Prior to amendment, text read as follows:

“(a) APPLICABILITY OF TITLE.—Unless otherwise specifically provided, nothing in this chapter shall be construed as providing that any other provision of this title relating to procurement is inapplicable to the procurement of commercial items.

“(b) LIST OF LAWS INAPPLICABLE TO CONTRACTS FOR THE ACQUISITION OF COMMERCIAL ITEMS.—No contract for the procurement of a commercial item entered into by the head of an agency shall be subject to any law properly listed in the Federal Acquisition Regulation (pursuant to section 1906 of title 41).

“(c) CROSS REFERENCE TO EXCEPTION TO COST OR PRICING DATA REQUIREMENTS FOR COMMERCIAL ITEMS.—For a provision relating to an exception for requirements for cost or pricing data for contracts for the procurement of commercial items, see section 2306a(b) of this title.”

2011—Subsec. (b). Pub. L. 111-350 substituted “section 1906 of title 41” for “section 34 of the Office of Federal Procurement Policy Act (41 U.S.C. 430)”.

2001—Subsec. (b). Pub. L. 107-107 inserted “(41 U.S.C. 430)” after “section 34 of the Office of Federal Procurement Policy Act”.

1997—Subsec. (c). Pub. L. 105-85 substituted “a provision relating to an exception” for “provisions relating to exceptions” and “section 2306a(b)” for “section 2306a(d)”.

#### EFFECTIVE DATE

For effective date and applicability of chapter, see section 10001 of Pub. L. 103-355 set out as an Effective Date of 1994 Amendment note under section 2302 of this title.

#### CHANGES TO DEFENSE FEDERAL ACQUISITION REGULATION SUPPLEMENT

Pub. L. 114-328, div. A, title VIII, §874(b), Dec. 23, 2016, 130 Stat. 2310, provided that:

“(1) IN GENERAL.—To the maximum extent practicable, the Under Secretary of Defense for Acquisition, Technology, and Logistics shall ensure that—

“(A) the Defense Federal Acquisition Regulation Supplement does not require the inclusion of contract clauses in contracts for the procurement of commercial items or contracts for the procurement of commercially available off-the-shelf items, unless such clauses are—

“(i) required to implement provisions of law or executive orders applicable to such contracts; or

“(ii) determined to be consistent with standard commercial practice; and

“(B) the flow-down of contract clauses to subcontracts under contracts for the procurement of commercial items or commercially available off-the-shelf items is prohibited unless such flow-down is required to implement provisions of law or executive orders applicable to such subcontracts.

“(2) SUBCONTRACTS.—In this subsection, the term ‘subcontract’ includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractor or subcontractor. The term does not include agreements entered into by a contractor for the supply of commodities that are intended for use in the performance of multiple contracts with the Department of Defense and other parties and are not identifiable to any particular contract.”

#### PROVISIONS NOT AFFECTED BY TITLE VIII OF PUB. L. 103-355

Pub. L. 103-355, title VIII, §8304, Oct. 13, 1994, 108 Stat. 3398, provided that: “Nothing in this title [see Tables for classification] shall be construed as modifying or superseding, or as intended to impair or restrict, authorities or responsibilities under—

“(1) section 2323 of title 10, United States Code, or section 7102 of the Federal Acquisition Streamlining Act of 1994 [Pub. L. 103-355, 15 U.S.C. 644 note];

“(2) the Brooks Automatic Data Processing Act (section 111 of the Federal Property and Administrative Services Act of 1949 ([former] 40 U.S.C. 759));

“(3) Brooks Architect-Engineers Act (title IX of the Federal Property and Administrative Services Act of 1949 ([former] 40 U.S.C. 541 et seq.) [now 40 U.S.C. 1101-1104]);

“(4) subsections (a) and (d) of section 8 of the Small Business Act (15 U.S.C. 637(a) and (d)); or

“(5) the Javits-Wagner-O’Day Act ([former] 41 U.S.C. 46-48c) [now 41 U.S.C. 8501 et seq.]”.

#### § 2376. Definitions

In this chapter:

(1) The terms “commercial item”, “non-developmental item”, “component”, and “commercial component” have the meanings provided in chapter 1 of title 41.

(2) The term “head of an agency” means the Secretary of Defense, the Secretary of Homeland Security, and the Administrator of the National Aeronautics and Space Administration.

(3) The term “agency” means the Department of Defense, the Coast Guard, and the National Aeronautics and Space Administration.

(Added Pub. L. 103-355, title VIII, §8103, Oct. 13, 1994, 108 Stat. 3390; amended Pub. L. 107-107, div. A, title X, §1048(a)(19), Dec. 28, 2001, 115 Stat. 1223; Pub. L. 107-296, title XVII, §1704(b)(1), Nov. 25, 2002, 116 Stat. 2314; Pub. L. 111-350, §5(b)(22), Jan. 4, 2011, 124 Stat. 3844.)

#### AMENDMENTS

2011—Par. (1). Pub. L. 111-350 substituted “chapter 1 of title 41” for “section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. 403)”.