

Chairman and the Vice Chairman of the Joint Chiefs of Staff, in consultation with the Under Secretary of Defense for Acquisition, Technology, and Logistics, shall review Chairman of the Joint Chiefs of Staff Instruction 3170.01, the Manual for the Operation of the Joint Capabilities Integration and Development System, and other documents governing the requirements development process and revise these documents as necessary to ensure that the Department of Defense fully complies with the requirement in section 2377(c) of title 10, United States Code, and section 10.001 of the Federal Acquisition Regulation for Federal agencies to conduct appropriate market research before developing new requirements.

“(c) MARKET RESEARCH DEFINED.—For the purposes of this section, the term ‘market research’ means a review of existing systems, subsystems, capabilities, and technologies that are available or could be made available to meet the needs of the Department of Defense in whole or in part. The review may include any of the techniques for conducting market research provided in section 10.002(b)(2) of the Federal Acquisition Regulation and shall include, at a minimum, contacting knowledgeable individuals in Government and industry regarding existing market capabilities.”

LIMITATION ON CONVERSION OF PROCUREMENTS FROM  
COMMERCIAL ACQUISITION PROCEDURES

Pub. L. 114-92, div. A, title VIII, § 856, Nov. 25, 2015, 129 Stat. 920, provided that:

“(a) LIMITATION.—

“(1) IN GENERAL.—Except as provided in paragraph (2), prior to converting the procurement of commercial items or services valued at more than \$1,000,000 from commercial acquisition procedures under part 12 of the Federal Acquisition Regulation to non-commercial acquisition procedures under part 15 of the Federal Acquisition Regulation, the contracting officer for the procurement shall determine in writing that—

“(A) the earlier use of commercial acquisition procedures under part 12 of the Federal Acquisition Regulation was in error or based on inadequate information; and

“(B) the Department of Defense will realize a cost savings compared to the cost of procuring a similar quantity or level of such item or service using commercial acquisition procedures.

“(2) REQUIREMENT FOR APPROVAL OF DETERMINATION BY HEAD OF CONTRACTING ACTIVITY.—In the case of a procurement valued at more than \$100,000,000, a contract may not be awarded pursuant to a conversion of the procurement described in paragraph (1) until—

“(A) the head of the contracting activity approves the determination made under paragraph (1); and

“(B) a copy of the determination so approved is provided to the Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics.

“(b) FACTORS TO BE CONSIDERED.—In making a determination under paragraph (1), the determining official shall, at a minimum, consider the following factors:

“(1) The estimated cost of research and development to be performed by the existing contractor to improve future products or services.

“(2) The transaction costs for the Department of Defense and the contractor in assessing and responding to data requests to support a conversion to non-commercial acquisition procedures.

“(3) Changes in purchase quantities.

“(4) Costs associated with potential procurement delays resulting from the conversion.

“(c) PROCEDURES.—Not later than 180 days after the date of the enactment of this Act [Nov. 25, 2015], the Secretary of Defense shall develop procedures to track conversions of future contracts and subcontracts for improved analysis and reporting and shall revise the Defense Federal Acquisition Regulation Supplement to reflect the requirement in subsection (a).

“(d) REPORTING REQUIREMENT.—Not later than one year after the date of the enactment of this Act, the

Secretary of Defense shall submit to the congressional defense committees [Committees on Armed Services and Appropriations of the Senate and the House of Representatives] a report on the implementation of subsection (a), including any procurements converted as described in that subsection.

“(e) SUNSET.—The requirements of this section shall terminate 5 years after the date of the enactment of this Act [Nov. 25, 2015].”

COMMERCIAL SOFTWARE REUSE PREFERENCE

Pub. L. 110-417, [div. A], title VIII, § 803, Oct. 14, 2008, 122 Stat. 4519, provided that:

“(a) IN GENERAL.—The Secretary of Defense shall ensure that contracting officials identify and evaluate, at all stages of the acquisition process (including concept refinement, concept decision, and technology development), opportunities for the use of commercial computer software and other non-developmental software.

“(b) REPORT.—Not later than 270 days after the date of enactment of this Act [Oct. 14, 2008], the Secretary shall submit to the congressional defense committees [Committees on Armed Services and Appropriations of the Senate and the House of Representatives] a report on actions taken to implement subsection (a), including a description of any relevant regulations and policy guidance.”

REQUIREMENT TO DEVELOP TRAINING AND TOOLS

Pub. L. 110-181, div. A, title VIII, § 826(b), Jan. 28, 2008, 122 Stat. 228, provided that: “The Secretary of Defense shall develop training to assist contracting officers, and market research tools to assist such officers and prime contractors, in performing appropriate market research as required by subsection (c) of section 2377 of title 10, United States Code, as amended by this section.”

**§ 2378. Repealed. Pub. L. 114-328, div. A, title VIII, § 833(b)(3)(A), Dec. 23, 2016, 130 Stat. 2284]**

Section, added Pub. L. 105-85, div. A, title III, § 350(a), Nov. 18, 1997, 111 Stat. 1691, related to procurement of copier paper containing specified percentages of post-consumer recycled content.

**§ 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 submit information or analysis relating to the value of a commercial item to aid in the determination of the reasonableness of the price of such item. A contracting officer may consider such information or analysis in addition to the information submitted pursuant to paragraphs (1)(A) and (1)(B).

(3) 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; Pub. L. 114–328, div. A, title VIII, §872, Dec. 23, 2016, 130 Stat. 2307.)

#### AMENDMENTS

2016—Subsec. (d)(2), (3). Pub. L. 114–328 added par. (2) and redesignated former par. (2) as (3).

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 provide assistance to the military departments and Defense Agencies in making commercial item determinations, conducting market research, and performing analysis of price reasonableness for the purposes of procurements by the Department of Defense; and

(2) provide to officials of the Department of Defense access to previous Department of Defense commercial item determinations, market research, and analysis used to determine the reasonableness of price 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; amended Pub. L. 114–328, div. A, title VIII, § 873, Dec. 23, 2016, 130 Stat. 2307.)

#### AMENDMENTS

2016—Pars. (1), (2). Pub. L. 114–328 amended pars. (1) and (2) generally. Prior to amendment, pars. (1) and (2) read as follows:

“(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.”

### § 2380a. Treatment of certain items as commercial items

(a) GOODS AND SERVICES PROVIDED BY NONTRADITIONAL DEFENSE CONTRACTORS.—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.

(b) SERVICES PROVIDED BY CERTAIN NONTRADITIONAL CONTRACTORS.—Notwithstanding section 2376(1) of this title, services provided by a business unit that is a nontraditional defense contractor (as that term is defined in section 2302(9) of this title) shall be treated as commercial items for purposes of this chapter, to the extent that such services use the same pool of employees as used for commercial customers and are priced using methodology similar to methodology used for commercial pricing.

(Added Pub. L. 114–92, div. A, title VIII, § 857(a), Nov. 25, 2015, 129 Stat. 921, § 2380A; renumbered § 2380a and amended Pub. L. 114–328, div. A, title VIII, § 878(a), (b)(1), Dec. 23, 2016, 130 Stat. 2312.)

#### AMENDMENTS

2016—Pub. L. 114–328, § 878(b)(1), which directed amendment of “Section 2380A of title 10” by striking out the section catchline and inserting “§ 2380a. Treatment of certain items as commercial items”, was executed by redesignating this section as section 2380a and substituting “Treatment of certain items as commercial items” for “Treatment of goods and services provided by nontraditional defense contractors as commercial items” in section catchline, to reflect the probable intent of Congress.

Pub. L. 114–328, § 878(a), designated existing provisions as subsec. (a), inserted heading, and added subsec. (b).

### § 2380B. Treatment of commingled items purchased by contractors as commercial items

Notwithstanding 2376(1) of this title, items valued at less than \$10,000 that are purchased by a contractor for use in the performance of multiple contracts with the Department of Defense and other parties and are not identifiable to any particular contract shall be treated as a commercial item for purposed of this chapter.

(Added Pub. L. 114–328, div. A, title VIII, § 877(a), Dec. 23, 2016, 130 Stat. 2311.)

## CHAPTER 141—MISCELLANEOUS PROCUREMENT PROVISIONS

Sec.	
2381.	Contracts: regulations for bids.
[2382.]	Repealed.]
2383.	Contractor performance of acquisition functions closely associated with inherently governmental functions.
2384.	Supplies: identification of supplier and sources.
2384a.	Supplies: economic order quantities.
2385.	Arms and ammunition: immunity from taxation.