

§ 1071(b)(13), Dec. 19, 2014, 128 Stat. 3429, 3507, which authorized certain officials, as designated by the Secretary of Defense, to carry out prototype projects directly relevant to enhancing the mission effectiveness of military personnel and the supporting platforms, systems, components, or materials proposed to be acquired or developed by or in use by the Department of Defense, was repealed by Pub. L. 114-92, div. A, title VIII, § 815(c), Nov. 25, 2015, 129 Stat. 896.

[Pub. L. 114-92, div. A, title VIII, § 815(c), Nov. 25, 2015, 129 Stat. 896, provided that: “Section 845 of the National Defense Authorization Act for Fiscal Year 1994 (Public Law 103-160; 10 U.S.C. 2371 note) [formerly set out above] is hereby repealed. Transactions entered into under the authority of such section 845 shall remain in force and effect and shall be modified as appropriate to reflect the amendments made by this section [enacting section 2371b of this title, amending section 2302 of this title, and amending provisions set out as a note under section 2358 of this title].”]

§ 2371a. Cooperative research and development agreements under Stevenson-Wydler Technology Innovation Act of 1980

The Secretary of Defense, in carrying out research projects through the Defense Advanced Research Projects Agency, and the Secretary of each military department, in carrying out research projects, may permit the director of any federally funded research and development center to enter into cooperative research and development agreements with any person, any agency or instrumentality of the United States, any unit of State or local government, and any other entity under the authority granted by section 12 of the Stevenson-Wydler Technology Innovation Act of 1980 (15 U.S.C. 3710a). Technology may be transferred to a non-Federal party to such an agreement consistent with the provisions of sections 11 and 12 of such Act (15 U.S.C. 3710, 3710a).

(Added and amended Pub. L. 104-201, div. A, title II, § 267(c)(1)(A), (B), Sept. 23, 1996, 110 Stat. 2468; Pub. L. 105-85, div. A, title X, § 1073(a)(50), Nov. 18, 1997, 111 Stat. 1903.)

CODIFICATION

The text of section 2371(i) of this title, which was transferred to this section, redesignated as text of section, and amended by Pub. L. 104-201, § 267(c)(1)(A), (B), was based on Pub. L. 103-355, title I, § 1301(b), Oct. 13, 1994, 108 Stat. 3286.

AMENDMENTS

1997—Pub. L. 105-85 inserted “Defense” before “Advanced Research Projects Agency”.

1996—Pub. L. 104-201 transferred section 2371(i) of this title to this section, added section catchline, and struck out subsec. (i) designation and heading which read as follows: “Cooperative Research and Development Agreements Under Stevenson-Wydler Technology Innovation Act of 1980”. See Codification note above.

§ 2371b. Authority of the Department of Defense to carry out certain prototype projects

(a) **AUTHORITY.**—(1) Subject to paragraph (2), the Director of the Defense Advanced Research Projects Agency, the Secretary of a military department, or any other official designated by the Secretary of Defense may, under the authority of section 2371 of this title, carry out prototype projects that are directly relevant to enhancing the mission effectiveness of military personnel and the supporting platforms, systems, components, or materials proposed to be

acquired or developed by the Department of Defense, or to improvement of platforms, systems, components, or materials in use by the armed forces.

(2) The authority of this section—

(A) may be exercised for a transaction for a prototype project, and any follow-on production contract or transaction that is awarded pursuant to subsection (f), that is expected to cost the Department of Defense in excess of \$100,000,000 but not in excess of \$500,000,000 (including all options) only upon a written determination by the senior procurement executive for the agency as designated for the purpose of section 1702(c) of title 41, or, for the Defense Advanced Research Projects Agency or the Missile Defense Agency, the director of the agency that—

(i) the requirements of subsection (d) will be met; and

(ii) the use of the authority of this section is essential to promoting the success of the prototype project; and

(B) may be exercised for a transaction for a prototype project, and any follow-on production contract or transaction that is awarded pursuant to subsection (f), that is expected to cost the Department of Defense in excess of \$500,000,000 (including all options) only if—

(i) the Under Secretary of Defense for Research and Engineering or the Under Secretary of Defense for Acquisition and Sustainment determines in writing that—

(I) the requirements of subsection (d) will be met; and

(II) the use of the authority of this section is essential to meet critical national security objectives; and

(ii) the congressional defense committees are notified in writing at least 30 days before such authority is exercised.

(3) The authority of a senior procurement executive or director of the Defense Advanced Research Projects Agency or Missile Defense Agency under paragraph (2)(A), and the authority of the Under Secretaries of Defense under paragraph (2)(B), may not be delegated.

(b) **EXERCISE OF AUTHORITY.**—

(1) Subsections (e)(1)(B) and (e)(2) of such section 2371 shall not apply to projects carried out under subsection (a).

(2) To the maximum extent practicable, competitive procedures shall be used when entering into agreements to carry out the prototype projects under subsection (a).

(c) **COMPTROLLER GENERAL ACCESS TO INFORMATION.**—(1) Each agreement entered into by an official referred to in subsection (a) to carry out a project under that subsection that provides for payments in a total amount in excess of \$5,000,000 shall include a clause that provides for the Comptroller General, in the discretion of the Comptroller General, to examine the records of any party to the agreement or any entity that participates in the performance of the agreement.

(2) The requirement in paragraph (1) shall not apply with respect to a party or entity, or a subordinate element of a party or entity, that has

not entered into any other agreement that provides for audit access by a Government entity in the year prior to the date of the agreement.

(3)(A) The right provided to the Comptroller General in a clause of an agreement under paragraph (1) is limited as provided in subparagraph (B) in the case of a party to the agreement, an entity that participates in the performance of the agreement, or a subordinate element of that party or entity if the only agreements or other transactions that the party, entity, or subordinate element entered into with Government entities in the year prior to the date of that agreement are cooperative agreements or transactions that were entered into under this section or section 2371 of this title.

(B) The only records of a party, other entity, or subordinate element referred to in subparagraph (A) that the Comptroller General may examine in the exercise of the right referred to in that subparagraph are records of the same type as the records that the Government has had the right to examine under the audit access clauses of the previous agreements or transactions referred to in such subparagraph that were entered into by that particular party, entity, or subordinate element.

(4) The head of the contracting activity that is carrying out the agreement may waive the applicability of the requirement in paragraph (1) to the agreement if the head of the contracting activity determines that it would not be in the public interest to apply the requirement to the agreement. The waiver shall be effective with respect to the agreement only if the head of the contracting activity transmits a notification of the waiver to Congress and the Comptroller General before entering into the agreement. The notification shall include the rationale for the determination.

(5) The Comptroller General may not examine records pursuant to a clause included in an agreement under paragraph (1) more than three years after the final payment is made by the United States under the agreement.

(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 or nonprofit research institution participating to a significant extent in the prototype project.

(B) All significant participants in the transaction other than the Federal Government are small businesses (including small businesses participating in a program described under section 9 of the Small Business Act (15 U.S.C. 638)) 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 sources other than other than¹ 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. A transaction includes all individual prototype subprojects awarded under the transaction to a consortium of United States industry and academic institutions.

(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) A follow-on production contract or transaction may be awarded, pursuant to this subsection, when the Department determines that an individual prototype or prototype subproject as part of a consortium is successfully completed by the participants.

(4) Award of a follow-on production contract or transaction pursuant to the terms under this subsection is not contingent upon the successful

¹ So in original.

completion of all activities within a consortium as a condition for an award for follow-on production of a successfully completed prototype or prototype subproject within that consortium.

(5) 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; amended Pub. L. 115-91, div. A, title II, §216, title VIII, §864, Dec. 12, 2017, 131 Stat. 1328, 1494; Pub. L. 115-232, div. A, title II, §211, Aug. 13, 2018, 132 Stat. 1674.)

AMENDMENTS

2018—Subsec. (a)(2)(A). Pub. L. 115-232, §211(1)(A), substituted “for a prototype project, and any follow-on production contract or transaction that is awarded pursuant to subsection (f),” for “(for a prototype project)” in introductory provisions.

Subsec. (a)(2)(B). Pub. L. 115-232, §211(1)(B)(i), substituted “for a prototype project, and any follow-on production contract or transaction that is awarded pursuant to subsection (f),” for “(for a prototype project)” in introductory provisions.

Subsec. (a)(2)(B)(i). Pub. L. 115-232, §211(1)(B)(ii), substituted “Under Secretary of Defense for Research and Engineering or the Under Secretary of Defense for Acquisition and Sustainment” for “Under Secretary of Defense for Acquisition, Technology, and Logistics” in introductory provisions.

Subsec. (a)(3). Pub. L. 115-232, §211(1)(C), substituted “Under Secretaries of Defense” for “Under Secretary of Defense for Acquisition, Technology, and Logistics”.

Subsec. (b)(2). Pub. L. 115-232, §211(2), inserted “the prototype” after “carry out”.

Subsec. (f)(3) to (5). Pub. L. 115-232, §211(3), added pars. (3) and (4) and redesignated former par. (3) as (5).

2017—Subsec. (a)(2)(A). Pub. L. 115-91, §864(a)(1), (2), in introductory provisions, substituted “for a transaction (for a prototype project)” for “for a prototype project”, “\$100,000,000” for “\$50,000,000”, and “\$500,000,000” for “\$250,000,000”.

Subsec. (a)(2)(B). Pub. L. 115-91, §864(a)(1), (3), in introductory provisions, substituted “for a transaction (for a prototype project)” for “for a prototype project” and “\$500,000,000” for “\$250,000,000”.

Subsec. (d)(1)(A). Pub. L. 115-91, §216, inserted “or nonprofit research institution” after “defense contractor”.

Subsec. (d)(1)(B). Pub. L. 115-91, §864(b), inserted “(including small businesses participating in a program described under section 9 of the Small Business Act (15 U.S.C. 638))” after “small businesses”.

Subsec. (d)(1)(C). Pub. L. 115-91, §864(c), substituted “provided by sources other than” for “provided by parties to the transaction”.

Subsec. (f)(1). Pub. L. 115-91, §864(d), inserted at end “A transaction includes all individual prototype subprojects awarded under the transaction to a consortium of United States industry and academic institutions.”

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)(2)(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