

§ 2375. Relationship of other provisions of law to procurement of commercial products and commercial services

(a) **APPLICABILITY OF GOVERNMENT-WIDE STATUTES.**—(1) No contract for the procurement of a commercial product or commercial service 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 product or commercial service 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 PRODUCTS AND COMMERCIAL SERVICES.**—(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 products and commercial services. A provision of law or contract clause requirement properly included on the list pursuant to paragraph (2) does not apply to purchases of commercial products and commercial services 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 products and commercial services.

(2) A provision of law or contract clause requirement described in subsection (e) that is enacted after October 13, 1994, 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 and Sustainment 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 products and commercial services from the applicability of the provision or contract clause requirement.

(c) **APPLICABILITY OF DEFENSE-UNIQUE STATUTES TO SUBCONTRACTS FOR COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES.**—(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 products and commercial services. A provision of law or contract clause requirement properly included on the list pursuant to paragraph (2) does not apply to those subcontracts. This sec-

tion 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 products and commercial services.

(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 and Sustainment 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 products and commercial services from the applicability of the provision or contract clause requirement.

(3) In this subsection, the term “subcontract” includes a transfer of commercial products and commercial services 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 products and commercial services 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 and Sustainment 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 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 and Sustainment 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 products and commercial services.

(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; Pub. L. 115-232, div. A, title VIII, §§836(d)(1), (8)(B), 837(a), Aug. 13, 2018, 132 Stat. 1866, 1868, 1875; Pub. L. 116-92, div. A, title IX, §902(57), Dec. 20, 2019, 133 Stat. 1549.)

AMENDMENTS

2019—Subsecs. (b)(2), (c)(2), (d)(2), (e). Pub. L. 116-92 substituted “Under Secretary of Defense for Acquisition and Sustainment” for “Under Secretary of Defense for Acquisition, Technology, and Logistics”.

2018—Pub. L. 115-232, §836(d)(8)(B), substituted “Relationship of other provisions of law to procurement of commercial products and commercial services” for “Relationship of commercial item provisions to other provisions of law” in section catchline.

Subsec. (a)(1), (2). Pub. L. 115-232, §836(d)(1)(A), substituted “commercial product or commercial service” for “commercial item”.

Subsec. (b). Pub. L. 115-232, §836(d)(1)(B), in heading, substituted “Commercial Products and Commercial Services” for “Commercial Items” and, in text, substituted “commercial products and commercial services” for “commercial items” wherever appearing.

Subsec. (b)(2). Pub. L. 115-232, §837(a), substituted “October 13, 1994” for “January 1, 2015”.

Subsec. (c). Pub. L. 115-232, §836(d)(1)(B), in heading, substituted “Commercial Products and Commercial Services” for “Commercial Items” and, in text, substituted “commercial products and commercial services” for “commercial items” wherever appearing.

Subsec. (e)(3). Pub. L. 115-232, §836(d)(1)(C), substituted “commercial products and commercial services” for “commercial items”.

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 OF 2018 AMENDMENT

Amendment by section 836(d)(1), (8)(B) of Pub. L. 115-232 effective Jan. 1, 2020, subject to a savings provision, see section 836(h) of Pub. L. 115-232, set out as an Effective Date of 2018 Amendment; Savings Provision note under section 453b of Title 6, Domestic Security.

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, as amended by Pub. L. 116-92, div. A, title IX, §902(58), Dec. 20, 2019, 133 Stat. 1549, provided that:

“(1) **IN GENERAL.**—To the maximum extent practicable, the Under Secretary of Defense for Acquisition and Sustainment 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, as amended by Pub. L. 115-232, div. A, title VIII, §812(a)(2)(C)(iii), Aug. 13, 2018, 132 Stat. 1847, 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 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 product”, “commercial service”, “nondevelopmental item”, “component”, and “commercial component” have the meanings provided in sections 103, 103a, 110, 105, and 102, respectively, 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; Pub. L. 115-232, div. A, title VIII, §836(d)(2), Aug. 13, 2018, 132 Stat. 1866.)

AMENDMENTS

2018—Par. (1). Pub. L. 115-232 substituted “terms ‘commercial product’, ‘commercial service’,” for “terms ‘commercial item’,” and “sections 103, 103a, 110, 105, and 102, respectively, of title 41” for “chapter 1 of title 41”.

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)”.

2002—Par. (2). Pub. L. 107-296 substituted “of Homeland Security” for “of Transportation”.

2001—Par. (1). Pub. L. 107-107 inserted “(41 U.S.C. 403)” after “section 4 of the Office of Federal Procurement Policy Act”.

EFFECTIVE DATE OF 2018 AMENDMENT

Amendment by Pub. L. 115-232 effective Jan. 1, 2020, subject to a savings provision, see section 836(h) of Pub. L. 115-232, set out as an Effective Date of 2018 Amendment; Savings Provision note under section 453b of Title 6, Domestic Security.

EFFECTIVE DATE OF 2002 AMENDMENT

Amendment by Pub. L. 107-296 effective on the date of transfer of the Coast Guard to the Department of Homeland Security, see section 1704(g) of Pub. L. 107-296, set out as a note under section 101 of this title.

§ 2377. Preference for commercial products and commercial services

(a) PREFERENCE.—The head of an agency shall ensure that, to the maximum extent practicable—

(1) requirements of the agency with respect to a procurement of supplies or services are stated in terms of—

- (A) functions to be performed;
- (B) performance required; or
- (C) essential physical characteristics;

(2) such requirements are defined so that commercial services or commercial products or, to the extent that commercial products suitable to meet the agency’s needs are not available, nondevelopmental items other than commercial products, may be procured to fulfill such requirements; and

(3) offerors of commercial services, commercial products, and nondevelopmental items other than commercial products are provided

an opportunity to compete in any procurement to fill such requirements.

(b) IMPLEMENTATION.—The head of an agency shall ensure that procurement officials in that agency, to the maximum extent practicable—

(1) acquire commercial services, commercial products, or nondevelopmental items other than commercial products to meet the needs of the agency;

(2) require prime contractors and sub-contractors at all levels under the agency contracts to incorporate commercial services, commercial products, or nondevelopmental items other than commercial products as components of items supplied to the agency;

(3) modify requirements in appropriate cases to ensure that the requirements can be met by commercial services or commercial products or, to the extent that commercial products suitable to meet the agency’s needs are not available, nondevelopmental items other than commercial products;

(4) state specifications in terms that enable and encourage bidders and offerors to supply commercial services or commercial products or, to the extent that commercial products suitable to meet the agency’s needs are not available, nondevelopmental items other than commercial products in response to the agency solicitations;

(5) revise the agency’s procurement policies, practices, and procedures not required by law to reduce any impediments in those policies, practices, and procedures to the acquisition of commercial products and commercial services; and

(6) require training of appropriate personnel in the acquisition of commercial products and commercial services.

(c) PRELIMINARY MARKET RESEARCH.—(1) The head of an agency shall conduct market research appropriate to the circumstances—

(A) before developing new specifications for a procurement by that agency;

(B) before soliciting bids or proposals for a contract in excess of the simplified acquisition threshold; and

(C) before awarding a task order or delivery order in excess of the simplified acquisition threshold.

(2) The head of an agency shall use the results of market research to determine whether there are commercial services or commercial products or, to the extent that commercial products suitable to meet the agency’s needs are not available, nondevelopmental items other than commercial products available that—

- (A) meet the agency’s requirements;
- (B) could be modified to meet the agency’s requirements; or
- (C) could meet the agency’s requirements if those requirements were modified to a reasonable extent.

(3) In conducting market research, the head of an agency should not require potential sources to submit more than the minimum information that is necessary to make the determinations required in paragraph (2).

(4) The head of an agency shall document the results of market research in a manner appro-