

§ 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-

priate to the size and complexity of the acquisition.

(5) The head of an agency shall take appropriate steps to ensure that any prime contractor of a contract (or task order or delivery order) in an amount in excess of \$5,000,000 for the procurement of products other than commercial products or services other than commercial services engages in such market research as may be necessary to carry out the requirements of subsection (b)(2) before making purchases for or on behalf of the Department of Defense.

(d) MARKET RESEARCH FOR PRICE ANALYSIS.—The Secretary of Defense shall ensure that procurement officials in the Department of Defense conduct or obtain market research to support the determination of the reasonableness of price for commercial products or commercial services contained in any bid or offer submitted in response to an agency solicitation. To the extent necessary to support such market research, the procurement official for the solicitation—

(1) in the case of products or services acquired under section 2379 of this title, shall use information submitted under subsection (d) of that section; and

(2) in the case of other products or services, may require the offeror to submit relevant information.

(e) MARKET RESEARCH TRAINING REQUIRED.—The Secretary of Defense shall provide mandatory training for members of the armed forces and employees of the Department of Defense responsible for the conduct of market research required under subsections (c) and (d). Such mandatory training shall, at a minimum—

(1) provide comprehensive information on the subject of market research and the function of market research in the acquisition of commercial products and commercial services;

(2) teach best practices for conducting and documenting market research; and

(3) provide methodologies for establishing standard processes and reports for collecting and sharing market research across the Department.

(Added Pub. L. 103-355, title VIII, § 8104(a), Oct. 13, 1994, 108 Stat. 3390; amended Pub. L. 110-181, div. A, title VIII, § 826(a), Jan. 28, 2008, 122 Stat. 227; Pub. L. 114-92, div. A, title VIII, § 844(a), Nov. 25, 2015, 129 Stat. 915; Pub. L. 114-328, div. A, title VIII, § 871, Dec. 23, 2016, 130 Stat. 2307; Pub. L. 115-232, div. A, title VIII, § 836(d)(3), (8)(C), Aug. 13, 2018, 132 Stat. 1866, 1868; Pub. L. 116-92, div. A, title VIII, § 818(a), Dec. 20, 2019, 133 Stat. 1488.)

AMENDMENTS

2019—Subsec. (c)(4). Pub. L. 116-92, § 818(a)(1)(B), added par. (4). Former par. (4) redesignated (5).

Subsec. (c)(5). Pub. L. 116-92, § 818(a)(2), amended directory language of Pub. L. 115-232, § 836(d)(3)(C)(ii). See 2018 Amendment note below.

Pub. L. 116-92, § 818(a)(1)(A), redesignated par. (4) as (5).

2018—Pub. L. 115-232, § 836(d)(8)(C), substituted “commercial products and commercial services” for “acquisition of commercial items” in section catchline.

Subsec. (a)(2). Pub. L. 115-232, § 836(d)(3)(A)(i), substituted “commercial services or commercial products or, to the extent that commercial products suitable to meet the agency’s needs are not available, nondevelop-

mental items other than commercial products” for “commercial items or, to the extent that commercial items suitable to meet the agency’s needs are not available, nondevelopmental items other than commercial items”.

Subsec. (a)(3). Pub. L. 115-232, § 836(d)(3)(A)(ii), substituted “commercial services, commercial products, and nondevelopmental items other than commercial products” for “commercial items and nondevelopmental items other than commercial items”.

Subsec. (b)(1), (2). Pub. L. 115-232, § 836(d)(3)(B)(i), substituted “commercial services, commercial products, or nondevelopmental items other than commercial products” for “commercial items or nondevelopmental items other than commercial items”.

Subsec. (b)(3), (4). Pub. L. 115-232, § 836(d)(3)(B)(ii), substituted “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” for “commercial items or, to the extent that commercial items suitable to meet the agency’s needs are not available, nondevelopmental items other than commercial items”.

Subsec. (b)(5), (6). Pub. L. 115-232, § 836(d)(3)(B)(iii), substituted “commercial products and commercial services” for “commercial items”.

Subsec. (c)(2). Pub. L. 115-232, § 836(d)(3)(C)(i), in introductory provisions, substituted “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” for “commercial items or, to the extent that commercial items suitable to meet the agency’s needs are not available, nondevelopmental items other than commercial items”.

Subsec. (c)(5). Pub. L. 115-232, § 836(d)(3)(C)(ii), as amended by Pub. L. 116-92, § 818(a)(2), substituted “products other than commercial products or services other than commercial services” for “items other than commercial items”.

Subsec. (d). Pub. L. 115-232, § 836(d)(3)(D)(i), substituted “commercial products or commercial services” for “commercial items” in introductory provisions.

Subsec. (d)(1), (2). Pub. L. 115-232, § 836(d)(3)(D)(ii), (iii), substituted “products or services” for “items”.

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

2016—Subsecs. (d), (e). Pub. L. 114-328 added subsec. (d), redesignated former subsec. (d) as (e), and in introductory provisions of subsec. (e), substituted “subsections (c) and (d)” for “subsection (c)”.

2015—Subsec. (d). Pub. L. 114-92 added subsec. (d).

2008—Subsec. (c)(1)(C). Pub. L. 110-181, § 826(a)(1), added subpar. (C).

Subsec. (c)(4). Pub. L. 110-181, § 826(a)(2), added par. (4).

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.

COMMERCIAL OPERATIONAL AND SUPPORT SAVINGS INITIATIVE

Pub. L. 114-328, div. A, title VIII, § 849(d), Dec. 23, 2016, 130 Stat. 2294, as amended by Pub. L. 115-232, div. A, title VIII, § 836(f)(7), Aug. 13, 2018, 132 Stat. 1871, provided that:

“(1) IN GENERAL.—The Secretary of Defense may establish a commercial operational and support savings initiative to improve readiness and reduce operations and support costs by inserting existing commercial products or technology into military legacy systems through the rapid development of prototypes and fielding of production items based on current commercial technology.

“(2) PROGRAM PRIORITY.—The commercial operational and support savings initiative shall fund programs that—

“(A) reduce the costs of owning and operating a military system, including the costs of personnel, consumables, goods and services, and sustaining the support and investment associated with the peacetime operation of a weapon system;

“(B) take advantage of the commercial sector’s technological innovations by inserting commercial technology into fielded weapon systems; and

“(C) emphasize prototyping and experimentation with new technologies and concepts of operations.

“(3) FUNDING PHASES.—

“(A) IN GENERAL.—Projects funded under the commercial operational and support savings initiative shall consist of two phases, Phase I and Phase II.

“(B) PHASE I.—(i) Funds made available during Phase I shall be used to perform the non-recurring engineering, testing, and qualification that are typically needed to adapt a commercial product or technology for use in a military system.

“(ii) Phase I shall include—

“(I) establishment of cost and performance metrics to evaluate project success;

“(II) establishment of a transition plan and agreement with a military department or Defense Agency for adoption and sustainment of the technology or system; and

“(III) the development, fabrication, and delivery of a demonstrated prototype to a military department for installation into a fielded Department of Defense system.

“(iii) Programs shall be terminated if no agreement is established within two years of project initiation.

“(iv) The Office of the Secretary of Defense may provide up to 50 percent of Phase I funding for a project. The military department or Defense Agency concerned may provide the remainder of Phase I funding, which may be provided out of operation and maintenance funding.

“(v) Phase I funding shall not exceed three years.

“(vi) Phase I projects shall be selected based on a merit-based process using criteria to be established by the Secretary of Defense.

“(C) PHASE II.—(i) Phase II shall include the purchase of limited production quantities of the prototype kits and transition to a program of record for continued sustainment.

“(ii) Phase II awards may be made without competition if general solicitation competitive procedures were used for the selection of parties for participation in a Phase I project.

“(iii) Phase II awards may be made as firm fixed-price awards.

“(4) TREATMENT AS COMPETITIVE PROCEDURES.—The use of a merit-based process for selection of projects under the commercial operational and support savings initiative shall be considered to be the use of competitive procedures for purposes of chapter 137 of title 10, United States Code.

“(5) DEFINITION.—In this subsection, the term ‘commercial product’ has the meaning given that term in section 103 of title 41.”

PREFERENCE FOR COMMERCIAL SERVICES

Pub. L. 114-328, div. A, title VIII, §876, Dec. 23, 2016, 130 Stat. 2311, as amended by Pub. L. 116-92, div. A, title IX, §902(59), Dec. 20, 2019, 133 Stat. 1550, provided that: “Not later than 90 days after the date of the enactment of this Act [Dec. 23, 2016], the Secretary of Defense shall revise the guidance issued pursuant to section 855 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114-92; 10 U.S.C. 2377 note) to provide that—

“(1) the head of an agency may not enter into a contract in excess of \$10,000,000 for facilities-related services, knowledge-based services (except engineering services), construction services, medical services, or transportation services that are not commercial

services unless the service acquisition executive of the military department concerned, the head of the Defense Agency concerned, the commander of the combatant command concerned, or the Under Secretary of Defense for Acquisition and Sustainment (as applicable) determines in writing that no commercial services are suitable to meet the agency’s needs as provided in section 2377(c)(2) of title 10, United States Code; and

“(2) the head of an agency may not enter into a contract in an amount above the simplified acquisition threshold and below \$10,000,000 for facilities-related services, knowledge-based services (except engineering services), construction services, medical services, or transportation services that are not commercial services unless the contracting officer determines in writing that no commercial services are suitable to meet the agency’s needs as provided in section 2377(c)(2) of such title.”

INCORPORATION INTO MANAGEMENT CERTIFICATION TRAINING MANDATE

Pub. L. 114-92, div. A, title VIII, §844(b), Nov. 25, 2015, 129 Stat. 915, provided that: “The Chairman of the Joint Chiefs of Staff shall ensure that the requirements of section 2377(d) [now 2377(e)] of title 10, United States Code, as added by subsection (a), are incorporated into the requirements management certification training mandate of the Joint Capabilities Integration Development System.”

MARKET RESEARCH AND PREFERENCE FOR COMMERCIAL ITEMS

Pub. L. 114-92, div. A, title VIII, §855, Nov. 25, 2015, 129 Stat. 919, as amended by Pub. L. 116-92, div. A, title IX, §902(60), Dec. 20, 2019, 133 Stat. 1550, provided that:

“(a) GUIDANCE REQUIRED.—Not later than 90 days after the date of the enactment of this Act [Nov. 25, 2015], the Under Secretary of Defense for Acquisition and Sustainment shall issue guidance to ensure that acquisition officials of the Department of Defense fully comply with the requirements of section 2377 of title 10, United States Code, regarding market research and commercial items. The guidance issued pursuant to this subsection shall, at a minimum—

“(1) provide that the head of an agency may not enter into a contract in excess of the simplified acquisition threshold for information technology products or services that are not commercial items unless the head of the agency determines in writing that no commercial items are suitable to meet the agency’s needs as provided in subsection (c)(2) of such section; and

“(2) ensure that market research conducted in accordance with subsection (c) of such section is used, where appropriate, to inform price reasonableness determinations.

“(b) REVIEW REQUIRED.—Not later than 180 days after the date of the enactment of this Act [Nov. 25, 2015], the Chairman and the Vice Chairman of the Joint Chiefs of Staff, in consultation with the Under Secretary of Defense for Acquisition and Sustainment, 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, as amended by Pub. L. 115-232, div. A, title VIII, § 836(f)(8), Aug. 13, 2018, 132 Stat. 1872; Pub. L. 116-92, div. A, title IX, § 902(61), Dec. 20, 2019, 133 Stat. 1550, provided that:

“(a) LIMITATION.—

“(1) IN GENERAL.—Except as provided in paragraph (2), prior to converting the procurement of a commercial product or a commercial service, as defined in sections 103 and 103a, respectively, of title 41, valued at more than \$1,000,000 from commercial acquisition procedures under part 12 of the Federal Acquisition Regulation to noncommercial 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 and Sustainment.

“(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. Procurement of a major weapon system as a commercial product: requirement for prior determination by Secretary of Defense and notification to Congress

(a) REQUIREMENT FOR DETERMINATION AND NOTIFICATION.—A major weapon system of the Department of Defense may be treated as a commercial product, or purchased under procedures established for the procurement of commercial products, only if—

(1) the Secretary of Defense determines that—

(A) the major weapon system is a commercial product; 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 PRODUCTS.—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 product and purchased under procedures established for the procurement of commercial products 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 products in accordance with the requirements of subsection (a); or

(2) the contracting officer determines in writing that the subsystem is a commercial product.

(c) TREATMENT OF COMPONENTS AND SPARE PARTS AS COMMERCIAL PRODUCTS.—(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 product for the purposes of section 2306a of this title if either—