

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 noncommercial 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—

(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 products 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 products 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 product.

(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 products 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 product 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; Pub. L. 115-232, div. A, title VIII, §836(d)(4), (8)(D), Aug. 13, 2018, 132 Stat. 1868, 1869.)

AMENDMENTS

2018—Pub. L. 115-232, §836(d)(8)(D), substituted “Procurement of a major weapon system as a commercial product: requirement for prior determination by Secretary of Defense and notification to Congress” for “Requirement for determination by Secretary of Defense and notification to Congress before procurement of major weapon systems as commercial items” in section catchline.

Pub. L. 115-232, §836(d)(4)(C), substituted “commercial product” for “commercial item” and “commercial products” for “commercial items” wherever appearing.

Subsec. (a)(1)(A). Pub. L. 115-232, §836(d)(4)(B), struck out “, as defined in section 103 of title 41” before “; and”.

Subsec. (b). Pub. L. 115-232, §836(d)(4)(A), substituted “Commercial Products” for “Commercial Items” in heading.

Subsec. (b)(2). Pub. L. 115-232, §836(d)(4)(B), struck out “, as defined in section 103 of title 41” before period.

Subsec. (c). Pub. L. 115-232, §836(d)(4)(A), substituted “Commercial Products” for “Commercial Items” in heading.

Subsec. (c)(1)(B). Pub. L. 115-232, §836(d)(4)(B), struck out “, as defined in section 103 of title 41” before period.

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 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

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 product and commercial service determinations by Department of Defense

(a) IN GENERAL.—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 product and commercial service 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 product and commercial service determinations, market research, and analysis used to determine the reasonableness of price for the purposes of procurements by the Department of Defense.

(b) ITEMS PREVIOUSLY ACQUIRED USING COMMERCIAL ACQUISITION PROCEDURES.—

(1) DETERMINATIONS.—A contract for a product or service acquired using commercial acquisition procedures under part 12 of the Federal Acquisition Regulation shall serve as a prior commercial product or service determination with respect to such product or service for purposes of this chapter unless the senior procurement executive of the military department or the Department of Defense as designated for purposes of section 1702(c) of title 41 determines in writing that it is no longer appropriate to acquire the product or service using commercial acquisition procedures.

(2) LIMITATION.—(A) Except as provided under subparagraph (B), funds appropriated or otherwise made available to the Department of Defense may not be used for the procurement under part 15 of the Federal Acquisition Regulation of a product or service that was previously acquired under a contract using commercial acquisition procedures under part 12 of the Federal Acquisition Regulation.

(B) The limitation under subparagraph (A) does not apply to the procurement of a product or service that was previously acquired using commercial acquisition procedures under part 12 of the Federal Acquisition Regulation following—

(i) a written determination by the head of contracting activity pursuant to section 2306a(b)(4)(B) of this title that the use of such procedures was improper; or

(ii) a written determination by the senior procurement executive of the military department or the Department of Defense as designated for purposes of section 1702(c) of title 41 that it is no longer appropriate to acquire the product or service using such procedures.

(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; Pub. L. 115-91, div. A, title VIII, §848, Dec. 12, 2017, 131 Stat. 1487; Pub. L. 115-232, div. A, title VIII, §836(d)(5), (8)(E), Aug. 13, 2018, 132 Stat. 1868, 1869.)

AMENDMENTS

2018—Pub. L. 115-232, §836(d)(8)(E), substituted “Commercial product and commercial service” for “Commercial item” in section catchline.

Subsec. (a). Pub. L. 115-232, §836(d)(5)(A), substituted “commercial product and commercial service determinations” for “commercial item determinations” in pars. (1) and (2).

Subsec. (b). Pub. L. 115-232, §836(d)(5)(B)(i)–(iii), in heading, struck out “Item” after “Commercial” and, in text, substituted “a product or service” for “an item” and struck out “item” after “using commercial” wherever appearing.

Subsec. (b)(1). Pub. L. 115-232, §836(d)(5)(B)(iv)–(vi) substituted “prior commercial product or service determination” for “prior commercial item determination”,