

(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 3455 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, §2377; 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; renumbered §3453 and amended Pub. L. 116-283, div. A, title XVIII, §1821(a)(2), (b)(3), Jan. 1, 2021, 134 Stat. 4195.)

AMENDMENTS

2021—Pub. L. 116-283, §1821(a)(2), renumbered section 2377 of this title as this section.

Subsec. (d)(1). Pub. L. 116-283, §1821(b)(3), substituted “section 3455” for “section 2379”.

EFFECTIVE DATE OF 2021 AMENDMENT

Amendment by Pub. L. 116-283 effective Jan. 1, 2022, with additional provisions for delayed implementation and applicability of existing law, see section 1801(d) of Pub. L. 116-283, set out as a note preceding section 3001 of this title.

§ 3455. 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 chapter 271 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 2430¹ of this title).

(Added Pub. L. 109-163, div. A, title VIII, §803(a)(1), Jan. 6, 2006, 119 Stat. 3370, §2379;

¹ See References in Text note below.

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; renumbered §3455 and amended Pub. L. 116-283, div. A, title XVIII, §§1821(a)(2), (b)(4), 1831(j)(4), 1883(b)(2), Jan. 1, 2021, 134 Stat. 4195, 4217, 4294.)

REFERENCES IN TEXT

Section 2430 of this title, referred to in subsec. (f), was transferred to sections 4201, 4202, and 4204 of this title by Pub. L. 116-283, div. A, title XVIII, §1846(c)(1), (d)(1), (f)(1), Jan. 1, 2021, 134 Stat. 4248-4250. Section 4201 of this title defines “major defense acquisition program”.

AMENDMENTS

2021—Pub. L. 116-283, §1821(a)(2), renumbered section 2379 of this title as this section.

Subsec. (c)(1), Pub. L. 116-283, §1831(j)(4), which directed amendment of this section, effective Jan. 1, 2022, by substituting “sections 3701-3708” for “section 2306a”, could not be executed in introductory provisions due to the intervening amendments by section 1821(a)(2) and (b)(4) of Pub. L. 116-283, which renumbered this section as section 3455 of this title and had already struck out the phrase “section 2306a”, effective Jan. 1, 2022. See Amendment notes above and below.

Pub. L. 116-283, §1821(b)(4), substituted “chapter 271” for “section 2306a” in introductory provisions.

Subsec. (f), Pub. L. 116-283, §1883(b)(2), which directed that each reference in the text of title 10 to a section that was redesignated by title XVIII of Pub. L. 116-283, as such section was in effect before the redesignation, be amended by striking such reference and inserting a reference to the appropriate redesignated section, was not executed with respect to “section 2430”, which was redesignated as multiple sections.

EFFECTIVE DATE OF 2021 AMENDMENT

Amendment by Pub. L. 116-283 effective Jan. 1, 2022, with additional provisions for delayed implementation and applicability of existing law, see section 1801(d) of Pub. L. 116-283, set out as a note preceding section 3001 of this title.

§ 3456. 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) DETERMINATIONS REGARDING THE COMMERCIAL NATURE OF PRODUCTS OR SERVICES.—

(1) IN GENERAL.—In making a determination whether a particular product or service offered by a contractor meets the definition of a commercial product or commercial service, a contracting officer of the Department of Defense may—

(A) request support from the Director of the Defense Contract Management Agency, the Director of the Defense Contract Audit Agency, or other appropriate experts in the Department to make a determination whether a product or service is a commercial product or commercial service; and

(B) consider the views of appropriate public and private sector entities.

(2) MEMORANDUM.—Within 30 days after a contract award, the contracting officer shall, consistent with the policies and regulations of the Department, submit a written memorandum summarizing the determination referred to in paragraph (1), including a detailed justification for such determination.

(c) 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 3703(d)(2) 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, §2380; 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; renumbered §3456 and amended Pub. L. 116-283, div. A, title VIII, §816, title XVIII, §§1821(a)(2), (b)(5), 1831(j)(5), Jan. 1, 2021, 134 Stat. 3750, 4195, 4217.)

AMENDMENTS

2021—Pub. L. 116-283, §1821(a)(2), renumbered section 2380 of this title as this section.

Subsec. (b). Pub. L. 116-283, §816(2), added subsec. (b). Former subsec. (b) redesignated (c).

Subsec. (c). Pub. L. 116-283, §816(1), redesignated subsec. (b) as (c).

Subsec. (c)(2)(B)(i). Pub. L. 116-283, §§1821(b)(5), 1831(j)(5), made identical amendments, substituting “section 3703(d)(2)” for “section 2306a(b)(4)(B)”. Amendment by section 1831(j)(5) to section 2380(b)(2)(B)(i) of this title and by section 1821(b)(5) to subsec. (b)(2)(B)(i) of this section were both executed to reflect the probable intent of Congress and the intervening amendments made by sections 1821(a)(2) and 816(1) of Pub. L. 116-283, which had renumbered section 2380 of this title as this section and redesignated subsec. (b) as (c). See Amendment notes above.

EFFECTIVE DATE OF 2021 AMENDMENT

Amendment by sections 1821(a)(2), (b)(5) and 1831(j)(5) of Pub. L. 116-283 effective Jan. 1, 2022, with additional provisions for delayed implementation and applicability of existing law, see section 1801(d) of Pub. L. 116-283, set out as a note preceding section 3001 of this title.

§ 3457. Treatment of certain products and services as commercial products and commercial services

(a) GOODS AND SERVICES PROVIDED BY NONTRADITIONAL DEFENSE CONTRACTORS.—Notwithstanding section 3451(1) of this title, products and services provided by nontraditional defense contractors (as that term is defined in section 3014 of this title) may be treated by the head of an agency as commercial products and commercial services, respectively, for purposes of this chapter.

(b) SERVICES PROVIDED BY CERTAIN NONTRADITIONAL CONTRACTORS.—Notwithstanding section 3451(1) of this title, services provided by a business unit that is a nontraditional defense contractor (as that term is defined in section 3014 of this title) shall be treated as commercial serv-