

§ 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.]”

§ 3453. 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 subcontractors 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 appropriate 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 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 manda-

tory 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.)

Editorial Notes

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”.

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), 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, 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. (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).

Statutory Notes and Related Subsidiaries

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.

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.

USE OF COMMERCIAL ITEMS IN DISTRIBUTED COMMON GROUND SYSTEMS

Pub. L. 115-91, div. A, title XVI, §1698, Dec. 12, 2017, 131 Stat. 1794, provided that:

“(a) IN GENERAL.—The procurement process for each covered Distributed Common Ground System shall be carried out in accordance with section 2377 of title 10, United States Code [now 10 U.S.C. 3453].

“(b) CERTIFICATION.—Not later than 30 days after the date of the enactment of this Act [Dec. 12, 2017], the service acquisition executive responsible for each covered Distributed Common Ground System shall certify to the appropriate congressional committees that the procurement process for increments of the system procured after the date of the enactment of this Act will be carried out in accordance with section 2377 of title 10, United States Code [now 10 U.S.C. 3453].

“(c) DEFINITIONS.—In this section:

“(1) The term ‘appropriate congressional committees’ means—

“(A) the congressional defense committees [Committees on Armed Services and Appropriations of the Senate and the House of Representatives]; and

“(B) the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives.

“(2) The term ‘covered Distributed Common Ground System’ includes the following:

“(A) The Distributed Common Ground System of the Army.

“(B) The Distributed Common Ground System of the Navy.

“(C) The Distributed Common Ground System of the Marine Corps.

“(D) The Distributed Common Ground System of the Air Force.

“(E) The Distributed Common Ground System of the Special Operations Forces.”

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 competi-

tive procedures for purposes of [former] 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 [now 10 U.S.C. 3453(c)(2)]; 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 [now 10 U.S.C. 3453(c)(2)].”

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) of title 10, United States Code [now 10 U.S.C. 3453(e)], 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 [now 10 U.S.C. 3453], 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 [now 10 U.S.C. 3453(c)], 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.”

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 [now 10 U.S.C. 3453(c)], as amended by this section.”

§ 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 sys-

tem (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 de-