

priations of the Senate and the House of Representatives] a report on the use of agreements and activities described in subsection (a) and associated funding.

“(f) PUBLICATION OF INFORMATION.—Not later than one year after the date of enactment of this Act, the Secretary of Defense shall establish procedures to collect information on individual agreements and activities described in this section and associated funding in an online, public, searchable database, unless the Secretary deems such disclosure inappropriate for individual agreements based on national security concerns.”

#### LISTING OF OTHER TRANSACTION AUTHORITY CONSORTIA

Pub. L. 116-283, div. A, title VIII, §833, Jan. 1, 2021, 134 Stat. 3753, provided that: “Not later than 90 days after the date of the enactment of this Act [Jan. 1, 2021], the Secretary of Defense shall maintain on the single Government-wide point of entry described under section 1708 of title 41, United States Code, a list of the consortia used by the Secretary to announce or otherwise make available opportunities to enter into a transaction under the authority of section 2371 of title 10, United States Code [now 10 U.S.C. 4021], or a transaction for a prototype project under section 2371b of such title [now 10 U.S.C. 4022].”

#### DATA, POLICY, AND REPORTING ON THE USE OF OTHER TRANSACTIONS

Pub. L. 115-232, div. A, title VIII, §873, Aug. 13, 2018, 132 Stat. 1905, as amended by Pub. L. 116-92, div. A, title VIII, §819, Dec. 20, 2019, 133 Stat. 1488, provided that:

“(a) COLLECTION AND STORAGE.—The Service Acquisition Executives of the military departments shall collect data on the use of other transactions by their respective departments, and the Under Secretary of Defense for Research and Engineering and the Under Secretary of Defense for Acquisition and Sustainment shall collect data on all other use by the Department of Defense of other transactions, including use by the Defense Agencies. The data shall be stored in a manner that allows the Assistant Secretary of Defense for Acquisition and other appropriate officials access at any time.

“(b) USE OF DATA.—The Assistant Secretary of Defense for Acquisition shall—

“(1) analyze and leverage the data collected under subsection (a) to update policy and guidance related to the use of other transactions; and

“(2) make the data collected under subsection (a) accessible to any official designated by the Secretary of Defense for inclusion by such official in relevant reports made by such official.

“(c) REPORT REQUIRED.—

“(1) IN GENERAL.—Not later than December 31, 2019, and annually thereafter through December 31, 2023, 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 use of other transaction authority to carry out prototype projects during the preceding fiscal year. Each report shall summarize the data collected under subsection (a) on the nature and extent of each such use of the authority, including a description—

“(A) of the participants to an agreement entered into pursuant to the authority of subsection (a) of section 2371b of title 10, United States Code [now 10 U.S.C. 4022], or a follow-on contract or transaction entered into pursuant to the authority of subsection (f) of such section;

“(B) of the quantity of prototype projects to be produced pursuant to such an agreement, follow-on contract, or transaction;

“(C) of the amount of payments made pursuant to each such agreement, follow-on contract, or transaction;

“(D) of the purpose, description, and status of prototype projects carried out pursuant to each

such agreement, follow-on contract, or transaction; and

“(E) including case examples, of the successes and challenges with using the authority of such subsection (a) or (f).

“(2) FORM OF REPORT.—A report required under this subsection shall be submitted in unclassified form without any designation relating to dissemination control, but may contain a classified annex.”

#### PREFERENCE FOR USE OF OTHER TRANSACTIONS AND EXPERIMENTAL AUTHORITY

Pub. L. 115-91, div. A, title VIII, §867, Dec. 12, 2017, 131 Stat. 1495, provided that: “In the execution of science and technology and prototyping programs, the Secretary of Defense shall establish a preference, to be applied in circumstances determined appropriate by the Secretary, for using transactions other than contracts, cooperative agreements, and grants entered into pursuant to sections 2371 and 2371b of title 10, United States Code [now 10 U.S.C. 4021 and 4022], and authority for procurement for experimental purposes pursuant to section 2373 of title 10, United States Code [now 10 U.S.C. 4023].”

#### § 4022. Authority of the Department of Defense to carry out certain prototype projects

(a) AUTHORITY.—(1) Subject to paragraph (2), the Director of the Defense Advanced Research Projects Agency, the Secretary of a military department, or any other official designated by the Secretary of Defense may, under the authority of section 4021 of this title, carry out prototype projects that are directly relevant to enhancing the mission effectiveness of military personnel and the supporting platforms, systems, components, or materials proposed to be acquired or developed by the Department of Defense, or to improvement of platforms, systems, components, or materials in use by the armed forces.

(2) The authority of this section—

(A) may be exercised for a transaction for a prototype project, and any follow-on production contract or transaction that is awarded pursuant to subsection (f), that is expected to cost the Department of Defense in excess of \$100,000,000 but not in excess of \$500,000,000 (including all options) only upon a written determination by the senior procurement executive for the agency as designated for the purpose of section 1702(c) of title 41, or, for the Defense Advanced Research Projects Agency or the Missile Defense Agency, the director of the agency that—

(i) the requirements of subsection (d) will be met; and

(ii) the use of the authority of this section is essential to promoting the success of the prototype project; and

(B) may be exercised for a transaction for a prototype project, and any follow-on production contract or transaction that is awarded pursuant to subsection (f), that is expected to cost the Department of Defense in excess of \$500,000,000 (including all options) only if—

(i) the Under Secretary of Defense for Research and Engineering or the Under Secretary of Defense for Acquisition and Sustainment determines in writing that—

(I) the requirements of subsection (d) will be met; and

(II) the use of the authority of this section is essential to meet critical national security objectives; and

(ii) the congressional defense committees are notified in writing at least 30 days before such authority is exercised.

(3) The authority of a senior procurement executive or director of the Defense Advanced Research Projects Agency or Missile Defense Agency under paragraph (2)(A), and the authority of the Under Secretaries of Defense under paragraph (2)(B), may not be delegated.

(b) EXERCISE OF AUTHORITY.—

(1) Subsection (e)(2) of such section 4021 shall not apply to projects carried out under subsection (a).

(2) To the maximum extent practicable, competitive procedures shall be used when entering into agreements to carry out the prototype projects under subsection (a).

(c) COMPTROLLER GENERAL ACCESS TO INFORMATION.—(1) Each agreement entered into by an official referred to in subsection (a) to carry out a project under that subsection that provides for payments in a total amount in excess of \$5,000,000 shall include a clause that provides for the Comptroller General, in the discretion of the Comptroller General, to examine the records of any party to the agreement or any entity that participates in the performance of the agreement.

(2) The requirement in paragraph (1) shall not apply with respect to a party or entity, or a subordinate element of a party or entity, that has not entered into any other agreement that provides for audit access by a Government entity in the year prior to the date of the agreement.

(3)(A) The right provided to the Comptroller General in a clause of an agreement under paragraph (1) is limited as provided in subparagraph (B) in the case of a party to the agreement, an entity that participates in the performance of the agreement, or a subordinate element of that party or entity if the only agreements or other transactions that the party, entity, or subordinate element entered into with Government entities in the year prior to the date of that agreement are cooperative agreements or transactions that were entered into under this section or section 4021 of this title.

(B) The only records of a party, other entity, or subordinate element referred to in subparagraph (A) that the Comptroller General may examine in the exercise of the right referred to in that subparagraph are records of the same type as the records that the Government has had the right to examine under the audit access clauses of the previous agreements or transactions referred to in such subparagraph that were entered into by that particular party, entity, or subordinate element.

(4) The head of the contracting activity that is carrying out the agreement may waive the applicability of the requirement in paragraph (1) to the agreement if the head of the contracting activity determines that it would not be in the public interest to apply the requirement to the agreement. The waiver shall be effective with respect to the agreement only if the head of the contracting activity transmits a notification of

the waiver to Congress and the Comptroller General before entering into the agreement. The notification shall include the rationale for the determination.

(5) The Comptroller General may not examine records pursuant to a clause included in an agreement under paragraph (1) more than three years after the final payment is made by the United States under the agreement.

(d) APPROPRIATE USE OF AUTHORITY.—(1) The Secretary of Defense shall ensure that no official of an agency enters into a transaction (other than a contract, grant, or cooperative agreement) for a prototype project under the authority of this section unless one of the following conditions is met:

(A) There is at least one nontraditional defense contractor or nonprofit research institution participating to a significant extent in the prototype project.

(B) All significant participants in the transaction other than the Federal Government are small businesses (including small businesses participating in a program described under section 9 of the Small Business Act (15 U.S.C. 638)) or nontraditional defense contractors.

(C) At least one third of the total cost of the prototype project is to be paid out of funds provided by sources other than the Federal Government.

(D) The senior procurement executive for the agency determines in writing that exceptional circumstances justify the use of a transaction that provides for innovative business arrangements or structures that would not be feasible or appropriate under a contract, or would provide an opportunity to expand the defense supply base in a manner that would not be practical or feasible under a contract.

(2)(A) Except as provided in subparagraph (B), the amounts counted for the purposes of this subsection as being provided, or to be provided, by a party to a transaction with respect to a prototype project that is entered into under this section other than the Federal Government do not include costs that were incurred before the date on which the transaction becomes effective.

(B) Costs that were incurred for a prototype project by a party after the beginning of negotiations resulting in a transaction (other than a contract, grant, or cooperative agreement) with respect to the project before the date on which the transaction becomes effective may be counted for purposes of this subsection as being provided, or to be provided, by the party to the transaction if and to the extent that the official responsible for entering into the transaction determines in writing that—

(i) the party incurred the costs in anticipation of entering into the transaction; and

(ii) it was appropriate for the party to incur the costs before the transaction became effective in order to ensure the successful implementation of the transaction.

(e) DEFINITIONS.—In this section:

(1) The term “nontraditional defense contractor” has the meaning given the term under section 3014 of this title.

(2) The term “small business” means a small business concern as defined under section 3 of the Small Business Act (15 U.S.C. 632).

(f) FOLLOW-ON PRODUCTION CONTRACTS OR TRANSACTIONS.—(1) A transaction entered into under this section for a prototype project may provide for the award of a follow-on production contract or transaction to the participants in the transaction. A transaction includes all individual prototype subprojects awarded under the transaction to a consortium of United States industry and academic institutions.

(2) A follow-on production contract or transaction provided for in a transaction under paragraph (1) may be awarded to the participants in the transaction without the use of competitive procedures, notwithstanding the requirements of section 2304<sup>1</sup> of this title, if—

(A) competitive procedures were used for the selection of parties for participation in the transaction; and

(B) the participants in the transaction successfully completed the prototype project provided for in the transaction.

(3) A follow-on production contract or transaction may be awarded, pursuant to this subsection, when the Department determines that an individual prototype or prototype subproject as part of a consortium is successfully completed by the participants.

(4) Award of a follow-on production contract or transaction pursuant to the terms under this subsection is not contingent upon the successful completion of all activities within a consortium as a condition for an award for follow-on production of a successfully completed prototype or prototype subproject within that consortium.

(5) Contracts and transactions entered into pursuant to this subsection may be awarded using the authority in subsection (a), under the authority of chapter 137<sup>1</sup> of this title, or under such procedures, terms, and conditions as the Secretary of Defense may establish by regulation.

(g) AUTHORITY TO PROVIDE PROTOTYPES AND FOLLOW-ON PRODUCTION ITEMS AS GOVERNMENT-FURNISHED EQUIPMENT.—An agreement entered into pursuant to the authority of subsection (a) or a follow-on contract or transaction entered into pursuant to the authority of subsection (f) may provide for prototypes or follow-on production items to be provided to another contractor as Government-furnished equipment.

(h) APPLICABILITY OF PROCUREMENT ETHICS REQUIREMENTS.—An agreement entered into under the authority of this section shall be treated as a Federal agency procurement for the purposes of chapter 21 of title 41.

(Added Pub. L. 114-92, div. A, title VIII, §815(a)(1), Nov. 25, 2015, 129 Stat. 893, §2371b; amended Pub. L. 115-91, div. A, title II, §216, title VIII, §864, Dec. 12, 2017, 131 Stat. 1328, 1494; Pub. L. 115-232, div. A, title II, §211, Aug. 13, 2018, 132 Stat. 1674; Pub. L. 116-92, div. A, title XVII, §1731(a)(46), Dec. 20, 2019, 133 Stat. 1814; renumbered §4022 and amended Pub. L. 116-283, div. A, title XVIII, §§1841(b)(1), (2)(C), 1883(b)(2), Jan. 1, 2021, 134 Stat. 4243, 4294; Pub. L. 117-81, div. A, title VIII, §821(b), title XVII, §1701(u)(2)(B), (F)(i)(IV), Dec. 27, 2021, 135 Stat. 1825, 2151.)

<sup>1</sup> See References in Text note below.

## Editorial Notes

### REFERENCES IN TEXT

Section 2304 of this title, referred to in subsec. (f)(2), was repealed by Pub. L. 116-283, div. A, title XVIII, §§1801(d), 1881(a), Jan. 1, 2021, 134 Stat. 4151, 4293, effective Jan. 1, 2022, with additional provisions for delayed implementation and applicability of existing law. Subsecs. (a) to (l) of section 2304 were transferred to various provisions in chapter 221 of this title, with the same effective date and conditions, by Pub. L. 116-283, div. A, title XVIII, §1811(c)(2)-(5), (d)(2)-(9), Jan. 1, 2021, 134 Stat. 4165-4170.

Chapter 137 of this title, referred to in subsec. (f)(5), was repealed by Pub. L. 116-283, div. A, title XVIII, §1881(a), Jan. 1, 2021, 134 Stat. 4293, effective Jan. 1, 2022, in conjunction with the transfer and reorganization of acquisition provisions in this title by Pub. L. 116-283, div. A, title XVIII, Jan. 1, 2022, 134 Stat. 4149.

### PRIOR PROVISIONS

A prior section 4022, act Aug. 10, 1956, ch. 1041, 70A Stat. 233, related to employment of contract surgeons in an emergency, prior to repeal by Pub. L. 98-94, title IX, §932(b)(1), (f) Sept. 24, 1983, 97 Stat. 650, effective Oct. 1, 1983, with continuation provision for existing contracts.

### AMENDMENTS

2021—Pub. L. 116-283, §1841(b)(1), as amended by Pub. L. 117-81, §1701(u)(2)(B), renumbered section 2371b of this title as this section.

Subsec. (a)(1). Pub. L. 116-283, §1841(b)(2)(C), as amended by Pub. L. 117-81, §1701(u)(2)(F)(i)(IV), substituted “section 4021” for “section 2371”.

Subsec. (b)(1). Pub. L. 117-81, §821(b), substituted “Subsection (e)(2)” for “Subsections (e)(1)(B) and (e)(2)”.

Pub. L. 116-283, §1841(b)(2)(C), as amended by Pub. L. 117-81, §1701(u)(2)(F)(i)(IV), substituted “section 4021” for “section 2371”.

Subsec. (c)(3)(A). Pub. L. 116-283, §1841(b)(2)(C), as amended by Pub. L. 117-81, §1701(u)(2)(F)(i)(IV), substituted “section 4021” for “section 2371”.

Subsec. (e)(1). Pub. L. 116-283, §1883(b)(2), substituted “section 3014” for “section 2302(9)”.

Subsec. (f)(2). 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 2304”, which was redesignated as multiple sections.

2019—Subsec. (d)(1)(C). Pub. L. 116-92 substituted “sources other than” for “sources other than other than”.

2018—Subsec. (a)(2)(A). Pub. L. 115-232, §211(1)(A), substituted “for a prototype project, and any follow-on production contract or transaction that is awarded pursuant to subsection (f),” for “(for a prototype project)” in introductory provisions.

Subsec. (a)(2)(B). Pub. L. 115-232, §211(1)(B)(i), substituted “for a prototype project, and any follow-on production contract or transaction that is awarded pursuant to subsection (f),” for “(for a prototype project)” in introductory provisions.

Subsec. (a)(2)(B)(i). Pub. L. 115-232, §211(1)(B)(ii), substituted “Under Secretary of Defense for Research and Engineering or the Under Secretary of Defense for Acquisition and Sustainment” for “Under Secretary of Defense for Acquisition, Technology, and Logistics” in introductory provisions.

Subsec. (a)(3). Pub. L. 115-232, §211(1)(C), which directed substitution of “Under Secretaries of Defense” for “Under Secretary of Defense for Acquisition, Technology, and Logistics” in par. (3) of subsec. (a)(2), was executed by making the substitution in par. (3) of subsec. (a), to reflect the probable intent of Congress.

Subsec. (b)(2). Pub. L. 115-232, §211(2), inserted “the prototype” after “carry out”.

Subsec. (f)(3) to (5). Pub. L. 115-232, §211(3), added pars. (3) and (4) and redesignated former par. (3) as (5).

2017—Subsec. (a)(2)(A). Pub. L. 115-91, §864(a)(1), (2), in introductory provisions, substituted “for a transaction (for a prototype project)” for “for a prototype project”, “\$100,000,000” for “\$50,000,000”, and “\$500,000,000” for “\$250,000,000”.

Subsec. (a)(2)(B). Pub. L. 115-91, §864(a)(1), (3), in introductory provisions, substituted “for a transaction (for a prototype project)” for “for a prototype project” and “\$500,000,000” for “\$250,000,000”.

Subsec. (d)(1)(A). Pub. L. 115-91, §216, inserted “or nonprofit research institution” after “defense contractor”.

Subsec. (d)(1)(B). Pub. L. 115-91, §864(b), inserted “(including small businesses participating in a program described under section 9 of the Small Business Act (15 U.S.C. 638))” after “small businesses”.

Subsec. (d)(1)(C). Pub. L. 115-91, §864(c), substituted “provided by sources other than” for “provided by parties to the transaction”.

Subsec. (f)(1). Pub. L. 115-91, §864(d), inserted at end “A transaction includes all individual prototype sub-projects awarded under the transaction to a consortium of United States industry and academic institutions.”

### Statutory Notes and Related Subsidiaries

#### EFFECTIVE DATE OF 2021 AMENDMENT

Amendment by section 1701(u)(2)(B), (F)(i)(IV) of Pub. L. 117-81 applicable as if included in the enactment of title XVIII of Pub. L. 116-283 as enacted, see section 1701(a)(2) of Pub. L. 117-81, set out in a note preceding section 3001 of this title and note below.

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.

#### LIMITATION ON MISSILE DEFENSE AGENCY PRODUCTION OF SATELLITES AND GROUND SYSTEMS ASSOCIATED WITH OPERATION OF SUCH SATELLITES

Pub. L. 117-81, div. A, title XVI, §1662(a), Dec. 27, 2021, 135 Stat. 2103, provided that:

“(1) PRODUCTION OF SATELLITES AND GROUND SYSTEMS.—The Director of the Missile Defense Agency may not authorize or obligate funding for a program of record for the production of satellites or ground systems associated with the operation of such satellites.

“(2) PROTOTYPE SATELLITES.—

“(A) AUTHORITY.—The Director, with the concurrence of the Space Acquisition Council established by section 9021 of title 10, United States Code, may authorize the production of one or more prototype satellites, consistent with the requirements of the Missile Defense Agency.

“(B) REPORT.—Not later than 30 days after the date on which the Space Acquisition Council concurs with the Director with respect to authorizing the production of a prototype satellite under subparagraph (A), the chair of the Council shall submit to the congressional defense committees [Committees on Armed Services and Appropriations of the Senate and the House of Representatives] a report explaining the reasons for such concurrence.

“(C) OBLIGATION OF FUNDS.—The Director may not obligate funds for the production of a prototype satellite under subparagraph (A) before the date on which the Space Acquisition Council submits the report for such prototype satellite under subparagraph (B).”

#### RELAXATION OF DEPARTMENT OF DEFENSE OTHER TRANSACTION AUTHORITY REQUIREMENTS RELATED TO THE NATIONAL EMERGENCY FOR THE CORONAVIRUS DISEASE 2019

Pub. L. 116-136, div. B, title III, §13006, Mar. 27, 2020, 134 Stat. 522, provided that:

“(a) Notwithstanding paragraph (3) of section 2371b(a) of title 10, United States Code [now 10 U.S.C. 4022(a)], the authority of a senior procurement executive or director of the Defense Advanced Research Projects Agency or Missile Defense Agency under paragraph (2)(A) of such section [probably should be “subsection”], and the authority of the Under Secretaries of Defense under paragraph (2)(B) of such section [probably should be “subsection”], for any transaction related to the national emergency for the Coronavirus Disease 2019 (COVID-19) may be delegated to such officials in the Department of Defense as the Secretary of Defense shall specify for purposes of this section.

“(b)(1) Notwithstanding clause (ii) of section 2371b(a)(2)(B) of title 10, United States Code [now 10 U.S.C. 4022(a)(2)(B)], no advance notice to Congress is required under that clause for transitions described in that section that are related to the national emergency for the Coronavirus Disease 2019 (COVID-19).

“(2) In the event a transaction covered by paragraph (1) is carried out, the Under Secretary of Defense for Research and Engineering or the Under Secretary of Defense for Acquisition and Sustainment, as applicable, shall submit to the congressional defense committees a notice on the carrying out of such transaction as soon as is practicable after the commencement of the carrying out of such transaction.

“(3) In this subsection, the term ‘congressional defense committees’ has the meaning given such term in section 101(a)(16) of title 10, United States Code.”

#### REPEAL OF OBSOLETE AUTHORITY; TRANSITION PROVISION

Pub. L. 114-92, div. A, title VIII, §815(c), Nov. 25, 2015, 129 Stat. 896, provided that: “Section 845 of the National Defense Authorization Act for Fiscal Year 1994 (Public Law 103-160; [former] 10 U.S.C. 2371 note) is hereby repealed. Transactions entered into under the authority of such section 845 shall remain in force and effect and shall be modified as appropriate to reflect the amendments made by this section [enacting this section, amending former section 2302 of this title, and amending provisions set out as a note under section 4001 of this title].”

#### UPDATED GUIDANCE

Pub. L. 114-92, div. A, title VIII, §815(e), Nov. 25, 2015, 129 Stat. 896, provided that: “Not later than 180 days after the date of the enactment of this Act [Nov. 25, 2015], the Secretary of Defense shall issue updated guidance to implement the amendments made by this section [enacting this section, amending former section 2302 of this title, amending provisions set out as a note under section 4001 of this title, and repealing provisions formerly set out as a note under section 2371 of this title].”

### § 4023. Procurement for experimental purposes

(a) AUTHORITY.—The Secretary of Defense and the Secretaries of the military departments may each buy ordnance, signal, chemical activity, transportation, energy, medical, space-flight, telecommunications, and aeronautical supplies, including parts and accessories, and designs thereof, that the Secretary of Defense or the Secretary concerned considers necessary for experimental or test purposes in the development of the best supplies that are needed for the national defense.

(b) PROCEDURES.—Purchases under this section may be made inside or outside the United States and by contract or otherwise. Chapter 137<sup>1</sup> of this title applies only when such purchases are made in quantities greater than necessary for

<sup>1</sup> See References in Text note below.