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.—(1) 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—

(A) 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

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

(2)(A) For a subsystem proposed as commercial (as defined in section 103(1) of title 41) and that has not been previously determined commercial in accordance with section 3703(d) of this title, the offeror shall—

(i) identify the comparable commercial product the offeror sells to the general public or nongovernmental entities that serves as the basis for the ''of a type'' assertion;

(ii) submit to the contracting officer a comparison necessary to serve as the basis of the ''of a type'' assertion of the physical characteristics and functionality between the subsystem and the comparable commercial product identified under clause (i); and

(iii) provide to the contracting officer the National Stock Number for both the comparable commercial product identified under clause (i), if one is assigned, and the subsystem, if one is assigned.

(B) If the offeror does not sell a comparable commercial product to the general public or nongovernmental entities for purposes other than governmental purposes that can serve as the basis for an ''of a type'' assertion with respect to the subsystem—

(i) the offeror shall—

(I) notify the contracting officer in writing that it does not so sell such a comparable commercial product; and

(II) provide to the contracting officer a comparison necessary to serve as the basis of the ''of a type'' assertion of the physical characteristics and functionality between the subsystem and the most comparable commercial product in the commercial marketplace, to the extent reasonably known by the offeror; and

(ii) subparagraph (A) shall not apply with respect to the offeror for such subsystem.

(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)(A) For a component or spare part proposed as commercial (as defined in section 103(1) of title 41) and that has not previously been determined commercial in accordance with section 3703(d) of this title, the offeror shall—

(i) identify the comparable commercial product the offeror sells to the general public or nongovernmental entities that serves as the basis for the ''of a type'' assertion;

(ii) submit to the contracting officer a comparison necessary to serve as the basis of the ''of a type'' assertion of the physical characteristics and functionality between the component or spare part and the comparable commercial product identified under clause (i); and

(iii) provide to the contracting officer the National Stock Number for both the comparable commercial product identified under clause (i), if one is assigned, and the component or spare part, if one is assigned.

(B) If the offeror does not sell a comparable commercial product to the general public or nongovernmental entities for purposes other than governmental purposes that can serve as the basis for an ''of a type'' assertion with respect to the component or spare part—

(i) the offeror shall—

(I) notify the contracting officer in writing that it does not so sell such a comparable commercial product; and

(II) provide to the contracting officer a comparison necessary to serve as the basis of the ''of a type'' assertion of the physical characteristics and functionality between the component or spare part and the most comparable commercial product in the commercial marketplace, to the extent reasonably known by the offeror; and

(ii) subparagraph (A) shall not apply with respect to the offeror for such component or spare part.

(d) INFORMATION SUBMITTED FOR PROCUREMENTS THAT ARE NOT COVERED BY THE EXCEPTIONS IN SECTION 3703(A)(1) OF THIS TITLE.—(1) To the extent necessary to determine the reasonableness of the price for items acquired under this section, the offeror shall, in accordance with paragraph (4), submit to the contracting officer or provide the contracting officer access to—

(A) a representative sample, as determined by the contracting officer, of the prices paid for the same or similar commercial products under comparable terms and conditions by both Government and commercial customers, and the terms and conditions of such sales;

(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, a representative sample, as determined by the contracting officer, of the prices paid for the same or similar commercial products sold under different terms and conditions, and the terms and conditions of such sales; and

(C) only if the contracting officer determines that the information submitted pursuant to subparagraphs (A) and (B) is not sufficient to

determine the reasonableness of price because either the comparable commercial products provided by the offeror are not a valid basis for a price analysis or the contracting officer determines the proposed price is not reasonable after evaluating sales data, and the contracting officer receives the approval described in paragraph (5), 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.

(4)(A) An offeror may redact data information submitted or made available under subparagraph (A) or (B) of paragraph (1) with respect to sales of an item acquired under this section only to the extent necessary to remove information individually identifying government customers, commercial customers purchasing such item for governmental purposes, and commercial customers purchasing such item for commercial, mixed, or unknown purposes.

(B) Before an offeror may exercise the authority under subparagraph (A) with respect to a customer, the offeror shall certify in writing to the contracting officer whether the customer is a government customer, a commercial customer purchasing the item for governmental purpose, or a commercial customer purchasing the item for a commercial, mixed, or unknown purpose.

(5) A contracting officer may not require an offeror to submit or make available information under paragraph (1)(C) without approval from a level above the contracting officer.

(6) Nothing in this subsection shall relieve an offeror of other obligations under any other law or regulation to disclose and support the actual rationale of the offeror for the price proposed by the offeror to the Government for any good or service.

(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[1] of this title).

(g) APPLICABILITY.—

(1) IN GENERAL.—Subsections (b) and (c) shall apply only with respect to subsystems described in subsection (b) and components or spare parts described in subsection (c), respectively, that the Department of Defense acquires through—

(A) a prime contract;

(B) a modification to a prime contract; or

(C) a subcontract described in paragraph (2).

(2) SUBCONTRACT DESCRIBED.—A subcontract described in this paragraph is a subcontract through which the Department of Defense acquires a subsystem or component or spare part proposed as commercial (as defined in section 103(1) of title 41) under this section and that has not previously been determined commercial in accordance with section 3703(d).

(Added Pub. L. 109–163, div. A, title VIII, § 803(a)(1), Jan. 6, 2006, 119 Stat. 3370, § 2379; 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; Pub. L. 117–81, div. A, title XVII, § 1701(b)(10)(i)(ii), Dec. 27, 2021, 135 Stat. 2134; Pub. L. 117–263, div. A, title VIII, § 803, Dec. 23, 2022, 136 Stat. 2693.)

**Editorial Notes**

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

2022—Subsec. (b). Pub. L. 117–263, § 803(a), designated existing provisions as par. (1), redesignated former pars. (1) and (2) as subpars. (A) and (B), respectively, of par. (1), and added par. (2).

Subsec. (c)(2). Pub. L. 117–263, § 803(b), amended par. (2) generally. Prior to amendment, par. (2) read as follows: ''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).''

Subsec. (d). Pub. L. 117–263, § 803(c)(1), inserted ''FOR PROCUREMENTS THAT ARE NOT COVERED BY THE EXCEPTIONS IN SECTION 3703(A)(1) OF THIS TITLE'' after ''SUBMITTED'' in heading.

Subsec. (d)(1). Pub. L. 117–263, § 803(c)(2)(A), in introductory provisions, substituted ''the offeror shall, in accordance with paragraph (4), submit to the contracting officer or provide the contracting officer access to—'' for ''the contracting officer shall require the offeror to submit—''.

Subsec. (d)(1)(A). Pub. L. 117–263, § 803(c)(2)(B), inserted ''a representative sample, as determined by the contracting officer, of the'' before ''prices paid'' and '', and the terms and conditions of such sales'' before semicolon at end.

[1] See References in Text note below.

Subsec. (d)(1)(B). Pub. L. 117–263, §803(c)(2)(C), substituted ''a representative sample, as determined by the contracting officer, of the prices paid for the same or similar commercial products sold under different terms and conditions, and the terms and conditions of such sales; and'' for ''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''.

Subsec. (d)(1)(C). Pub. L. 117–263, §803(c)(2)(D), inserted ''only'' before ''if the contracting officer'' and ''because either the comparable commercial products provided by the offeror are not a valid basis for a price analysis or the contracting officer determines the proposed price is not reasonable after evaluating sales data, and the contracting officer receives the approval described in paragraph (5)'' after ''reasonableness of price''.

Subsec. (d)(4) to (6). Pub. L. 117–263, §803(c)(3), added pars. (4) to (6).

Subsec. (g). Pub. L. 117–263, §803(d), added subsec. (g).

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 by substituting ''sections 3701–3708'' for ''section 2306a'' and could not be executed, was repealed by Pub. L. 117–81, §1701(b)(10)(I)(ii).

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.

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.

**Statutory Notes and Related Subsidiaries**

EFFECTIVE DATE OF 2021 AMENDMENT

Amendment by 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.

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.''

### § 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 why the product or service was determined to be commercial or noncommercial. Upon the request of the contractor or subcontractor offering the product or service for which such determination is summarized in such memorandum, the contracting officer shall provide to such contractor or subcontractor a copy of such memorandum.

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

(1) DETERMINATIONS.—A contract or subcontract for a product (including a product without a part number or a product with a prior part number that has the same functionality as the product had with the prior part number) or service acquired using commercial acquisition procedures under part 12 of the Federal Acquisition Regulation shall serve as a prior commercial product or commercial service determination with respect to such product or service for purposes of this chapter, including when subject to minor modifications, unless—

(A) the prior determination was not issued or approved by a contracting officer of the Department of Defense; or

(B) 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; Pub. L. 117–81, div. A, title XVII, § 1701(b)(9), (10)(I)(ii), Dec. 27, 2021, 135 Stat. 2133, 2134; Pub. L. 118–31, div. A, title VIII, § 801, Dec. 22, 2023, 137 Stat. 312; Pub. L. 118–159, div. A, title VIII, § 814, Dec. 23, 2024, 138 Stat. 1980.)

#### Editorial Notes

AMENDMENTS

2024—Subsec. (c)(1). Pub. L. 118–159 added par. (1) and struck out former par. (1). Prior to amendment, text read as follows: ''A contract for a product or service acquired using commercial acquisition procedures under part 12 of the Federal Acquisition Regulation shall