

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

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.”

2023—Subsec. (b)(2). Pub. L. 118-31 substituted “why the product or service was determined to be commercial or noncommercial” for “for such determination” and inserted at end “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.”

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. (b)(2)(B)(i). Pub. L. 116-283, §1831(j)(5), which directed amendment of subsec. (b)(2)(B)(i) of section 2380 of this title (now subsec. (c)(2)(B)(i) of this section) by substituting “section 3703(d)(2)” for “section 2306a(b)(4)(B)”, was repealed by Pub. L. 117-81, §1701(b)(10)(I)(ii). Identical amendment was made to subsec. (c)(2)(B)(i) of this section by Pub. L. 116-283, §1821(b)(5), see below.

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), as amended by Pub. L. 117-81, §1701(b)(9), substituted “section 3703(d)(2)” for “section 2306a(b)(4)(B)”.

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

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

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

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

Subsec. (b)(2)(B)(ii). Pub. L. 115-232, §836(d)(5)(B)(vi), substituted “the product or service” for “the item”.

2017—Pub. L. 115-91 designated existing provisions as subsec. (a), inserted heading, and added subsec. (b).

2016—Pars. (1), (2). Pub. L. 114-328 amended pars. (1) and (2) generally. Prior to amendment, pars. (1) and (2) read as follows:

“(1) establish and maintain a centralized capability with necessary expertise and resources to oversee the making of commercial item determinations for the purposes of procurements by the Department of Defense; and

“(2) provide public access to Department of Defense commercial item determinations for the purposes of procurements by the Department of Defense.”

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 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.

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.

REGULATIONS

Pub. L. 114-92, div. A, title VIII, §851(d), Nov. 25, 2015, 129 Stat. 917, provided that: “Not later than 180 days after the date of the enactment of this Act [Nov. 25, 2015], the Defense Federal Acquisition Regulation Supplement shall be updated to reflect the requirements of this section [enacting this section, amending section 2306a of this title, and enacting provisions set out as notes under section 2306a of this title] and the amendments made by this section.”

CONSTRUCTION

Pub. L. 114-92, div. A, title VIII, §851(e), Nov. 25, 2015, 129 Stat. 917, provided that: “Nothing in this section [enacting this section, amending section 2306a of this title, and enacting provisions set out as notes under section 2306a of this title] or the amendments made by this section shall be construed to preclude the contracting officer for the procurement of a commercial item from requiring the contractor to supply information that is sufficient to determine the reasonableness of price, regardless of whether or not the contractor was required to provide such information in connection with any earlier procurement.”

DEFINITION OF COMMERCIAL ITEM

Pub. L. 114-92, div. A, title VIII, §851(c), Nov. 25, 2015, 129 Stat. 917, provided that: “Nothing in this section [enacting section 2380 of this title, amending section 2306a of this title, and enacting provisions set out as notes under section 2306a of this title] or the amendments made by this section shall affect the meaning of the term ‘commercial item’ under subsection (a)(5) of section 2464 of title 10, United States Code, or any requirement under subsection (a)(3) or subsection (c) of such section.” [Pub. L. 115-232 amended subsecs. (a)(3), (5) and (c) of section 2464 of title 10 by substituting references to “commercial products or commercial services” for references to “commercial items”. See 2018 Amendment notes set out under that section.]

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

(a) **GOODS AND SERVICES PROVIDED BY NON-TRADITIONAL 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 services for purposes of this chapter, to the extent that such services use the same pool of employees as used for commercial customers and are priced using methodology similar to methodology used for commercial pricing.

(c) **COMMINGLED ITEMS PURCHASED BY CONTRACTORS.**—Notwithstanding section 3451(1) of this