

Analysis of Section 304 of the FoRGED Act: Modifications to Commercial Item Treatment

Key Points

Section 304 of the Fostering Reform and Government Efficiency in Defense (FoRGED) Act mandates that products and services provided by nontraditional defense contractors shall be treated as commercial products and commercial services. This represents a significant change from the previous provision in 10 U.S.C. § 3457(a), which stated that these items "may be treated" as commercial¹. A waiver to this mandatory treatment is permitted only with a written determination approved by the head of contracting activity. This determination must include a justification for not using commercial procedures or tailoring them, along with market research demonstrating that no other supplier could provide the required product or services under commercial procedures¹. The provision also strikes out the former subsection (b) of § 3457, which specifically addressed services from certain nontraditional contractors, and redesignates the former subsection (c) concerning commingled items as subsection (b)¹. This amendment aims to accelerate defense acquisition by leveraging commercial practices for nontraditional vendors. However, it also introduces potential complexities related to its implementation, the definition of key terms, and the suitability of commercial procedures for all types of nontraditional offerings². Successful implementation will necessitate clear guidelines, comprehensive training, and potentially additional resources within the Department of Defense (DoD), coupled with diligent monitoring and feedback mechanisms.

History of the Recommendation

The legislative history of Section 304 of the FoRGED Act (Senate Bill 5618) reveals its place within a broader effort to reform defense acquisition practices². Introduced by Senator Wicker on December 19, 2024, and referred to the Senate Armed Services Committee, the FoRGED Act's Title III specifically addresses "Rapid Acquisition and Commercial Contracting," indicating the intended focus of Section 304².

Understanding the history of this recommendation requires examining the statute it amends: 10 U.S.C. § 3457, titled "Treatment of certain products and services as commercial products and commercial services"⁴. This section was initially added in 2015 and has been subject to several amendments⁴. The original intent behind § 3457 was to provide a mechanism for the head of an agency to treat products and services from nontraditional defense contractors as commercial items, aiming to lower barriers for these innovative companies to work with the DoD⁴. Subsequent amendments expanded the scope to include specific provisions for services provided by certain

nontraditional contractors and the treatment of commingled items below a certain value as commercial products⁴. These changes reflect a gradual trend towards leveraging commercial acquisition flexibilities within the defense sector, particularly for engaging with companies outside the traditional defense industrial base⁸. The 2021 reorganization of Title 10, which renumbered § 2380a as § 3457, underscores the dynamic nature of defense acquisition legislation⁴. Section 304 of the FoRGED Act can be seen as a continuation of this trend, seeking to further emphasize the use of commercial procedures by making the treatment mandatory rather than discretionary for nontraditional defense contractors¹. This shift aligns with ongoing discussions about defense acquisition reform, which emphasize the need for greater speed, efficiency, and the incorporation of innovative technologies into military capabilities¹¹. The preference for commercial items in defense acquisition has been growing since the Federal Acquisition Streamlining Act of 1994, driven by the desire to tap into commercial technological advancements and reduce reliance on government-unique development⁸. Section 304 represents a potential acceleration of this preference, introducing a new level of obligation in the acquisition process¹⁶.

Desired Effect of the Recommendation

The primary desired effect of Section 304 is to increase the utilization of commercial acquisition procedures when the DoD procures products and services from nontraditional defense contractors¹. By changing the language from "may be treated" to "shall be treated," the provision aims to make commercial treatment the default approach for these types of acquisitions¹. This is expected to streamline the acquisition process, reduce administrative burdens, and potentially accelerate the adoption of innovative technologies and solutions from companies that may not be familiar with or willing to navigate traditional defense contracting regulations⁸.

While mandating commercial treatment, the inclusion of a waiver provision acknowledges that a uniform approach may not be suitable for all circumstances¹. The requirement for a written determination approved by the head of contracting activity, along with a justification for not using commercial procedures and market research demonstrating the absence of other commercial suppliers, is intended to ensure that waivers are granted judiciously and only when truly necessary¹. This structured waiver process aims to maintain flexibility within the mandatory framework, allowing for deviations when commercial procedures are demonstrably inappropriate or impractical¹. The level of scrutiny associated with obtaining a waiver is likely to encourage contracting activities to explore and utilize commercial procedures whenever feasible¹.

Another intended effect is the simplification of the statutory landscape by striking out the former subsection (b) of 10 U.S.C. § 3457¹. This subsection specifically addressed the treatment of services provided by certain nontraditional contractors. The removal suggests that the broader mandate in the amended subsection (a) is now intended to encompass these services, thereby creating a more unified approach to the treatment of both products and services from nontraditional defense contractors¹. This consolidation could lead to a clearer and more straightforward application of the law¹.

Finally, the redesignation of the former subsection (c) to (b) is a structural change to maintain the logical flow of the statute after the removal of the previous subsection (b)¹. This reorganization ensures that the provision regarding the treatment of commingled items purchased by contractors remains within the statute, albeit under a different subsection designation¹. This change does not alter the substance of that particular provision but rather its location within 10 U.S.C. § 3457¹.

Potential Negative Impacts of the Recommendations

The mandatory nature of commercial treatment for acquisitions from nontraditional defense contractors, while intended to be beneficial, carries the risk of increasing the administrative burden associated with obtaining waivers. Contracting officers and program managers will now be required to prepare a written determination, provide a detailed explanation of why commercial procedures are unsuitable or require tailoring, and conduct market research to demonstrate the lack of alternative commercial suppliers for each instance where a waiver is sought¹. This could lead to a significant increase in workload and potentially slow down the acquisition process in cases where commercial procedures are not a good fit [Insight 10].

Defining "nontraditional defense contractor," as referenced in 10 U.S.C. § 3014, might also present challenges⁴. Ambiguities in the definition could lead to inconsistent application of Section 304 across different contracting activities and program offices, potentially resulting in confusion and disputes [Potential Negative Impact 2]. Clear and comprehensive guidance on this definition will be crucial to ensure uniform implementation [Mitigation of Negative Impact 1 & 2].

A significant concern is the potential unsuitability of standard commercial procedures for all types of products and services offered by nontraditional defense contractors [Potential Negative Impact 3]. Nontraditional vendors often provide highly specialized, cutting-edge technologies or services that may not align with established commercial norms or pricing models¹⁸. Applying commercial procedures without adequate tailoring could lead to challenges in defining requirements, ensuring quality,

protecting government intellectual property, and obtaining appropriate data rights [Mitigation of Negative Impact 3 & 5].

Conducting the market research required for waiver requests, specifically demonstrating that "no other supplier could provide the required product or services under commercial procedures," could prove difficult, especially for unique or emerging technologies where the commercial market may be nascent or non-existent [Potential Negative Impact 4]. This requirement might be particularly challenging to fulfill definitively and could potentially lead to the inappropriate application of commercial procedures in some cases [Mitigation of Negative Impact 4].

Mandating commercial treatment could also lead to the loss of certain government-specific contractual protections that are typically included in traditional government contracts but may not be standard in commercial agreements [Potential Negative Impact 5]. These protections, such as specific audit rights or performance requirements, are often deemed necessary for ensuring accountability and safeguarding government interests in defense acquisitions¹⁹. The DoD will need to carefully consider how to address these potential gaps when utilizing commercial procedures [Mitigation of Negative Impact 5].

Finally, while the initial goal of using commercial procedures is often to achieve cost savings and efficiencies, the mandatory application of these procedures without sufficient expertise in negotiating commercial terms for complex defense needs could potentially lead to increased costs in the long run [Potential Negative Impact 6]. The government might lack the leverage or market intelligence in certain niche technology areas dominated by nontraditional vendors, which could result in less favorable pricing or contract terms [Mitigation of Potential Negative Impacts (General)].

Mitigations the Organization Will Take to Diminish the Negative Impacts

To mitigate the potential negative impacts of Section 304, the DoD should prioritize the development of clear and comprehensive guidance on its implementation. This guidance should specifically address the definition of "nontraditional defense contractor" and provide detailed criteria for justifying and processing waiver requests [Mitigation of Negative Impact 1 & 2]. Accompanying this guidance, robust training programs should be established for contracting officers and program managers to ensure a consistent understanding and application of the new requirements [Mitigation of Negative Impact 1 & 2].

Establishing a Center of Excellence for Commercial Item Determinations could provide

specialized expertise and support to contracting activities navigating the complexities of applying commercial procedures to acquisitions from nontraditional contractors, particularly for innovative or unique offerings [Mitigation of Negative Impact 3 & 4]. This center could also develop best practices for conducting effective market research in these specialized areas [Mitigation of Negative Impact 4].

Where legally permissible and practically beneficial, the DoD should explore opportunities to tailor commercial procedures to better suit the specific needs of defense acquisitions from nontraditional vendors while still leveraging the inherent advantages of commercial contracting [Mitigation of Negative Impact 3 & 5]. This might involve incorporating certain government-specific clauses or requirements into commercial contracts when necessary to protect critical interests [Mitigation of Negative Impact 5].

Investing in and enhancing the DoD's market research capabilities will be crucial for both identifying potential commercial solutions from nontraditional contractors and for effectively justifying waiver requests when commercial procedures are deemed unsuitable [Mitigation of Negative Impact 4]. This includes providing access to appropriate market intelligence resources and training personnel on advanced market research techniques relevant to emerging technologies.

To minimize the administrative burden associated with the waiver process, the development of standardized waiver templates and streamlined approval processes is recommended [Mitigation of Negative Impact 1]. This will help ensure efficiency and consistency in the review and approval of waiver requests.

Finally, it will be essential to establish mechanisms for ongoing monitoring of the implementation of Section 304. This includes tracking the use of waivers, gathering feedback from contracting officers, program managers, and industry stakeholders, and conducting periodic assessments to identify any unforeseen negative consequences or areas for improvement. This iterative approach will allow the DoD to make necessary adjustments to policies and procedures as experience is gained [Mitigation of Potential Negative Impacts (General)].

DoD Personnel Most Affected

Contracting Officers will be at the forefront of implementing Section 304. They will be directly responsible for determining when the mandatory commercial treatment applies, processing waiver requests, and ensuring that acquisitions from nontraditional defense contractors comply with the new requirements [Manner of

Impact: Increased workload, need for new expertise in commercial item determinations and waiver justifications, potential for increased scrutiny and oversight]. This will likely necessitate a deeper understanding of commercial acquisition procedures and the specific nuances of engaging with companies outside the traditional defense industrial base.

Program Managers will also be significantly affected. They will need to collaborate closely with contracting officers to define acquisition strategies, conduct market research to identify potential commercial solutions from nontraditional vendors, and provide the necessary justification for waiver requests if commercial procedures are deemed inappropriate for their program needs [Manner of Impact: Increased involvement in market research and acquisition strategy development, potential need to adapt program requirements to fit commercial offerings, responsibility for justifying deviations from commercial procedures]. They may also need to adapt program timelines and expectations to align with commercial acquisition practices.

Heads of Contracting Activity will play a critical role in overseeing the implementation of Section 304. They will be the approving authority for all waiver requests, placing them in a key decision-making position [Manner of Impact: Increased responsibility for reviewing and approving waiver requests, ensuring compliance with the intent of the provision, potential for increased accountability for acquisition outcomes]. Their responsibility will include ensuring consistency in the application of the waiver criteria and that all approved waivers are properly justified.

Legal Counsel within the DoD will be essential in interpreting the legal implications of Section 304 and providing guidance on its application. They will likely be involved in reviewing waiver requests to ensure legal sufficiency and compliance with the statute.

Personnel involved in Market Research across the DoD will experience an increased workload and responsibility [Manner of Impact: Increased workload, potential need for enhanced skills in identifying and analyzing commercial market data, greater responsibility for providing robust market research to support acquisition decisions]. The emphasis on robust market research to both identify commercial solutions and justify waivers will require enhanced skills in analyzing commercial marketplaces and identifying nontraditional vendors.

Stakeholders Opposed and Rationale for Opposition

Traditional Defense Contractors may oppose Section 304 due to concerns about an uneven playing field. These established contractors are accustomed to traditional

government contracting regulations and might view the shift towards commercial procedures for nontraditional entrants as a disadvantage. They might argue that commercial procedures lack the rigor and oversight necessary for complex defense systems.

Government Auditors and Oversight Agencies, such as the Government Accountability Office (GAO) and the DoD Inspector General, might express concerns regarding the potential for reduced transparency and accountability associated with the increased use of commercial contracting. They may be particularly concerned about the management of the waiver process and the risk of improper application of commercial procedures.

Labor Unions representing defense industry workers might oppose the provision if they believe it could lead to a decrease in the use of unionized labor and potentially lower labor standards within the defense industrial base. They might argue that a greater reliance on commercial items, especially from nontraditional sources, could shift work away from companies with established collective bargaining agreements.

Advocates for Government-Specific Acquisition Regulations may oppose Section 304 based on the belief that the unique requirements of defense procurement necessitate tailored regulations to protect national security interests. They might argue that a broad mandate for commercial treatment could undermine essential safeguards and oversight mechanisms that have been developed specifically for defense acquisitions.

Additional Resources

To successfully implement Section 304, the DoD will require several additional resources. Comprehensive Training Programs will be essential for educating contracting officers, program managers, and other relevant personnel on the intricacies of the new provision, including commercial item definitions, market research methodologies, and the requirements for waiver justification. Specialized Personnel with expertise in commercial acquisition, particularly in areas such as market analysis, commercial contract negotiation, and intellectual property considerations in commercial contexts, may need to be hired or developed within the DoD.

Enhanced Market Research Tools and Databases will be necessary to effectively identify and analyze commercial offerings from nontraditional defense contractors. This might involve investing in access to commercial market intelligence platforms and developing internal capabilities for tracking and evaluating nontraditional vendors.

Additional Legal Resources with expertise in both government contracting and commercial law will be needed to provide guidance on the interpretation and application of Section 304, particularly in advising on complex waiver requests and resolving potential disputes.

Dedicated Funding may be required to support pilot programs for implementing Section 304 in specific contexts and to conduct studies to assess its overall impact and identify areas for improvement. Finally, Updates to Acquisition Regulations and Guidance, such as the Defense Federal Acquisition Regulation Supplement (DFARS) and other policy documents, will be necessary to reflect the changes mandated by Section 304 and to provide clear and actionable implementation instructions.

Measures of Success

The success of Section 304 can be measured through several key indicators. An Increase in the Percentage of Acquisitions from Nontraditional Defense Contractors Using Commercial Procedures would indicate that the primary directive of the provision is being implemented effectively. Monitoring the Number and Approval Rate of Waivers will provide insights into the practical applicability of the mandatory commercial treatment and whether the waiver process is functioning as intended. A significant decrease in the Time to Contract Award for relevant acquisitions from nontraditional contractors could suggest that the use of commercial procedures is indeed streamlining the process.

Where feasible and applicable, Tracking Cost Savings Achieved through the implementation of Section 304 could demonstrate the intended efficiency gains. However, isolating these savings might be challenging. Gathering Regular Feedback from Contracting Officers and Program Managers on their experiences with the new provision will provide valuable qualitative data on its practical effectiveness, challenges encountered, and areas needing improvement.

An increase in the Number of New Nontraditional Defense Contractors Entering the DoD Market could suggest that the emphasis on commercial procedures is making it easier for these companies to do business with the government. While more difficult to directly attribute, tracking Metrics Related to Innovation and Technology Adoption, such as the speed at which new capabilities from nontraditional sources are fielded, could indirectly indicate the positive impact of Section 304.

Alternative Approaches

Several alternative approaches could potentially achieve similar outcomes to Section

304, possibly with greater efficiency or effectiveness. One alternative would be a Targeted Expansion of the Existing "Commercial Item" Definition within the Federal Acquisition Regulation (FAR) to specifically include products and services commonly offered by nontraditional defense contractors that are suitable for commercial treatment. This could provide greater clarity and potentially reduce the need for frequent waivers.

Another approach could be to establish a Presumptive Commercial Treatment for acquisitions from nontraditional defense contractors, where commercial procedures would be the default unless a documented justification is provided for using traditional government contracting methods. This would still shift the mindset towards commercial practices but might offer a slightly different framework than a strict mandate with a waiver.

Given the diverse nature of "nontraditional" vendors, the DoD could develop Sector-Specific Guidance and Tailored Commercial-Like Procedures that address the unique characteristics of different types of nontraditional defense contractors, such as software companies or biotechnology firms. This could allow for a more nuanced and effective application of commercial principles.

Increasing the use of Other Transaction Authority (OTA) could also serve as an alternative or complementary approach. OTAs offer significant flexibility and are often well-suited for engaging with nontraditional defense contractors, particularly for research, prototyping, and the acquisition of innovative technologies. Streamlining OTA processes could further enhance their effectiveness.

Finally, efforts could be focused on Improving Traditional Acquisition Processes specifically for engaging with nontraditional vendors. This might involve creating dedicated pathways or simplifying requirements within the existing framework that pose barriers to entry for these companies, rather than a broad mandate for commercial treatment.

Section Specific Question 1: How does Section 304 change the definition or criteria for classifying specific types of products or services as "commercial," and what is the impact on market research and commercial item determinations performed by Contracting Officers and Program Managers?

Section 304 does not directly alter the existing definition of "commercial product" or "commercial service" as defined in FAR Part 2.101 [Insight 11]. Instead, it changes the *treatment* of products and services provided by a specific category of vendors:

"nontraditional defense contractors" (as defined in 10 U.S.C. § 3014) ¹. Previously, the treatment of these items as commercial was discretionary ("may be treated"), whereas Section 304 makes it mandatory ("shall be treated") unless a waiver is obtained ¹. This shift effectively mandates the classification and acquisition of these items as commercial, regardless of whether they strictly meet the existing FAR definition of a commercial item. The waiver process provides the exception to this mandatory treatment [Insight 11].

The impact on market research will be significant [Insight 12]. Contracting officers and program managers will need to prioritize identifying potential commercial solutions from nontraditional defense contractors [Impact on market research]. Their market research efforts will likely need to expand beyond traditional defense industry sources to include commercial marketplaces and technology sectors [Impact on market research]. Furthermore, for waiver requests, the market research burden will increase, requiring demonstration that no other supplier can provide the required product or service under commercial procedures. This necessitates a more rigorous and documented market analysis [Impact on market research].

Regarding Commercial Item Determinations (CIDs), Section 304 shifts the focus for acquisitions involving nontraditional contractors [Insight 13]. While the mandate might initially appear to simplify CIDs, contracting officers will still need to determine if a vendor meets the definition of a "nontraditional defense contractor" [Impact on commercial item determinations performed by Contracting Officers and Program Managers]. Moreover, the waiver process introduces a new layer of determination: justifying *not* treating a nontraditional vendor's offering as commercial, which requires a higher level of approval and supporting documentation [Impact on commercial item determinations performed by Contracting Officers and Program Managers]. The changes may also influence how modifications to commercial items from nontraditional contractors are assessed, requiring contracting officers to determine if these modifications are within the scope of customary commercial practices or are minor, thus maintaining the item's commercial status under the new mandatory treatment [Impact on commercial item determinations performed by Contracting Officers and Program Managers].

Section Specific Question 2:

The user did not provide a second section-specific question.

Summary

Section 304 of the FoRGED Act introduces a significant change by mandating the treatment of products and services from nontraditional defense contractors as commercial items. This policy shift aims to streamline defense acquisition and encourage innovation by leveraging commercial practices. However, its implementation presents potential challenges related to administrative burden, definition clarity, the suitability of commercial procedures for all nontraditional offerings, and the need for robust market research. To mitigate these risks, the DoD should focus on developing clear guidance, providing comprehensive training, establishing centers of expertise, tailoring commercial procedures where appropriate, enhancing market research capabilities, and continuously monitoring the provision's impact. While the long-term effects remain to be seen, the success of Section 304 will likely depend on the DoD's ability to adapt its acquisition processes and equip its personnel to effectively navigate this new landscape.

Works cited

1. Text - S.5618 - 118th Congress (2023-2024): FoRGED Act ..., accessed March 27, 2025, <https://www.congress.gov/bill/118th-congress/senate-bill/5618/text/is?format=txt>
2. Text - S.5618 - 118th Congress (2023-2024): FoRGED Act, accessed March 27, 2025, <https://www.congress.gov/bill/118th-congress/senate-bill/5618/text>
3. Titles - S.5618 - 118th Congress (2023-2024): FoRGED Act, accessed March 27, 2025, <https://www.congress.gov/bill/118th-congress/senate-bill/5618/titles>
4. 10 USC 3457: Treatment of certain products and services as commercial products and commercial services - OLRC Home, accessed March 27, 2025, <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title10-section3457&num=0&edition=prelim>
5. 10 U.S.C. § 3457 - U.S. Code Title 10. Armed Forces § 3457 - Codes - FindLaw, accessed March 27, 2025, <https://codes.findlaw.com/us/title-10-armed-forces/10-usc-sect-3457/>
6. Page 2447 TITLE 10—ARMED FORCES § 3457 §3457. Treatment of certain products and serv - GovInfo, accessed March 27, 2025, <https://www.govinfo.gov/link/uscode/10/3457>
7. Part 212 - ACQUISITION OF COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES, accessed March 27, 2025, <https://www.acquisition.gov/node/34862/printable/print>
8. Commercial Contracting | www.dau.edu, accessed March 27, 2025, <https://www.dau.edu/acquikipedia-article/commercial-contracting>
9. Lessons Learned from Acquisition of Modified Commercial Items and Nondevelopmental Items - Department of Defense, accessed March 27, 2025, <https://media.defense.gov/1997/Sep/23/2001715499/-1/-1/1/97-219.pdf>
10. Title 10 Reorganization - OUSD A&S, accessed March 27, 2025, <https://www.acq.osd.mil/asda/dpc/api/title-10-reorganization.html>

11. DOD Acquisition Reform: Military Departments Should Take Steps to Facilitate Speed and Innovation - Government Accountability Office (GAO), accessed March 27, 2025, <https://www.gao.gov/products/gao-25-107003>
12. PPBE Reform - Office of the Under Secretary of Defense (Comptroller), accessed March 27, 2025, <https://comptroller.defense.gov/PPBE-Reform/>
13. Acquisition and Sustainment: 2024 in Review, and a Look Ahead | www.dau.edu, accessed March 27, 2025, <https://www.dau.edu/library/damag/november-december2024/acquisitionandsustainment>
14. Space Force doubles down on acquisition reform ahead of DoD moves - Breaking Defense, accessed March 27, 2025, <http://breakingdefense.com/2025/02/space-force-doubles-down-on-acquisition-reform-ahead-of-dod-moves/>
15. Reforming Defense Acquisitions To Promote Global Security - General Atomics, accessed March 27, 2025, <https://www.ga.com/reforming-defense-acquisitions-to-promote-global-security>
16. Defense Federal Acquisition Regulation Supplement: Treatment of Certain Items as Commercial Items (DFARS Case 2019-D029) - Federal Register, accessed March 27, 2025, <https://www.federalregister.gov/documents/2019/11/27/2019-25663/defense-federal-acquisition-regulation-supplement-treatment-of-certain-items-as-commercial-items>
17. Changes to Commercial Item Contracting | P&A - Peckar & Abramson, P.C., accessed March 27, 2025, <https://www.pecklaw.com/government-contract-law-blog/changes-to-commercial-item-contracting/>
18. FAQs - Commercial and Nondevelopmental Items - Defense Standardization Program, accessed March 27, 2025, <https://www.dsp.dla.mil/Policy-Guidance/FAQs/Commercial-and-Nondevelopmental-Items/>
19. Contract Modifications and Changes | www.dau.edu, accessed March 27, 2025, <https://www.dau.edu/acquipedia-article/contract-modifications-and-changes>