

Analysis of Section 310: Modifications to Commercial Product and Commercial Service Determinations by Department of Defense

Key Points

- Section 310 of the Forged Act mandates a shift towards treating products and services acquired by the Department of Defense (DoD) as commercial by default.
- Non-commercial determinations will require a detailed justification, including market research, and a signed determination from the program manager that commercial options cannot reasonably meet the requirements.
- This provision aims to streamline acquisition processes and increase the DoD's access to commercial innovations.
- Potential negative impacts include challenges in acquiring truly unique defense capabilities and increased administrative burdens.

History of the Recommendation

The emphasis on commercial item acquisition within the Department of Defense has evolved significantly over several decades, reflecting a continuous effort to balance the need for specialized military capabilities with the benefits of leveraging the commercial marketplace¹. The Packard Commission in the mid-1980s advocated for increased use of off-the-shelf commercial products to reduce inefficiencies and costs in defense procurement¹. This principle was further solidified with the passage of the Federal Acquisition Streamlining Act (FASA) in 1994, which aimed to simplify requirements for purchasing commercial items³. Despite these initial reforms, Congress noted that commercial buying had not become as widespread in the DoD as intended³.

Subsequent legislation, such as the Federal Acquisition Reform Act (FARA) of 1996, continued to emphasize the importance of commercial solutions³. However, challenges persisted, including the increasing number of regulations and clauses applicable to commercial items, which grew from 57 in 1995 to 165³. This complexity sometimes hindered the intended streamlining benefits. Furthermore, issues arose concerning the definition of commercial items, particularly regarding items embedded in major weapon systems that were initially developed with government funding but later claimed to be commercial³.

More recent initiatives, such as the establishment of the Defense Contract Management Agency (DCMA) Commercial Item Group in 2016, aimed to improve the

consistency and efficiency of commercial item determinations by providing centralized expertise and a shared database ⁴. This database, accessible through the Procurement Integrated Enterprise Environment (PIEE), serves as a repository for prior commerciality determinations ⁶. Section 310 of the Forged Act can be viewed as a continuation of this trend, pushing further towards a default assumption of commerciality to encourage greater utilization of commercial products and services within the DoD ⁸. The provision builds upon the historical context of seeking to reduce bureaucratic hurdles and leverage the innovation and efficiency of the commercial marketplace ⁹.

Desired Effect of the Recommendation

The primary desired effect of Section 310 is to fundamentally change the acquisition culture within the DoD, making the procurement of commercial products and services the standard approach [Forged Act]. This shift is intended to yield several positive outcomes:

Desired Effect 1: Increased Efficiency in Acquisition Processes

By establishing a default determination of commerciality, Section 310 aims to reduce the time and resources spent on determining whether a product or service qualifies as commercial [Forged Act]. This proactive stance should streamline the initial stages of the acquisition process, allowing contracting officers to proceed more quickly with commercial acquisition procedures under Part 12 of the Federal Acquisition Regulation (FAR) ⁷. The requirement for a non-commercial determination, including a detailed justification and program manager sign-off, introduces a higher bar for classifying items as non-commercial, thus encouraging the use of simpler commercial pathways where appropriate.

Desired Effect 2: Greater Access to Innovative Commercial Technologies

The provision seeks to tap into the rapid innovation cycles of the commercial sector ¹. By making commercial acquisition the default, the DoD intends to lower barriers for non-traditional defense contractors and small businesses offering cutting-edge commercial solutions ⁹. This could lead to the adoption of more advanced technologies and capabilities that might not be readily available through traditional defense-unique development processes.

Desired Effect 3: Potential Cost Savings

Leveraging commercial products and services can potentially lead to significant cost

savings for the DoD ¹. Commercial items often benefit from economies of scale and competitive pricing pressures within the commercial marketplace. By defaulting to commercial acquisition, the DoD anticipates reducing the need for expensive, bespoke, defense-unique developments when suitable commercial alternatives exist, even with some customization [Forged Act].

Desired Effect 4: Reduced Acquisition Cycle Times

Commercial items are typically readily available or require shorter development times compared to defense-unique items that often involve lengthy research, development, and testing phases ⁸. By prioritizing commercial solutions, Section 310 aims to accelerate the delivery of needed capabilities to the warfighter, addressing the challenge of keeping pace with evolving threats and technological advancements ⁹.

Desired Effect 5: Encouraging Requirement Flexibility

The requirement for a program manager to certify that the requirement could not be reasonably changed to accommodate a commercial product or service is a key aspect of Section 310 [Forged Act]. This provision is intended to encourage program managers to consider and potentially adapt their requirements to align with available commercial offerings. This flexibility can unlock access to a wider range of solutions and potentially lead to faster and more cost-effective acquisitions.

Potential Negative Impacts of the Recommendations

While Section 310 aims to bring numerous benefits, its implementation could also lead to several unintended negative consequences:

Potential Negative Impact 1: Difficulty in Acquiring Truly Unique Defense Capabilities

The default commerciality stance might create challenges when the DoD requires highly specialized products or services with no comparable commercial counterparts ¹⁵. While the provision allows for non-commercial determinations, the increased scrutiny and justification requirements could inadvertently discourage the pursuit of truly defense-unique innovations that are essential for maintaining military superiority in certain domains. The process of proving non-commerciality might become overly burdensome, potentially leading to suboptimal choices or delays in acquiring critical technologies.

Potential Negative Impact 2: Increased Administrative Burden on Contracting

Officers and Program Managers

Contracting officers will now bear the initial responsibility of assuming commerciality, but they will also face a more rigorous process when determining an item to be non-commercial [Forged Act]. This includes conducting thorough market research and preparing a detailed written memorandum for approval by the head of contracting activity. Program managers will also face a new requirement to provide a signed determination that their requirements cannot be reasonably modified to accommodate commercial solutions. These added layers of documentation and approval could significantly increase the administrative workload for both contracting officers and program managers, potentially slowing down the overall acquisition process in some cases.

Potential Negative Impact 3: Potential for Inconsistent or Incorrect Determinations

Despite the requirement for approval by the head of contracting activity, the initial determination of non-commerciality rests with the contracting officer [Forged Act]. There is a risk of inconsistencies in how different contracting officers interpret and apply the criteria for non-commerciality. Insufficient training or a lack of clear guidance could lead to either an overreliance on non-commercial determinations to avoid the more demanding justification process or, conversely, an inappropriate classification of defense-unique items as commercial, potentially leading to performance issues or unmet requirements.

Potential Negative Impact 4: Impact on the Defense Industrial Base

A strong emphasis on commercial products might inadvertently impact traditional defense contractors who specialize in developing and manufacturing defense-unique items¹⁶. If the DoD increasingly opts for commercial solutions, these contractors might see a reduction in demand for their specialized products, potentially affecting their long-term viability and the DoD's access to critical defense-specific capabilities in the future.

Potential Negative Impact 5: Challenges in Price Reasonableness Determinations for Modified Commercial Items

While the intent is to leverage commercial pricing, situations will arise where commercial products require modifications to meet DoD's specific needs⁵. Determining the price reasonableness of these modified commercial items can be complex. The commercial market price for the base item might not accurately reflect

the cost of the modifications, potentially leading to challenges in negotiating fair and reasonable prices¹⁷.

Mitigations the Organization Will Take to Diminish the Negative Impacts

To mitigate the potential negative impacts of Section 310, the DoD should consider the following actions:

Mitigation of Negative Impact 1: Develop Clear Guidance on Defining "Minimum Requirements" and "Reasonably Changed"

The DoD should issue comprehensive guidance defining what constitutes "minimum requirements" and what level of modification is considered "reasonable" to accommodate a commercial product or service [Forged Act]. This guidance should provide practical examples and case studies to help program managers and contracting officers make informed decisions about when a requirement truly necessitates a defense-unique solution.

Mitigation of Negative Impact 2: Provide Enhanced Training and Tools for Contracting Officers and Program Managers

To address the increased administrative burden, the DoD should invest in enhanced training programs for contracting officers and program managers on conducting effective market research, documenting non-commercial justifications, and understanding the nuances of Section 310. Providing user-friendly templates and digital tools for documenting these determinations can also help streamline the process.

Mitigation of Negative Impact 3: Establish a Center of Excellence for Commercial Item Determinations

Building upon the existing DCMA Commercial Item Group, the DoD could establish a more robust "Center of Excellence" with expertise in commercial market analysis and non-commercial justification reviews⁴. This center could provide guidance, support, and act as a central review authority for complex or potentially contentious non-commercial determinations, promoting consistency across the DoD.

Mitigation of Negative Impact 4: Foster Dialogue and Collaboration with the Traditional Defense Industrial Base

The DoD should proactively engage with traditional defense contractors to communicate the intent and scope of Section 310. Identifying areas where

commercial solutions are most applicable and where defense-unique capabilities remain paramount can help manage expectations and ensure the continued health of the defense industrial base. Exploring opportunities for these contractors to adapt and offer commercial or modified commercial solutions could also be beneficial.

Mitigation of Negative Impact 5: Develop Specific Pricing Guidance for Modified Commercial Items

The DoD should develop specific guidance and methodologies for determining the price reasonableness of commercial items that require modifications to meet military requirements¹⁷. This guidance should address factors such as the complexity of the modifications, the volume of the procurement, and the availability of comparable pricing data. Leveraging expertise from the Defense Contract Audit Agency (DCAA) and other pricing specialists will be crucial.

DoD Personnel Most Affected

Several roles within the DoD will be significantly affected by Section 310:

- **Contracting Officers:** They will be at the forefront of implementing the default commerciality determination. They will need to conduct market research to support non-commercial determinations and prepare the detailed written memorandum for approval⁷. Their workload related to non-commercial items is likely to increase due to the more stringent justification requirements.
- **Program Managers:** They will now be required to provide a signed determination that their requirements cannot be reasonably changed to accommodate a commercial product or service [Forged Act]. This places a greater responsibility on them to thoroughly consider commercial options and justify the need for defense-unique developments.
- **Heads of Contracting Activity:** They will have the responsibility of reviewing and approving the written memoranda justifying non-commercial determinations [Forged Act]. This new approval layer adds to their oversight responsibilities and requires them to have a strong understanding of both the requirements and the market research supporting the non-commercial classification.
- **Personnel involved in Market Research:** The emphasis on detailed justification for non-commercial determinations will increase the demand for thorough and accurate market research [Forged Act]. Personnel involved in conducting market research will need to provide robust data and analysis to support these determinations.

Stakeholders Opposed and Rationale for Opposition

Several stakeholders, both within and outside the DoD, might oppose the implementation of Section 310:

- **Traditional Defense Contractors:** As mentioned earlier, these contractors might oppose the provision due to concerns about a potential decrease in demand for their defense-unique products and services ¹⁶. Their rationale would likely center on the argument that certain critical military capabilities cannot be adequately met by commercial items, even with modifications, and that a strong domestic defense industrial base specializing in these areas is essential for national security.
- **Some Program Managers:** Some program managers might resist the pressure to adapt their requirements to fit commercial solutions [Forged Act]. They may believe that their specific mission needs necessitate bespoke, defense-unique items and that compromising on these requirements could negatively impact performance or operational effectiveness. The added requirement of a signed justification could also be perceived as an unnecessary administrative burden.
- **Individuals within the Acquisition Workforce Resistant to Change:** As with any significant policy shift, some individuals within the DoD acquisition workforce might oppose Section 310 simply due to resistance to change or a preference for established processes. They may perceive the new requirements as adding complexity and slowing down acquisition timelines, despite the intended goal of increased efficiency.

Additional Resources

Successful implementation of Section 310 will likely require the DoD to allocate additional resources in several areas:

- **Funding:** Increased funding may be needed for enhanced training programs for the acquisition workforce, particularly for contracting officers and program managers, on conducting market research and documenting non-commercial justifications ¹⁷.
- **Training:** Comprehensive training materials and workshops will be essential to ensure a thorough understanding of the new policy and procedures across the DoD acquisition community ¹⁷. This training should cover the definition of commercial items, the process for non-commercial determinations, and best practices for market research.
- **Personnel:** The increased workload associated with documenting and approving non-commercial determinations might necessitate the hiring of additional

personnel, particularly within contracting offices and potentially within the proposed Center of Excellence for commercial item determinations.

- **Tools and Systems:** Investment in improved digital tools and systems to support market research, documentation, and the sharing of commerciality determinations will be crucial for efficient implementation⁴. Enhancements to the DoD Commercial Item Database could be necessary to accommodate the new requirements.

Measures of Success

The DoD should establish clear metrics to measure the success and effectiveness of Section 310 once implemented:

- **Percentage of Acquisitions Using Commercial Procedures:** An increase in the proportion of acquisitions conducted using commercial procedures under FAR Part 12 would indicate a successful shift towards the default commerciality approach.
- **Time Taken for Commercial Item Determinations:** Monitoring the time taken to make commercial item determinations (and non-commercial determinations) can help assess whether the new policy is indeed streamlining the process or creating bottlenecks.
- **Cost Savings Achieved Through Commercial Acquisitions:** Tracking cost savings realized through the increased use of commercial products and services compared to previous spending patterns on similar items can demonstrate the financial benefits of the provision.
- **Number of Non-Traditional Defense Contractors Entering the DoD Marketplace:** An increase in the number of contracts awarded to non-traditional defense contractors could indicate that Section 310 is effectively lowering barriers to entry for innovative commercial providers.
- **Feedback from the Acquisition Workforce and Industry:** Regularly collecting feedback from contracting officers, program managers, and industry partners on their experiences with implementing Section 310 can provide valuable qualitative data on its effectiveness and identify areas for improvement.

Alternative Approaches

While Section 310 takes a significant step towards defaulting to commercial acquisition, alternative approaches could also achieve similar outcomes, potentially with different trade-offs:

- **Targeted Incentives for Commercial Acquisition:** Instead of a blanket default,

the DoD could implement targeted incentives, such as streamlined approval processes or increased funding flexibility, for program offices that choose to utilize commercial solutions where appropriate. This approach might offer more flexibility but could be less impactful in shifting the overall acquisition culture.

- **Expansion of Commercial Solutions Openings (CSOs):** Further expanding the use of CSOs, as authorized under 10 U.S.C. 3458, could provide another avenue for acquiring innovative commercial products and services using streamlined procedures¹¹. This approach focuses specifically on innovative commercial solutions but might not address the broader acquisition of more standard commercial items.
- **Enhanced Market Research Capabilities and Training:** Investing heavily in enhancing the DoD's market research capabilities and providing more comprehensive training to the acquisition workforce on identifying and evaluating commercial solutions could lead to increased utilization of commercial items without a mandatory default. This approach might be less disruptive but could rely heavily on the proactive engagement of individual acquisition professionals.

Section Specific Question 1:

Does Section 310 change *who* within DoD makes commercial item determinations or the *process* they must follow? What evidence or justification is now required from Program Managers or Contracting Officers?

Section 310 primarily changes the *process* for commercial item determinations. It establishes a *default* determination that products and services are commercial, shifting the onus to the contracting officer to justify why an item is non-commercial [Forged Act]. While the initial determination still rests with the contracting officer, the process now requires a written memorandum summarizing the non-commercial determination for approval by the head of contracting activity [Forged Act].

Crucially, Section 310 introduces a new requirement for a signed determination from the program manager stating that the requirement could not be reasonably changed to accommodate a commercial product or commercial service [Forged Act]. This adds a significant layer of justification from the program side, ensuring that commercial alternatives are thoroughly considered before pursuing defense-unique development. The contracting officer's memorandum must include a detailed justification for the non-commercial determination, including the results of market research [Forged Act].

Section Specific Question 2:

(This question was not provided in the initial prompt.)

Summary

Section 310 of the Forged Act represents a significant policy shift towards prioritizing the acquisition of commercial products and services within the Department of Defense. By establishing a default determination of commerciality and imposing stricter requirements for non-commercial classifications, this provision aims to enhance efficiency, foster innovation, and potentially reduce costs in DoD procurement. However, successful implementation will require careful attention to potential negative impacts, including challenges in acquiring unique defense capabilities and increased administrative burdens. Proactive mitigation strategies, such as clear guidance, enhanced training, and robust oversight, will be essential to ensure that Section 310 achieves its intended benefits without compromising the DoD's ability to meet its critical mission requirements.

Recommendation Text from Forged Act follows:

SEC. 310. MODIFICATIONS TO COMMERCIAL PRODUCT AND COMMERCIAL SERVICE DETERMINATIONS BY DEPARTMENT OF DEFENSE.

Section 3456 of title 10, United States Code, is amended by striking subsections (a) through (c) and inserting the following new subsections: (a) In General.—The Secretary of Defense shall create a default determination that products and services acquired by the Department of Defense are commercial and shall be acquired using commercial procedures, and, to the maximum extent practicable, general solicitation procedures under section 3458 of this title, unless determined to be non-commercial by the Department of Defense contracting officer. (b) Determinations Regarding the Non-Commercial Nature of Products or Services.—A defense-unique development product or service may not be procured if there is a commercial product or service, with or without customization, that meets the minimum requirements of the Department of Defense. In making a determination whether a particular product or service offered by a contractor is non-commercial and does not meet any definition for commercial products or commercial services, a contracting officer of the Department of Defense shall submit a written memorandum summarizing the determination for approval by the head of contracting activity, prior to awarding the contract, and provide it to the contractor or subcontractor offering the product or service for which such determination is (1) a detailed justification why the product or commercial service was determined to be noncommercial including the results of market research; and (2) a signed determination by the program manager that the

requirement could not be reasonably changed to accommodate a commercial product or commercial service. (c) Definition.—The term "defense-unique development" means a Department of Defense-financed development, either to repurpose a commercial product or solution or to develop a new product or solution, to provide a defense-unique capability.

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