

Modifications to Relationship of Other Provisions of Law to Procurement of Commercial Products and Commercial Services

Key Points

Section 314 of the Forged Act (Senate Bill 5618) proposes significant modifications to Section 3452 of Title 10 of the United States Code. The central aim of these changes is to streamline the application of defense-unique statutes to the Department of Defense's procurement of commercial products and commercial services. This streamlining is primarily achieved by shifting the default position regarding the applicability of post-1994 defense-unique laws. Instead of these laws automatically applying, they would only do so if the Under Secretary of Defense for Acquisition and Sustainment makes a written determination that their application is in the best interest of the DoD¹. This section also mandates the inclusion of lists within the Defense Federal Acquisition Regulation Supplement (DFARS) specifying which defense-unique provisions and contract clause requirements are applicable to contracts, subcontracts, and contracts for commercially available off-the-shelf (COTS) items¹.

History of the Recommendation

The recommendation to modify Section 3452 of Title 10 has its roots in the broader effort to reform and streamline defense acquisition processes, particularly concerning the procurement of commercial products and services. The original Section 3452, formerly Section 2375, was enacted as part of the Federal Acquisition Streamlining Act (FASA) of 1994¹. FASA aimed to reduce the burden of government-unique requirements on commercial vendors, encouraging their participation in the defense market⁴. The intent was to leverage commercial solutions and practices to improve efficiency and innovation in defense acquisition⁴.

The original statute sought to exempt commercial product and service acquisitions from certain government-wide statutes listed in the Federal Acquisition Regulation (FAR)¹. It also directed the DFARS to list defense-unique provisions that would *not* apply to commercial procurements unless the Under Secretary of Defense for Acquisition and Sustainment made a specific determination otherwise for laws enacted after October 13, 1994¹. This initial framework established a preference for treating commercial items under more commercially oriented terms and conditions⁴.

The proposed changes in Section 314 of the Forged Act represent a further evolution of this principle. By amending subsections (b) through (f) of Section 3452, the new

language refines the applicability criteria for defense-unique statutes. It emphasizes the need for explicit inclusion of such statutes in the DFARS for them to apply to commercial procurements, particularly for laws enacted after the original FASA enactment date ¹. This shift suggests a continued push to minimize the imposition of defense-specific regulations on commercial transactions, unless a clear and deliberate decision is made by the Under Secretary of Defense for Acquisition and Sustainment that such application is in the DoD's best interest ¹. This proposed modification aligns with ongoing discussions about reducing bureaucratic hurdles and making the DoD a more attractive customer for commercial firms ¹⁰.

Desired Effect of the Recommendation

The primary desired effect of Section 314 is to streamline the Department of Defense's acquisition of commercial products and commercial services. This simplification is expected to yield several positive outcomes:

- **Reduced Administrative Burden:** By requiring a conscious decision and written determination from the Under Secretary of Defense for Acquisition and Sustainment to apply post-1994 defense-unique statutes, the provision aims to reduce the automatic imposition of regulations that might not be relevant or necessary for commercial items ¹. This could decrease the administrative workload for both government contracting personnel and commercial vendors, allowing for faster and more efficient procurement processes ⁴.
- **Increased Access to Commercial Innovation:** Commercial companies, particularly those not traditionally engaged in defense contracting, often find the complex web of defense-specific regulations to be a significant barrier to entry ⁴. By limiting the automatic applicability of these regulations, Section 314 could make it more appealing for these innovative commercial firms to offer their products and services to the DoD ⁴. This could lead to the adoption of cutting-edge technologies and solutions that might not otherwise be available through traditional defense acquisition channels.
- **Cost Savings:** The reduced administrative burden and increased competition from commercial vendors could potentially lead to cost savings for the DoD ¹⁰. Streamlined processes can lower transaction costs, and greater competition can drive down prices. Furthermore, by avoiding the unnecessary application of certain defense-unique requirements that might necessitate modifications to commercial products or services, the DoD could procure these items at closer to their commercial market prices ¹¹.
- **Faster Acquisition Timelines:** The simplification of regulatory requirements and the potential for increased participation from commercial vendors could

contribute to faster acquisition timelines ¹⁰. Reduced bureaucratic processes and quicker agreement on contract terms could expedite the delivery of needed commercial products and services to the DoD.

- **Enhanced Flexibility in Contracting:** Section 314 allows for a more tailored approach to contracting for commercial items. The Under Secretary's determination process introduces a level of flexibility, enabling the DoD to selectively apply regulations only when they are deemed truly necessary and beneficial for specific commercial procurements ¹. This could lead to more efficient and effective contracting strategies that better align with commercial practices ⁶.

Potential Negative impacts of the recommendations

While the intended effects of Section 314 are largely positive, there are potential unintended negative consequences that need to be considered:

- **Reduced Oversight and Accountability:** The shift in default applicability could inadvertently lead to reduced oversight in certain areas. If the Under Secretary does not make a determination to apply a specific defense-unique statute, there might be a perception or reality of decreased accountability or adherence to certain standards that these statutes were designed to ensure ¹². This could potentially impact areas such as contractor performance, ethical conduct, or compliance with specific government policies.
- **Inconsistent Application of Regulations:** The requirement for a written determination by the Under Secretary introduces a degree of discretion that could lead to inconsistencies in how regulations are applied across different DoD components or procurements ¹. This lack of uniformity could create confusion for both government personnel and contractors, potentially leading to disputes or inefficiencies.
- **Potential for Erosion of Important Safeguards:** Some defense-unique statutes were enacted to address specific risks or concerns inherent in government contracting, such as national security requirements, domestic sourcing preferences, or labor standards ¹. The process of selectively applying these laws could inadvertently lead to the erosion of these important safeguards if insufficient consideration is given to their continued relevance in certain commercial procurement contexts.
- **Increased Workload for the Under Secretary of Defense for Acquisition and Sustainment:** The responsibility for making written determinations on the applicability of post-1994 defense-unique statutes places a significant workload on the Under Secretary of Defense for Acquisition and Sustainment ¹. Ensuring

thorough and timely reviews of these statutes and their potential impact on commercial procurements will require considerable time and resources at this senior leadership level.

- **Difficulty in Identifying and Listing Applicable Statutes:** The requirement to create and maintain lists of applicable defense-unique provisions within the DFARS could be a complex and time-consuming task¹. Identifying all relevant statutes and contract clause requirements, particularly those based on government-wide regulations, policies, or executive orders expressly required in law, will necessitate a comprehensive review and ongoing maintenance to ensure accuracy and completeness.

Mitigations the organization will take to diminish the negative impacts

To mitigate the potential negative impacts of Section 314, the Department of Defense should consider the following measures:

- **Establish Clear Criteria and Guidance for the Under Secretary's Determinations:** Develop transparent and well-defined criteria and guidance for the Under Secretary of Defense for Acquisition and Sustainment to use when making written determinations regarding the applicability of post-1994 defense-unique statutes¹. This guidance should outline the factors to be considered, the potential risks and benefits of applying or not applying specific statutes, and the consultation processes to be followed.
- **Develop a Robust Process for Creating and Maintaining DFARS Lists:** Implement a rigorous and systematic process for identifying, reviewing, and listing applicable defense-unique provisions and contract clause requirements in the DFARS¹. This process should involve collaboration across relevant DoD components, legal counsel, and acquisition experts to ensure accuracy and completeness. Regular updates and reviews of these lists should be scheduled to reflect any changes in legislation or policy.
- **Provide Comprehensive Training and Awareness Programs:** Develop and deliver comprehensive training programs for contracting officers and other relevant DoD personnel on the implications of Section 314 and the updated DFARS requirements¹³. These programs should emphasize the importance of understanding the remaining applicable regulations and the procedures for identifying and addressing potential risks in commercial procurements. Awareness campaigns targeting commercial vendors could also help ensure a clear understanding of the revised regulatory landscape.
- **Implement a Monitoring and Evaluation Framework:** Establish a framework for monitoring the implementation of Section 314 and evaluating its effectiveness in

achieving the desired outcomes while minimizing negative consequences¹⁵. This framework should include metrics for tracking acquisition speed, cost savings, contractor participation, and compliance with remaining regulations. Regular assessments and feedback mechanisms should be in place to identify any unintended negative impacts early on and allow for necessary adjustments to policies and procedures.

- **Foster Open Communication and Collaboration with Stakeholders:** Encourage open communication and collaboration with industry stakeholders, including commercial vendors and trade associations, to gather feedback on the implementation of Section 314 and identify any unforeseen challenges or negative impacts¹⁶. This engagement can help the DoD refine its approach and ensure that the changes are implemented in a way that is both effective and minimizes disruption to the commercial marketplace.

DoD Personnel Most Affected

The federal personnel most directly affected by Section 314 are likely to be **Contracting Officers** and the **Under Secretary of Defense for Acquisition and Sustainment**.

- **Contracting Officers:** These individuals will be responsible for implementing the changes outlined in Section 314. They will need to become familiar with the updated DFARS, particularly the lists of applicable defense-unique provisions for contracts, subcontracts, and COTS items¹. Contracting officers will also need to understand the implications of the Under Secretary's determinations regarding post-1994 statutes and ensure that contracts are awarded and administered in compliance with the revised regulations. This may require additional training and resources to navigate the new procedures and documentation requirements¹³.
- **Under Secretary of Defense for Acquisition and Sustainment:** This role is central to the implementation of Section 314. The Under Secretary will bear the responsibility for making written determinations on whether to apply defense-unique provisions of law or contract clause requirements enacted after October 13, 1994, to contracts and subcontracts for commercial products and services, as well as for COTS items¹. This will require a thorough understanding of the statutes in question, their potential impact on commercial procurements, and the overall best interests of the Department of Defense. The Under Secretary will also likely oversee the development and maintenance of the required lists in the DFARS.

Stakeholders opposed and rationale for Opposition

Several stakeholders might oppose Section 314, primarily due to concerns about potential negative consequences:

- **Organizations advocating for stringent regulatory oversight in government contracting:** Groups focused on ensuring accountability, transparency, and ethical conduct in government spending may oppose the provision, fearing that reduced automatic application of defense-unique statutes could lead to weakened oversight and potential for waste, fraud, and abuse¹². Their rationale would likely center on the importance of maintaining established safeguards in defense contracting, even for commercial items.
- **Domestic sourcing advocates:** Stakeholders who prioritize the purchase of goods and services from U.S. sources might oppose Section 314 if they believe it could lead to a decreased application of "Buy American" or similar provisions¹. Their opposition would stem from concerns about the impact on the domestic industrial base and national security implications of relying on foreign sources.
- **Labor and environmental advocacy groups:** Organizations focused on protecting labor rights and promoting environmental sustainability might oppose the provision if they fear that it could lead to a reduced application of labor laws or environmental regulations in contracts for commercial products and services¹³. Their rationale would likely emphasize the importance of ensuring that commercial vendors supplying the DoD adhere to certain social and environmental standards.
- **Traditional defense contractors:** While some might see benefits in reduced bureaucracy, others, particularly those accustomed to navigating the existing defense acquisition landscape, might view the changes as creating uncertainty or potentially favoring non-traditional commercial entrants⁴. They might also be concerned about potential shifts in contracting preferences or increased competition.

Additional Resources

To successfully implement Section 314, the DoD will likely require several additional resources:

- **Funding:** Dedicated funding may be needed to support the comprehensive review of defense-unique statutes and the development and maintenance of the required lists in the DFARS¹. Resources will also be necessary for the development and delivery of training programs for contracting officers and other relevant personnel¹³.
- **Personnel:** Additional personnel with expertise in acquisition policy, law, and commercial contracting practices may be required to support the Under

Secretary of Defense for Acquisition and Sustainment in making the necessary determinations and to manage the process of updating the DFARS¹. This could include policy analysts, legal counsel, and contracting specialists.

- **Training:** As mentioned above, comprehensive training programs will be crucial for ensuring that contracting officers and other DoD personnel understand the implications of Section 314 and can effectively implement the new procedures¹³. This training should cover the updated DFARS requirements, the process for determining the applicability of statutes, and best practices for contracting for commercial items.
- **Information Technology Systems:** Modifications to existing IT systems or the development of new tools might be needed to support the creation and management of the DFARS lists and to facilitate the tracking and documentation of the Under Secretary's determinations¹.

Measures of Success

The success or effectiveness of Section 314 can be measured through several key indicators:

- **Increased Participation of Non-Traditional Commercial Vendors:** A successful implementation should lead to a noticeable increase in the number of non-traditional commercial companies bidding on and being awarded DoD contracts for commercial products and services⁴. This can be tracked by monitoring the types of vendors entering the defense market and their share of contract awards.
- **Reduction in Procurement Lead Times:** One of the primary goals is to streamline acquisition processes. Therefore, a measure of success would be a demonstrable reduction in the average time it takes to award contracts for commercial products and services¹⁰.
- **Cost Savings in Commercial Acquisitions:** The provision aims to leverage commercial market efficiencies. Tracking the average prices paid for commercial products and services before and after the implementation of Section 314 can help determine if cost savings are being realized¹⁰.
- **Feedback from Industry:** Gathering feedback from commercial vendors on their experience contracting with the DoD after the implementation of Section 314 can provide valuable insights into the effectiveness of the changes in reducing bureaucratic hurdles and improving the overall acquisition process¹⁶.
- **Compliance with Remaining Regulations:** While streamlining regulations is the goal, it's crucial to ensure continued compliance with the defense-unique statutes that are deemed necessary and are explicitly applied. Monitoring audit

reports and contractor performance in these areas will be important.

Alternative approaches

While Section 314 proposes a broad modification to the applicability of defense-unique statutes, alternative approaches could potentially achieve similar outcomes:

- **Targeted Waivers or Exemptions:** Instead of a blanket modification, the DoD could explore a system of targeted waivers or exemptions for specific commercial items or categories of commercial items from certain defense-unique statutes ¹¹. This approach could offer more granular control and allow for exemptions based on the specific characteristics and risks associated with particular commercial procurements.
- **Increased Use of Commercial Solutions Openings (CSOs):** CSOs provide a flexible mechanism for the DoD to solicit innovative commercial solutions without the traditional rigidities of standard government contracting ¹¹. Expanding the use of CSOs and tailoring their terms and conditions to better align with commercial practices could be another way to enhance the acquisition of commercial products and services.
- **Enhanced Communication and Guidance:** Improving communication and providing clearer guidance to both government and industry on the applicability of existing regulations to commercial items could also help streamline the process ¹⁷. This could involve developing more user-friendly resources, conducting outreach events, and establishing dedicated points of contact for commercial vendors.

Section Specific Question 1: How does Section 314 clarify or change the applicability of non-procurement specific laws (e.g., certain environmental or labor laws) to contracts solely for commercial products or services? What are the compliance implications for Contracting Officers?

Section 314 primarily focuses on the applicability of "defense-unique provisions of law and of contract clause requirements based on government-wide acquisition regulations, policies, or executive orders expressly required in law" ¹. It does not explicitly address the applicability of non-procurement specific laws like certain environmental or labor laws that might generally apply to commercial entities regardless of their contractual relationship with the government. However, if such non-procurement specific laws have been incorporated into the DFARS as defense-unique requirements for DoD contracts, their applicability to commercial

product and service contracts would be affected by Section 314.

The key change is that for any such defense-unique requirement enacted after October 13, 1994, it will not automatically apply to contracts for commercial products and services. The Under Secretary of Defense for Acquisition and Sustainment must make a written determination that applying it is in the best interest of the DoD for it to be included on the list of applicable provisions in the DFARS ¹.

For Contracting Officers, the compliance implications are significant. They will need to rely on the updated DFARS to determine which defense-unique laws and clauses are applicable to their procurements of commercial items. They must be aware that post-1994 defense-unique requirements will only apply if they appear on the DFARS list, which signifies a determination by the Under Secretary. This shift requires Contracting Officers to stay informed about DFARS updates and to understand that the default is now non-applicability for newer defense-unique requirements unless explicitly stated ¹³.

Section Specific Question 2: (This question was not provided in the initial prompt).

Summary

Section 314 of the Forged Act aims to modernize and streamline the Department of Defense's acquisition of commercial products and commercial services by modifying the applicability of defense-unique statutes. By requiring a deliberate determination from the Under Secretary of Defense for Acquisition and Sustainment for post-1994 laws to apply and mandating the creation of comprehensive lists in the DFARS, this provision seeks to reduce unnecessary regulatory burdens, encourage participation from innovative commercial vendors, and ultimately improve the efficiency and cost-effectiveness of defense procurement. While the intended benefits are significant, potential negative impacts such as reduced oversight and inconsistent application need to be carefully mitigated through clear guidance, robust processes, comprehensive training, and ongoing monitoring. The successful implementation of Section 314 will require dedicated resources and a collaborative approach involving both government and industry stakeholders.

Recommendation Text from Forged Act follows:

SEC. 314. MODIFICATIONS TO RELATIONSHIP OF OTHER PROVISIONS OF LAW TO PROCUREMENT OF COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES.

Section 3452 of title 10, United States Code, is amended by striking

subsections (b) through (f) and inserting the following new subsections: (b) Applicability of Defense-Unique Statutes to Contracts for Commercial Products and Commercial Services.—(1) The Defense Federal Acquisition Regulation Supplement shall include a list of defense-unique provisions of law and of contract clause requirements based on government-wide acquisition regulations, policies, or executive orders expressly required in law that are applicable to contracts for the procurement of commercial products and commercial services by the Department of Defense. (2) A provision of law or contract clause requirement described in subsection (e) that is enacted after October 13, 1994, shall not be included on the list of applicable provisions of law and contract clause requirements required by paragraph (1) unless the Under Secretary of Defense for Acquisition and Sustainment makes a written determination that it would be in the best interest of the Department of Defense to apply the provision or contract clause requirement to the contract for the procurement of commercial products and commercial services. (c) Applicability of Defense-Unique Statutes to Subcontracts for Commercial Products and Commercial Services.—(1) The Defense Federal Acquisition Regulation Supplement shall include a list of defense-unique provisions of law and of contract clause requirements based on government-wide acquisition regulations, policies, or executive orders expressly required in law that are applicable to subcontracts for the procurement of commercial products and commercial services. A provision of law or contract clause requirement properly included on the list pursuant to paragraph (2) must apply to purchases of commercial products and commercial services by the Department of Defense. (2) A provision of law or contract clause requirement described in subsection (e) that is enacted after October 13, 1994, shall not be included on the list of applicable provisions of law and contract clause requirements required by paragraph (1) unless the Under Secretary of Defense for Acquisition and Sustainment makes a written determination that it would be in the best interest of the Department of Defense to apply the provision or contract clause requirement to the subcontract for the procurement of commercial products and commercial services. (3) In this subsection, the term "subcontract"—(A) includes a transfer of commercial products and commercial services between divisions, subsidiaries, or affiliates of a contractor or subcontractor; and (B) does not include agreements entered into by a contractor for the supply of commodities that are intended for use in the performance of multiple contracts with the Department of Defense and other parties and are not identifiable to any particular contract. (4) This subsection does not authorize the waiver of the applicability of any provision of law or contract clause requirement with respect to any first-tier subcontract under a contract with a prime contractor reselling or distributing commercial products and commercial services of another contractor without adding value. (d) Applicability of Defense-Unique Statutes to Contracts for Commercially

Available, Off-the-Shelf Items.—(1) The Defense Federal Acquisition Regulation Supplement shall include a list of defense-unique provisions of law and of contract clause requirements based on government-wide acquisition regulations, policies, or executive orders expressly required in law that are applicable to subcontracts for the procurement of commercially available off-the-shelf items by the Department of Defense. (2) A provision of law or contract clause requirement described in subsection (e) that is enacted after October 13, 1994, shall not be included on the list of applicable provisions of law and contract clause requirements required by paragraph (1) unless the Under Secretary of Defense for Acquisition and Sustainment makes a written determination that it would be in the best interest of the Department of Defense to apply the provision or contract clause requirement to the procurement of commercially available off-the-shelf items. (e) Covered Provision of Law or Contract Clause Requirement.—A provision of law or contract clause requirement referred to in subsections (b)(2), (c)(2), and (d)(2) is a provision of law or contract clause requirement that the Under Secretary of Defense for Acquisition and Sustainment determines sets forth policies, procedures, requirements, or restrictions for the procurement of property or services by the Federal Government, except for a provision of law or contract clause requirement that—(1) provides for criminal or civil penalties; (2) requires that certain articles be bought from United States sources pursuant to section 4862 of this title, or requires that strategic materials critical to national security be bought from United States sources pursuant to section 4863 of this title; or (3) specifically refers to this section and provides that, notwithstanding this section, it shall be applicable to contracts for the procurement of commercial products and commercial services.

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