

Excessive reliance by executive agencies on sole-source contracts (or contracts with a limited number of sources) and cost-reimbursement contracts creates a risk that taxpayer funds will be spent on contracts that are wasteful, inefficient, subject to misuse, or otherwise not well designed to serve the needs of the Federal Government or the interests of the American taxpayer. Reports by agency Inspectors General, the Government Accountability Office (GAO), and other independent reviewing bodies have shown that noncompetitive and cost-reimbursement contracts have been misused, resulting in wasted taxpayer resources, poor contractor performance, and inadequate accountability for results.

When awarding Government contracts, the Federal Government must strive for an open and competitive process. However, executive agencies must have the flexibility to tailor contracts to carry out their missions and achieve the policy goals of the Government. In certain exigent circumstances, agencies may need to consider whether a competitive process will not accomplish the agency's mission. In such cases, the agency must ensure that the risks associated with noncompetitive contracts are minimized.

Moreover, it is essential that the Federal Government have the capacity to carry out robust and thorough management and oversight of its contracts in order to achieve programmatic goals, avoid significant overcharges, and curb wasteful spending. A GAO study last year of 95 major defense acquisitions projects found cost overruns of 26 percent, totaling \$295 billion over the life of the projects. Improved contract oversight could reduce such sums significantly.

Government outsourcing for services also raises special concerns. For decades, the Federal Government has relied on the private sector for necessary commercial services used by the Government, such as transportation, food, and maintenance. Office of Management and Budget Circular A-76, first issued in 1966, was based on the reasonable premise that while inherently governmental activities should be performed by Government employees, taxpayers may receive more value for their dollars if non-inherently governmental activities that can be provided commercially are subject to the forces of competition.

However, the line between inherently governmental activities that should not be outsourced and commercial activities that may be subject to private sector competition has been blurred and inadequately defined. As a result, contractors may be performing inherently governmental functions. Agencies and departments must operate under clear rules prescribing when outsourcing is and is not appropriate.

It is the policy of the Federal Government that executive agencies shall not engage in noncompetitive contracts except in those circumstances where their use can be fully justified and where appropriate safeguards have been put in place to protect the taxpayer. In addition, there shall be a preference for fixed-price type contracts. Cost-reimbursement contracts shall be used only when circumstances do not allow the agency to define its requirements sufficiently to allow for a fixed-price type contract. Moreover, the Federal Government shall ensure that taxpayer dollars are not spent on contracts that are wasteful, inefficient, subject to misuse, or otherwise not well designed to serve the Federal Government's needs and to manage the risk associated with the goods and services being procured. The Federal Government must have sufficient capacity to manage and oversee the contracting process from start to finish, so as to ensure that taxpayer funds are spent wisely and are not subject to excessive risk. Finally, the Federal Government must ensure that those functions that are inherently governmental in nature are performed by executive agencies and are not outsourced.

I hereby direct the Director of the Office of Management and Budget (OMB), in collaboration with the Secretary of Defense, the Administrator of the National Aeronautics and Space Administration, the Administrator of General Services, the Director of the Office of

Personnel Management, and the heads of such other agencies as the Director of OMB determines to be appropriate, and with the participation of appropriate management councils and program management officials, to develop and issue by July 1, 2009, Government-wide guidance to assist agencies in reviewing, and creating processes for ongoing review of, existing contracts in order to identify contracts that are wasteful, inefficient, or not otherwise likely to meet the agency's needs, and to formulate appropriate corrective action in a timely manner. Such corrective action may include modifying or canceling such contracts in a manner and to the extent consistent with applicable laws, regulations, and policy.

I further direct the Director of OMB, in collaboration with the aforementioned officials and councils, and with input from the public, to develop and issue by September 30, 2009, Government-wide guidance to:

(1) govern the appropriate use and oversight of sole-source and other types of noncompetitive contracts and to maximize the use of full and open competition and other competitive procurement processes;

(2) govern the appropriate use and oversight of all contract types, in full consideration of the agency's needs, and to minimize risk and maximize the value of Government contracts generally, consistent with the regulations to be promulgated pursuant to section 864 of Public Law 110-417;

(3) assist agencies in assessing the capacity and ability of the Federal acquisition workforce to develop, manage, and oversee acquisitions appropriately; and

(4) clarify when governmental outsourcing for services is and is not appropriate, consistent with section 321 of Public Law 110-417 (31 U.S.C. 501 note).

Executive departments and agencies shall carry out the provisions of this memorandum to the extent permitted by law. This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

The Director of OMB is hereby authorized and directed to publish this memorandum in the Federal Register.

BARACK OBAMA.

DEFINITIONS

The definitions in section 102 of Title 40, Public Buildings, Property, and Works, apply to this subchapter.

§ 252. Purchases and contracts for property

(a) Applicability of subchapter; delegation of authority

Executive agencies shall make purchases and contracts for property and services in accordance with the provisions of this subchapter and implementing regulations of the Administrator; but this subchapter does not apply—

(1) to the Department of Defense, the Coast Guard, and the National Aeronautics and Space Administration; or

(2) when this subchapter is made inapplicable pursuant to section 113(e) of title 40 or any other law, but when this subchapter is made inapplicable by any such provision of law, sections 5 and 8 of this title shall be applicable in the absence of authority conferred by statute to procure without advertising or without regard to said section 5 of this title.

(b) Small business concerns; share of business

It is the declared policy of the Congress that a fair proportion of the total purchases and contracts for property and services for the Govern-

ment shall be placed with small business concerns.

(c) Authorization of erection, repair, or furnishing of public buildings or improvements; contracts for construction or repair of buildings, roads, sidewalks, sewers, mains, etc.; Federal Highway Lands Program

(1) This subchapter does not (A) authorize the erection, repair, or furnishing of any public building or public improvement, but such authorization shall be required in the same manner as heretofore, or (B) permit any contract for the construction or repair of buildings, roads, sidewalks, sewers, mains, or similar items using procedures other than sealed-bid procedures under section 253(a)(2)(A) of this title, if the conditions set forth in section 253(a)(2)(A) of this title apply or the contract is to be performed outside the United States.

(2) Section 253(a)(2)(A) of this title does not require the use of sealed-bid procedures in cases in which section 204(e) of title 23 applies.

(June 30, 1949, ch. 288, title III, §302, 63 Stat. 393; July 12, 1952, ch. 703, §1(m), 66 Stat. 594; Pub. L. 85-800, §§1-3, Aug. 28, 1958, 72 Stat. 966; Pub. L. 89-343, §§1, 2, Nov. 8, 1965, 79 Stat. 1303; Pub. L. 89-348, §1(2), Nov. 8, 1965, 79 Stat. 1310; Pub. L. 90-268, §4, Mar. 16, 1968, 82 Stat. 50; Pub. L. 93-356, §3, July 25, 1974, 88 Stat. 390; Pub. L. 98-191, §9(a)(1), Dec. 1, 1983, 97 Stat. 1331; Pub. L. 98-369, div. B, title VII, §2714(a)(1), July 18, 1984, 98 Stat. 1184.)

CODIFICATION

“Section 113(e) of title 40” substituted in subsec. (a)(2) for “section 602(d) of this Act”, meaning section 602(d) of the Federal Property and Administrative Services Act of 1949, on authority of Pub. L. 107-217, §5(c), Aug. 21, 2002, 116 Stat. 1303, the first section of which enacted Title 40, Public Buildings, Property, and Works.

AMENDMENTS

1984—Subsec. (b). Pub. L. 98-369, §2714(a)(1)(A), struck out provisions that whenever it was proposed to make a contract or purchase in excess of \$10,000 by negotiation and without advertising, pursuant to the authority of subsec. (c)(7) of this section, suitable advance publicity, as determined by the agency head with due regard to the type of property involved and other relevant considerations, had to be given for a period of at least fifteen days, wherever practicable, as determined by the agency head.

Subsec. (c)(1). Pub. L. 98-369, §2714(a)(1)(B), redesignated subsec. (e) as (c)(1), substituted reference to this subchapter for reference to this section in provisions preceding subpar. (A), in subpar. (B), substituted provisions relating to contracts using procedures other than sealed-bid procedures under section 253(a)(2)(A) of this title for provisions relating to contracts negotiated without advertising as required by section 253 of this title. Former subsec. (c), which related to conditions for negotiated purchases and contracts for property, was struck out.

Subsec. (c)(2). Pub. L. 98-369, §2714(a)(1)(B), added par. (2).

Subsec. (d). Pub. L. 98-369, §2714(a)(1)(B), struck out subsec. (d) which related to bids in violation of the antitrust laws.

Subsec. (e). Pub. L. 98-369, §2714(a)(1)(B), redesignated subsec. (e) as (c)(1).

Subsec. (f). Pub. L. 98-369, §2714(a)(1)(B), struck out subsec. (f) which related to specification of container size in contracts for the carriage of Government prop-

erty in other than Government-owned cargo containers.

1983—Subsec. (c)(3). Pub. L. 98-191 substituted “\$25,000” for “\$10,000”.

1974—Subsec. (c)(3). Pub. L. 93-356 substituted “\$10,000” for “\$2,500”.

1968—Subsec. (f). Pub. L. 90-268 added subsec. (f).

1965—Subsec. (a). Pub. L. 89-343, §1, substituted provisions requiring executive agencies to make purchases and contracts for property and services in accordance with the provisions of this subchapter and implementing regulations of the Administrator, exempting the Department of Defense, the Coast Guard, and the National Aeronautics and Space Administration from the application of this subchapter, and making this subchapter inapplicable when it is so made by law, for provisions which made this subchapter applicable to purchases and contracts for property or services made by the General Services Administration for the use of such agency or otherwise, or by any other executive agency (except the departments and activities specified in section 2303(a) of Title 10) in conformity with authority to apply such provisions delegated by the Administrator in his discretion.

Subsec. (c)(11). Pub. L. 89-348 struck out proviso which required a semiannual report to be furnished to the Congress setting forth the name of each contractor with whom a contract has been entered into pursuant to this paragraph, the amount of the contract, and, with due consideration given to the national security, a description of the work required to be performed thereunder.

Subsec. (c)(15). Pub. L. 89-343, §2, inserted “except that section 254 of this title shall apply to purchases and contracts made without advertising under this paragraph”.

1958—Subsec. (a). Pub. L. 85-800, §1, among other changes, substituted “or” for “and” in par. (1), substituted provisions excepting application of subchapter to departments and activities in section 2303(a) of title 10 for provisions which excepted agencies named in section 151(a) of this title, substituted provisions applying subchapter to agencies in conformity with authority delegated by Administrator in his discretion for provisions which applied chapter in conformity with authority delegated him pursuant to this subsection, and eliminated provisions authorizing Administrator to delegate authority for use of two or more agencies, and other cases where delegation is advantageous to Government in par. (2).

Subsec. (c). Pub. L. 85-800, §2, substituted in par. (3) “\$2,500” for “\$1,000”, struck out proviso barring agencies other than General Services Administration from making purchases in excess of \$500 except under authority to procure for two or more agencies, added par. (9), and renumbered former pars. (9) to (14) as pars. (10) to (15).

Subsec. (e). Pub. L. 85-800, §3, substituted “(10) to (12), or (14)” for “(9) to (11), or (13)”.

1952—Subsecs. (a) to (c). Act July 12, 1952, substituted “property” for “supplies” wherever appearing.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98-369 applicable with respect to any solicitation for bids or proposals issued after Mar. 31, 1985, see section 2751 of Pub. L. 98-369, set out as a note under section 251 of this title.

EFFECTIVE DATE

Section effective July 1, 1949, see section 605, formerly section 505, of act June 30, 1949, ch. 288, 63 Stat. 403; renumbered by act Sept. 5, 1950, ch. 849, §6(a), (b), 64 Stat. 583.

TRANSFER OF FUNCTIONS

For transfer of authorities, functions, personnel, and assets of the Coast Guard, including the authorities and functions of the Secretary of Transportation relating thereto, to the Department of Homeland Security,

and for treatment of related references, see sections 468(b), 551(d), 552(d), and 557 of Title 6, Domestic Security, and the Department of Homeland Security Reorganization Plan of November 25, 2002, as modified, set out as a note under section 542 of Title 6.

EMERGENCY RELIEF FOR SMALL BUSINESS CONCERNS
WITH GOVERNMENT CONTRACTS

Pub. L. 94-190, Dec. 31, 1975, 89 Stat. 1095, provided:

“SHORT TITLE

“SECTION 1. This Act may be cited as the ‘Small Business Emergency Relief Act’.

“POLICY

“SEC. 2. It is the policy of Congress to provide relief to small business concerns which have fixed-price Government contracts in cases where such concerns have suffered or can be expected to suffer serious financial loss because of significant and unavoidable difficulties during performance because of the energy crisis or rapid and unexpected escalations of contract costs.

“DEFINITIONS

“SEC. 3. As used in this Act—

“(1) the term ‘executive agency’ means an executive department, a military department, and an independent establishment within the meaning of sections 101, 102, and 104(1) respectively, of title 5, United States Code, and also a wholly owned Government corporation within the meaning of section 101 of the Government Corporation Control Act [section 9101(3) of Title 31, Money and Finance]; and

“(2) the term ‘small business concern’ means any concern which falls under the size limitations of the ‘Small Business Administrator’s Definitions of Small Business for Government Procurement’.

“AUTHORITY

“SEC. 4. (a) Pursuant to an application by a small business concern, the head of any executive agency may terminate for the convenience of the Government any fixed-price contract between that agency and such small business concern, upon a finding that—

“(1) during the performance of the contract, the concern has suffered or can be expected to suffer serious financial loss due to significant unanticipated cost increases directly affecting the cost of contract compliance; and

“(2) the conditions which have caused or are causing such cost increases were, or are being, experienced generally by other small business concerns in the market at the same time and are not caused by negligence, underbidding, or other special management factors peculiar to that small business concern.

“(b) Upon application under subsection (a) by a small business concern to terminate a fixed-price contract between an executive agency and such small business concern, the head of the executive agency may modify the terms of the contract in lieu of termination for the convenience of the Government only if he finds after review of the application that—

“(1)(a) the agency would reprocure the supplies or services in the event that the contract was terminated for the convenience of the Government; and

“(b) the cost of terminating the contract for the convenience of the Government plus the cost of reprocurement would exceed the amount of the contract as modified; and

“(2) Any such modification shall be made in compliance with cost comparison and compensation guidelines to be issued by the Administrator of the Office of Federal Procurement Policy. Such cost comparison and compensation guidelines shall be promulgated by the Administrator not later than 10 days after enactment of this Act [Dec. 31, 1975].

“(c) If a small business concern in performance of a fixed-price Government contract experiences or has experienced shortages of energy, petroleum products, or

products or components manufactured or derived therefrom or impacted thereby, and such shortages result in a delay in the performance of a contract, the head of the agency, or his designee, shall provide by modification to the contract for an appropriate extension of the contract delivery date or period of performance.

“(d) A small business concern requesting relief under subsection (a) shall support that request with the following documentation and certification:

“(1) a brief description of the contract, indicating the date of execution and of any amendment thereto, the items being procured, the price and delivery schedule, and any revision thereof, and any other special contractual provision as may be relevant to the request;

“(2) a history of performance indicating when work under the contract or commitment was begun, the progress made as of the date of the application, an exact statement of the contractor’s remaining obligations, and the contractor’s expectations regarding completion thereof;

“(3) a statement of the factors which have caused the loss under the contract;

“(4) a statement as to the course of events anticipated if the request is denied;

“(5) a statement of payments received, payments due and payments yet to be received or to become due, including advance and progress payments, and amounts withheld by the Government, and information as to other obligations of the Government, if any, which are yet to be performed under the contract;

“(6) a statement and evidence of the contractor’s original breakdown of estimated costs, including contingency allowances and profit;

“(7) a statement and evidence of the contractor’s present estimate of total costs under the contract if enabled to complete, broken down between costs accrued to date of request, and runout costs, and as between costs for which the contractor has made payment and those for which he is indebted at the time of the request;

“(8) a statement and evidence of the contractor’s estimate of the final price of the contract, giving effect to all escalation, changes, extras, and other comparable factors known or contemplated by the contractor;

“(9) a statement of any claims known or contemplated by the contractor against the Government involving the contract in question, other than those referred to under (8) above;

“(10) an estimate of the contractor’s total profit or loss under the contract if required to complete at the original contract price;

“(11) an estimate of the total profits from other Government business, and all other sources, during the period from the date of the first contract involved to the latest estimated date of completion of any other contracts involved;

“(12) balance sheets, certified by a certified public accountant, as of the end of the contractor’s fiscal year first preceding the date of the first contract, as of the end of each subsequent fiscal year, and as of the date of the request together with income statements for annual periods subsequent to the date of the first balance sheet; and

“(13) a list of all salaries, bonuses, and all other forms of compensation of the principal officers or partners and of all dividends and other withdrawals, and all payments to stockholders in any form since the date of the first contract involved.

“DELEGATION

“SEC. 5. The head of each executive agency shall delegate authority conferred by this Act, to the extent practicable, to an appropriate level that will permit the expeditious processing of applications under this Act and to insure the uniformity of its application.

“LIMITATIONS

“SEC. 6. (a) The authority prescribed in section 4(a) shall apply only to contracts which have not been com-

pletely performed or otherwise terminated and which were entered into during the period from August 15, 1971, through October 31, 1974.

“(b) The authority conferred by section 4(a) of this Act shall terminate September 30, 1976.”

NON-APPLICABILITY OF NATIONAL EMERGENCIES ACT

The provisions of the National Emergencies Act (Pub. L. 94-412, Sept. 14, 1976, 90 Stat. 1255) not applicable to the powers and authorities conferred by this section and actions taken hereunder, see section 1651 of Title 50, War and National Defense.

EXECUTIVE ORDER NO. 10936

Ex. Ord. No. 10936, Apr. 24, 1961, 26 F.R. 3555, which provided for the reporting and investigation of identical bids in connection with the procurement of goods or services, was revoked by Ex. Ord. No. 12430, July 6, 1983, 48 F.R. 31371.

DEFINITIONS

The definitions in section 102 of Title 40, Public Buildings, Property, and Works, apply to this subchapter.

§ 252a. Simplified acquisition threshold

(a) Simplified acquisition threshold

For purposes of acquisitions by executive agencies, the simplified acquisition threshold is as specified in section 403(11) of this title.

(b) Inapplicable laws

No law properly listed in the Federal Acquisition Regulation pursuant to section 429 of this title shall apply to or with respect to a contract or subcontract that is not greater than the simplified acquisition threshold.

(June 30, 1949, ch. 288, title III, §302A, as added and amended Pub. L. 103-355, title IV, §§4003, 4103(a), Oct. 13, 1994, 108 Stat. 3338, 3341.)

AMENDMENTS

1994—Subsec. (b). Pub. L. 103-355, §4103(a), added subsec. (b).

EFFECTIVE DATE

For effective date and applicability of section, see section 10001 of Pub. L. 103-355, set out as an Effective Date of 1994 Amendment note under section 251 of this title.

§ 252b. Implementation of simplified acquisition procedures

The simplified acquisition procedures contained in the Federal Acquisition Regulation pursuant to section 427 of this title shall apply in executive agencies as provided in such section.

(June 30, 1949, ch. 288, title III, §302B, as added Pub. L. 103-355, title IV, §4203(b), Oct. 13, 1994, 108 Stat. 3346.)

EFFECTIVE DATE

For effective date and applicability of section, see section 10001 of Pub. L. 103-355, set out as an Effective Date of 1994 Amendment note under section 251 of this title.

§ 252c. Implementation of electronic commerce capability

(a) Implementation of electronic commerce capability

(1) The head of each executive agency shall implement the electronic commerce capability required by section 426 of this title.

(2) In implementing the electronic commerce capability pursuant to paragraph (1), the head of an executive agency shall consult with the Administrator for Federal Procurement Policy.

(b) Designation of agency official

The head of each executive agency shall designate a program manager to implement the electronic commerce capability for that agency. The program manager shall report directly to an official at a level not lower than the senior procurement executive designated for the executive agency under section 414(3)¹ of this title.

(June 30, 1949, ch. 288, title III, §302C, as added Pub. L. 103-355, title IX, §9003, Oct. 13, 1994, 108 Stat. 3403; amended Pub. L. 105-85, div. A, title VIII, §850(f)(4)(A), Nov. 18, 1997, 111 Stat. 1850.)

REFERENCES IN TEXT

Section 414 of this title, referred to in subsec. (b), was amended generally by Pub. L. 108-136, div. A, title XIV, §1421(a)(1), Nov. 24, 2003, 117 Stat. 1666, and, as so amended, no longer contains a par. (3). See section 414(c)(1) of this title.

AMENDMENTS

1997—Pub. L. 105-85 amended section catchline and text generally. Prior to amendment, text read as follows:

“(a) IMPLEMENTATION OF FACNET CAPABILITY.—(1) The head of each executive agency shall implement the Federal acquisition computer network (‘FACNET’) capability required by section 426 of this title.

“(2) In implementing the FACNET capability pursuant to paragraph (1), the head of an executive agency shall consult with the Administrator for Federal Procurement Policy.

“(b) DESIGNATION OF AGENCY OFFICIAL.—The head of each executive agency shall designate a program manager to have responsibility for implementation of FACNET capability for that agency and otherwise to implement this section. Such program manager shall report directly to the senior procurement executive designated for the executive agency under section 414(3) of this title.”

EFFECTIVE DATE OF 1997 AMENDMENT

Amendment by Pub. L. 105-85 effective 180 days after Nov. 18, 1997, see section 850(g) of Pub. L. 105-85, set out as a note under section 2302c of Title 10, Armed Forces.

EFFECTIVE DATE

For effective date and applicability of section, see section 10001 of Pub. L. 103-355, set out as an Effective Date of 1994 Amendment note under section 251 of this title.

§ 253. Competition requirements

(a) Procurement through full and open competition; competitive procedures

(1) Except as provided in subsections (b), (c), and (g) of this section and except in the case of procurement procedures otherwise expressly authorized by statute, an executive agency in conducting a procurement for property or services—

(A) shall obtain full and open competition through the use of competitive procedures in accordance with the requirements of this subchapter and the Federal Acquisition Regulation; and

(B) shall use the competitive procedure or combination of competitive procedures that is

¹ See References in Text note below.