

**(b) Construction**

Nothing in subsection (a) of this section shall be construed to prohibit an executive agency from including in a contract a clause that requires the contractor to permit inspections for the purpose of ensuring that the contractor is performing the contract in accordance with the provisions of the contract.

(Pub. L. 93-400, § 40, formerly § 39, as added Pub. L. 105-277, div. I, title III, § 308(a), Oct. 21, 1998, 112 Stat. 2681-879; renumbered § 40, Pub. L. 108-136, div. A, title XIV, § 1431(d)(2), Nov. 24, 2003, 117 Stat. 1672.)

## REFERENCES IN TEXT

The Chemical Weapons Convention Implementation Act of 1997, referred to in subsec. (a), probably means the Chemical Weapons Convention Implementation Act of 1998, which is div. I of Pub. L. 105-277, Oct. 21, 1998, 112 Stat. 2681-856, and is classified principally to chapter 75 (§ 6701 et seq.) of Title 22, Foreign Relations and Intercourse. For complete classification of this Act to the Code, see Short Title note set out under section 6701 of Title 22 and Tables.

**§ 437. Incentives for efficient performance of services contracts****(a) Incentive for use of performance-based services contracts**

A performance-based contract for the procurement of services entered into by an executive agency or a performance-based task order for services issued by an executive agency may be treated as a contract for the procurement of commercial items if—

(1) the value of the contract or task order is estimated not to exceed \$25,000,000;

(2) the contract or task order sets forth specifically each task to be performed and, for each task—

(A) defines the task in measurable, mission-related terms;

(B) identifies the specific end products or output to be achieved; and

(C) contains firm, fixed prices for specific tasks to be performed or outcomes to be achieved; and

(3) the source of the services provides similar services to the general public under terms and conditions similar to those offered to the Federal Government.

**(b) Regulations**

The regulations implementing this section shall require agencies to collect and maintain reliable data sufficient to identify the contracts or task orders treated as contracts for commercial items using the authority of this section. The data may be collected using the Federal Procurement Data System or other reporting mechanism.

**(c) Report**

Not later than two years after November 24, 2003, the Director of the Office of Management and Budget shall prepare and submit to the Committees on Governmental Affairs and on Armed Services of the Senate and the Committees on Government Reform and on Armed Services of the House of Representatives a report on the contracts or task orders treated as contracts

for commercial items using the authority of this section. The report shall include data on the use of such authority both government-wide and for each department and agency.

**(d) Expiration**

The authority under this section shall expire 10 years after November 24, 2003.

(Pub. L. 93-400, § 41, as added Pub. L. 108-136, div. A, title XIV, § 1431(a), Nov. 24, 2003, 117 Stat. 1671.)

## CHANGE OF NAME

Committee on Government Reform of House of Representatives changed to Committee on Oversight and Government Reform of House of Representatives by House Resolution No. 6, One Hundred Tenth Congress, Jan. 5, 2007.

**§ 438. Civilian Board of Contract Appeals****(a) Board established**

There is established in the General Services Administration a board of contract appeals to be known as the Civilian Board of Contract Appeals (in this section referred to as the “Civilian Board”).

**(b) Membership****(1) Appointment**

(A) The Civilian Board shall consist of members appointed by the Administrator of General Services (in consultation with the Administrator for Federal Procurement Policy) from a register of applicants maintained by the Administrator of General Services, in accordance with rules issued by the Administrator of General Services (in consultation with the Administrator for Federal Procurement Policy) for establishing and maintaining a register of eligible applicants and selecting Civilian Board members. The Administrator of General Services shall appoint a member without regard to political affiliation and solely on the basis of the professional qualifications required to perform the duties and responsibilities of a Civilian Board member.

(B) The members of the Civilian Board shall be selected and appointed to serve in the same manner as administrative law judges appointed pursuant to section 3105 of title 5, with an additional requirement that such members shall have had not fewer than five years of experience in public contract law.

(C) Notwithstanding subparagraph (B) and subject to paragraph (2), the following persons shall serve as Civilian Board members: any full-time member of any agency board of contract appeals other than the Armed Services Board of Contract Appeals, the Postal Service Board of Contract Appeals, and the board of contract appeals of the Tennessee Valley Authority serving as such on the day before the effective date of this section.

**(2) Removal**

Members of the Civilian Board shall be subject to removal in the same manner as administrative law judges, as provided in section 7521 of title 5.

**(3) Compensation**

Compensation for members of the Civilian Board shall be determined under section 5372a of title 5.

**(c) Functions****(1) In general**

The Civilian Board shall have jurisdiction as provided by section 607(d) of this title.

**(2) Additional jurisdiction**

The Civilian Board may, with the concurrence of the Federal agency or agencies affected—

(A) assume jurisdiction over any additional category of laws or disputes over which an agency board of contract appeals established pursuant to section 607 of this title exercised jurisdiction before the effective date of this section; and

(B) assume any other functions performed by such a board before such effective date on behalf of such agencies.

(Pub. L. 93-400, § 42, as added Pub. L. 109-163, div. A, title VIII, § 847(a), Jan. 6, 2006, 119 Stat. 3391.)

## REFERENCES IN TEXT

For the effective date of this section, referred to in subsecs. (b)(1)(C) and (c)(2), see Effective Date note below.

Section 607 of this title, referred to in subsec. (c)(2)(A), was in the original “section 8 of the Contract Disputes Act”, and was translated as reading “section 8 of the Contract Disputes Act of 1978”, to reflect the probable intent of Congress.

## CHANGE OF NAME

References to an agency board of contract appeals other than the Armed Services Board of Contract Appeals, the board of contract appeals of the Tennessee Valley Authority, or the Postal Service Board of Contract Appeals, deemed to refer to the Civilian Board of Contract Appeals, see section 847(e) of Pub. L. 109-163, set out as a note under section 607 of this title.

## EFFECTIVE DATE

Section effective 1 year after Jan. 6, 2006, see section 847(g) of Pub. L. 109-163, set out as an Effective Date of 2006 Amendment note under section 5372a of Title 5, Government Organization and Employees.

## TRANSFERS

For transfer of personnel, property, etc. of agency boards of contract appeals to the Civilian Board of Contract Appeals, with certain exceptions, see section 847(b) of Pub. L. 109-163, set out as a note under section 607 of this title.

**§ 439. Public-private competition required before conversion to contractor performance****(a) Public-private competition**

(1) A function of an executive agency performed by 10 or more agency civilian employees may not be converted, in whole or in part, to performance by a contractor unless the conversion is based on the results of a public-private competition that—

(A) formally compares the cost of performance of the function by agency civilian employees with the cost of performance by a contractor;

(B) creates an agency tender, including a most efficient organization plan, in accordance with Office of Management and Budget Circular A-76, as implemented on May 29, 2003, or any successor circular;

(C) includes the issuance of a solicitation;

(D) determines whether the submitted offers meet the needs of the executive agency with respect to factors other than cost, including quality, reliability, and timeliness;

(E) examines the cost of performance of the function by agency civilian employees and the cost of performance of the function by one or more contractors to demonstrate whether converting to performance by a contractor will result in savings to the Government over the life of the contract, including—

(i) the estimated cost to the Government (based on offers received) for performance of the function by a contractor;

(ii) the estimated cost to the Government for performance of the function by agency civilian employees; and

(iii) an estimate of all other costs and expenditures that the Government would incur because of the award of such a contract;

(F) requires continued performance of the function by agency civilian employees unless the difference in the cost of performance of the function by a contractor compared to the cost of performance of the function by agency civilian employees would, over all performance periods required by the solicitation, be equal to or exceed the lesser of—

(i) 10 percent of the personnel-related costs for performance of that function in the agency tender; or

(ii) \$10,000,000; and

(G) examines the effect of performance of the function by a contractor on the agency mission associated with the performance of the function.

(2) A function that is performed by the executive agency and is reengineered, reorganized, modernized, upgraded, expanded, or changed to become more efficient, but still essentially provides the same service, shall not be considered a new requirement.

(3) In no case may a function being performed by executive agency personnel be—

(A) modified, reorganized, divided, or in any way changed for the purpose of exempting the conversion of the function from the requirements of this section; or

(B) converted to performance by a contractor to circumvent a civilian personnel ceiling.

**(b) Requirement to consult employees**

(1) Each civilian employee of an executive agency responsible for determining under Office of Management and Budget Circular A-76 whether to convert to contractor performance any function of the executive agency—

(A) shall, at least monthly during the development and preparation of the performance work statement and the management efficiency study used in making that determination, consult with civilian employees who will be affected by that determination and consider the views of such employees on the development and preparation of that statement and that study; and

(B) may consult with such employees on other matters relating to that determination.

(2)(A) In the case of employees represented by a labor organization accorded exclusive recogni-