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EXECUTIVE ORDER NO. 10925

Ex. Ord. No. 10925, Mar. 6, 1961, 26 F.R. 1977, which related to nondiscrimination provisions in Government contracts and established the President's Committee on Equal Employment Opportunity, was revoked by section 403 of Ex. Ord. No. 11246, Sept. 24, 1965, 30 F.R. 12319, set out as a note under section 2000e of Title 42, The Public Health and Welfare.

§§ 1 to 4a. Repealed. Oct. 21, 1941, ch. 452, 55 Stat. 743

Section 1, R.S. § 512; act Feb. 4, 1929, ch. 146, §§ 1, 3, 45 Stat. 1147, establish a return office for filing returns of contracts made by Secretaries of War, Navy and Interior and appointed a clerk for this office.

Section 2, R.S. § 513, required clerk to file all returns.

Section 3, R.S. § 514, required clerk to keep an index book.

Section 4, R.S. § 515, required clerk to provide certified copies of any returns for an established fee.

Section 4a, act Feb. 4, 1929, ch. 146, §§ 1, 3, 45 Stat. 1147, transferred returns office to General Accounting Office and imposed duties relating thereto upon Comptroller General.

§ 5. Advertisements for proposals for purchases and contracts for supplies or services for Government departments; application to Government sales and contracts to sell and to Government corporations

Unless otherwise provided in the appropriation concerned or other law, purchases and contracts for supplies or services for the Government may be made or entered into only after advertising a sufficient time previously for proposals, except (1) when the amount involved in any one case does not exceed $25,000, (2) when the public exigencies require the immediate delivery of the articles or performance of the service, (3) when only one source of supply is available and the Government purchasing or contracting officer shall so certify, or (4) when the services are required to be performed by the contractor in person and are (A) of a technical and professional nature or (B) under Government supervision and paid for on a time basis. Except (1) as authorized by section 1638[1] of Appendix to title 50, (2) when otherwise authorized by law, or (3) when the reasonable value involved in any one case does not exceed $500, sales and contracts of sale by the Government shall be governed by the requirements of this section for advertising.

In the case of wholly owned Government corporations, this section shall apply to their administrative transactions only.

(R.S. § 3709; Aug. 2, 1946, ch. 744, § 9(a), (c), 60 Stat. 809; June 30, 1949, ch. 288, title VI, § 602(f), formerly title V, § 502(e), 63 Stat. 403; renumbered Sept. 5, 1950, ch. 849, §§ 6(a), (b), 8(c), 64 Stat. 583, and amended Pub. L. 85–800, § 7, Aug. 28, 1958, 72 Stat. 967; Pub. L. 93–356, § 1, July 25, 1974, 88 Stat. 390; Pub. L. 98–191, § 9(b), Dec. 1, 1983, 97 Stat. 1332.)

REFERENCES IN TEXT

Section 1638 of Appendix to title 50, referred to in text, was repealed by act June 30, 1949, ch. 288, title VI, § 602(a)(1), formerly title V, § 502(a)(1), 63 Stat. 399, eff. July 1, 1949, renumbered by act Sept. 5, 1950, ch. 849, § 6(a), (b), 64 Stat. 583.

CODIFICATION

R.S. § 3709 derived from act Mar. 2, 1861, ch. 84, § 10, 12 Stat. 220.

AMENDMENTS

1983—Pub. L. 98–191 substituted "$25,000" for "$10,000".

1974—Pub. L. 93–356 substituted "$10,000" for "$2,500".

1958—Pub. L. 85–800 substituted "$2,500" for "$500".

1949—Act June 30, 1949, substituted "$500" for "$100".

1946—Act Aug. 2, 1946, among other changes, inserted cls. (1), (3), and (4), and made section applicable to sales and contracts of sale by the Government, except in certain cases.

EFFECTIVE DATE OF 1949 AMENDMENT

Amendment by act June 30, 1949, 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.

EXEMPTION OF FUNCTIONS

Functions authorized by Foreign Assistance Act of 1961, as amended, as exempt, see Ex. Ord. No. 11223, May 12, 1965, 30 F.R. 6635, set out as a note under section 2393 of Title 22, Foreign Relations and Intercourse.

SECTION INAPPLICABLE TO ARMED SERVICES AND NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

Section inapplicable to procurement or sale of property or services by Armed Services and National Aeronautics and Space Administration, see section 2314 of Title 10, Armed Forces.

REPEAL OF EXEMPTIONS

Section 9(b) of act Aug. 2, 1946, provided: "Exemptions from section 3709, Revised Statutes [this section], in other law in amounts of $100 or less are hereby repealed."

§ 5a. Definitions

The word "department" as used in this Act shall be construed to include independent establishments, other agencies, wholly owned Government corporations (the transactions of which corporations shall be subject to the authorizations and limitations of this Act, except that section 5 of this title shall apply to their administrative transactions only), and the government of the District of Columbia, but shall not include the Senate, House of Representatives, or office of the Architect of the Capitol, or the officers or employees thereof. The words "continental United States" as used herein shall be construed to mean the forty-eight States and the District of Columbia. The word "Government" shall be construed to include the government of the District of Columbia. The word "appropriation" shall be construed as including funds made available by legislation under section 9104 of title 31.

(Aug. 2, 1946, ch. 744, § 18, 60 Stat. 811.)

REFERENCES IN TEXT

This Act, referred to in text, means act Aug. 2, 1946, ch. 744, 60 Stat. 806. For complete classification of this Act to the Code see Tables.

CODIFICATION

"Section 9104 of title 31" substituted in text for "section 104 of the Government Corporation Control Act,

[1] See References in Text note below.

approved December 6, 1945 [31 U.S.C. 849]'' on authority of Pub. L. 97–258, §4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

Section was formerly classified to section 73b–4 of title 5 prior to the general revision and reenactment of Title 5, Government Organization and Employees by Pub. L. 89–554, Sept. 6, 1966 80 Stat. 378.

§6. Repealed. Oct. 31, 1951, ch. 654, §1(98)–(105), 65 Stat. 705

Section, acts Oct. 10, 1940, ch. 851, §1, 54 Stat. 1109; June 28, 1941, ch. 258, titles II, III, IV, 55 Stat. 281, 289, 292, 302; June 8, 1942, ch. 396, 56 Stat. 347; July 2, 1942, ch. 472, titles II, III, IV, 56 Stat. 483, 500, 505; June 28, 1943, ch. 173, titles I, II, 57 Stat. 236, 243; June 26, 1944, ch. 277, titles I, II, 58 Stat. 351, 358; June 13, 1945, ch. 189, 59 Stat. 256; July 1, 1946, ch. 530, 60 Stat. 405; June 30, 1947, ch. 166, title II, §204, 61 Stat. 208; June 30, 1949, ch. 288, title I, §§103, 104(a), 63 Stat. 380, which excepted from provisions of section 5 of this title a number of specified Government departments and agencies, when purchases or services were not in excess of certain specified amounts up to $500.

Another provision of title III of act July 2, 1942, ch. 472, 56 Stat. 493, which also had been shown as one of the sources of this former section, made an exception with respect to purchases or services rendered for the Office of the Administrator of Civil Aeronautics, when the aggregate amount involved did not exceed $100. That provision was not repealed, but, if it did not expire with that act, which was an appropriation act, it was superseded by section 5 of this title, as amended.

A prior section 6, acts Feb. 27, 1893, ch. 168, 27 Stat. 485; Mar. 1, 1899, ch. 325, 30 Stat. 957; Mar. 2, 1911, ch. 192, 36 Stat. 975; May 18, 1916, ch. 125, 39 Stat. 126; Mar. 1, 1919, ch. 86, 40 Stat. 1262; May 29, 1920, ch. 214, 41 Stat. 677; June 12, 1922, ch. 218, 42 Stat. 638; Feb. 13, 1923, ch. 72, 42 Stat. 1244; Feb. 15, 1934, ch. 13, 48 Stat. 351, related to exceptions to the requirements of section 5 of this title, prior to repeal by act Oct. 10, 1940, ch. 851, §4, 54 Stat. 1111. See sections 5, 6a, and 6b of this title.

§6a. Advertisements for proposals for purchases and contracts for supplies or services for Government departments; limited to particular agencies under specified circumstances

Section 5 of this title shall not be construed to apply under any appropriation Act to the following departments and independent offices under the circumstances specified herein:

(a) American Battle Monuments Commission—to any leases in foreign countries for office or garage space.

(b) to (e) Repealed. Oct. 31, 1951, ch. 654, §1(107), 65 Stat. 705.

(f) The Bureau of Interparliamentary Union for Promotion of International Arbitration—to stenographic reporting services by contract if deemed necessary.

(g) Repealed. Oct. 31, 1951, ch. 654, §1(107), 65 Stat. 705.

(h) Department of State—when the purchase or service relates to the packing of personal and household effects of Diplomatic, Consular, and Foreign Service officers and clerks for foreign shipment.

(i) Repealed. Oct. 31, 1951, ch. 654, §1(107), 65 Stat. 705.

(j) The International Committee of Aerial Legal Experts—to stenographic and other service by contract as deemed necessary.

(June 12, 1917, ch. 27, 40 Stat. 144; May 13, 1926, ch. 294, 44 Stat. 547; Oct. 10, 1940, ch. 851, §2, 54 Stat. 1110; June 28, 1941, ch. 259, 55 Stat. 344; Oct. 31, 1951, ch. 654, §§1(106)–(108), 3(8), (9), 4(9), 65 Stat. 705, 708, 709; Pub. L. 85–75, July 1, 1957, 71 Stat. 251.)

CODIFICATION

Opening par., and subsecs. (a), (f), (h), and (j) of this section are from act Oct. 10, 1940, §2, opening par., and pars. (a), (f), and (j). Remainder of paragraphs of section 2 were repealed. See 1951 amendment note set out under this section.

Subsec. (*o*) of this section, which was from Act May 13, 1926, ch. 294, §1, 44 Stat. 547, made section 5 of this title inapplicable to the Architect of the Capitol in the purchase of supplies and equipment and procurement of services when the aggregate amount thereof did not exceed $1,000 in any instance and was omitted as superseded by section 6a–1 of this title.

Subsec. (p) of this section, which was from act June 12, 1917, ch. 27, §1, 40 Stat. 144, made section 5 of this title inapplicable to expenditures not exceeding $50 by the United States Geological Survey and was repealed by act Oct. 31, 1951, ch. 654, §1(106), 65 Stat. 705.

PRIOR PROVISIONS

A prior section 6a, acts Jan. 25, 1929, ch. 102, title IV, 45 Stat. 1136; Apr. 18, 1930, ch. 184, title IV, 46 Stat. 215; Feb. 23, 1931, ch. 280, title IV, 46 Stat. 1352; July 1, 1932, ch. 361, title IV, 47 Stat. 520; Mar. 1, 1933, ch. 144, title IV, 47 Stat. 1409; Apr. 7, 1934, ch. 104, title IV, 48 Stat. 568; Mar. 22, 1935, ch. 39, §1, 49 Stat. 102; May 15, 1936, ch. 405, 49 Stat. 1347; June 16, 1937, ch. 359, title IV, 50 Stat. 298; Apr. 27, 1938, ch. 180, title IV, 52 Stat. 285; June 29, 1939, ch. 249, 53 Stat. 921; June 26, 1940, ch. 428, title I, 54 Stat. 575, excepted Department of Labor from the provisions of section 5 of this title, prior to repeal by act Oct. 10, 1940, ch. 851, §4, 54 Stat. 1111.

AMENDMENTS

1957—Subsec. (*o*). Pub. L. 85–75 substituted ''$1,000'' for ''$500''.

1951—Subsec. (a). Act Oct. 31, 1951, §3(8), struck out ''to any purchases when the aggregate amount involved does not exceed $500, nor'' before ''to any leases''.

Subsec. (b). Act Oct. 31, 1951, §1(107), repealed subsec. (b) which related to Botanic Garden.

Subsec. (c). Act Oct. 31, 1951, §1(107), repealed subsec. (c) which also related to Botanic Garden.

Subsec. (d). Act Oct. 31, 1951, §1(107), repealed subsec. (d) which related to Bureau of the Budget.

Subsec. (e). Act Oct. 31, 1951, §1(107), repealed subsec. (e) which related to Bureau of Foreign and Domestic Commerce.

Subsec. (g). Act Oct. 31, 1951, §1(107), repealed subsec. (g) which related to Department of the Interior.

Subsec. (h). Act Oct. 31, 1951, §3(9), struck out ''to any purchase or service when the aggregate amount does not exceed $100, or with respect to articles, materials, or supplies for use outside the United States when the aggregate amount involved does not exceed $300; or'' before ''when the purchase''.

Subsec. (i). Act Oct. 31, 1951, §1(107), repealed subsec. (i) which related to Federal Communications Commission.

Subsec. (k). Act Oct. 31, 1951, §1(107), repealed subsec. (k) which related to Medical Department of the Army.

Subsec. (*l*). Act Oct. 31, 1951, §1(107), repealed subsec. (*l*) which related to Social Security Board.

Subsec. (m). Act Oct. 31, 1951, §1(107), repealed subsec. (m) which related to Bureau of Mines.

Subsec. (n). Act Oct. 31, 1951, §1(107), repealed subsec. (n) which related to Bureau of Reclamation.

Subsec. (*o*). Act Oct. 31, 1951, §4(9), increased the maximum from $200 to $500.

1941—Subsec. (m). Act June 28, 1941, reaffirmed provision respecting Bureau of Mines.

REPEALS

Section 1(108) of act Oct. 31, 1951, repealed the proviso in act June 28, 1941, cited as a credit to this section,

which excepted expenditures not exceeding $500 by the Bureau of Mines from section 5 of this title.

Section 1(106) of act Oct. 31, 1951, repealed the proviso in act June 12, 1917, cited as a credit to this section, which excepted expenditures not exceeding $50 by the United States Geological Survey from section 5 of this title.

Section 4(a) of act Oct. 10, 1940, provided for repeal of all prior laws, which are covered by that act and that any rights or liabilities existing under those repealed sections or parts of sections shall not be affected by their repeal.

LEASES FOR FOREIGN SERVICE OFFICES

Provisions contained in annual appropriation acts for the Department of State authorizing the Secretary of State to enter into leases for Foreign Service offices and grounds for periods not exceeding ten years without regard to section 5 of this title were made permanent, and are covered by section 2670 of Title 22, Foreign Relations and Intercourse.

BUREAU OF EMPLOYEES' COMPENSATION

Section 5 of this title not applicable to any purchase or service of the Bureau of Employees' Compensation outside continental United States when the aggregate amount involved does not exceed $500 under acts July 8, 1947, ch. 210, title II, 61 Stat. 264; June 14, 1948, ch. 465, title II, 62 Stat. 396; June 29, 1949, ch. 275, title II, 63 Stat. 284. This Bureau, with its functions, transferred from Federal Security Agency to Department of Labor by Reorg. Plan No. 19, of 1950, § 1, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1271, set out in the Appendix to Title 5, Government Organization and Employees.

GOVERNMENT-OWNED FURNITURE REMOVED TO WASHINGTON, D.C.

Act July 30, 1947, ch. 359, title I, 61 Stat. 594, provided in part: ''That removal to the seat of government of Government-owned or leased furniture, equipment, supplies, and other property and household goods and personal effects of employees, and costs of restoration of leased office space when required, may be accomplished without regard to section 3709 of the Revised Statutes [section 5 of this title]''.

SECTION INAPPLICABLE TO ARMED SERVICES AND NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

Section inapplicable to procurement or sale of property or services by Armed Services and National Aeronautics and Space Administration, see section 2314 of Title 10, Armed Forces.

§ 6a–1. Architect of the Capitol, exception from advertisement requirements

On and after July 27, 1965, the purchase of supplies and equipment and the procurement of services for all branches under the Architect of the Capitol may be made in the open market without compliance with section 5 of this title in the manner common among businessmen, when the aggregate amount of the purchase or the service does not exceed $25,000 in any instance.

(Pub. L. 89–90, July 27, 1965, 79 Stat. 276; Pub. L. 93–356, § 2, July 25, 1974, 88 Stat. 390; Pub. L. 98–191, § 9(c), Dec. 1, 1983, 97 Stat. 1332.)

PRIOR PROVISIONS

A prior section 6a–1, acts June 25, 1910, ch. 431, § 23, 36 Stat. 861; May 18, 1916, ch. 125, § 1, 39 Stat. 126; Jan. 12, 1927, ch. 27, 44 Stat. 936, related to purchase of Indian supplies, prior to repeal by act Oct. 10, 1940, ch. 851, § 4, 54 Stat. 1111.

AMENDMENTS

1983—Pub. L. 98–191 substituted ''$25,000'' for ''$10,000''.

1974—Pub. L. 93–356 substituted ''$10,000'' for ''$2,500''.

§ 6a–2. Architect of the Capitol, authority for personal services contracts with legal entities

Notwithstanding any other provision of law, the Architect of the Capitol is authorized to contract for personal services with any firm, partnership, corporation, association, or other legal entity in the same manner as he is authorized to contract for personal services with individuals under the provisions of section 5 of this title.

(Pub. L. 96–558, Dec. 19, 1980, 94 Stat. 3263.)

§ 6a–3. House of Representatives, exception from advertisement requirements

Section 5 of this title does not apply to purchases and contracts for supplies or services for any office of the House of Representatives in any fiscal year.

(Pub. L. 108–7, div. H, title I, § 104, Feb. 20, 2003, 117 Stat. 354.)

§ 6a–4. Director of the Congressional Budget Office, exception from advertisement requirements

(a) Exception

The Director of the Congressional Budget Office may enter into agreements or contracts without regard to section 5 of this title.

(b) Effective Date

This section shall apply to fiscal year 2003 and each fiscal year thereafter.

(Pub. L. 108–7, div. H, title I, § 1102, Feb. 20, 2003, 117 Stat. 370.)

§ 6b. Miscellaneous exceptions from advertisement requirements

(a) Control of insects, pests, and grass diseases

Materials and equipment for the control of incipient or emergency outbreaks of insects, pests, or grass diseases, including grasshoppers, Mormon crickets, and chinch bugs, may be procured with any sums appropriated to carry out the provisions of sections 148 to 148e[1] of title 7 without regard to the provisions of section 5 of this title, and the transportation thereof may be under such conditions and means as shall be determined by the Secretary of Agriculture to be most advantageous.

(b) Omitted

(c) Operations on Menominee Indian Reservation

All contracts for labor or supplies necessary for the carrying on of operations on the Menominee Indian Reservation pursuant to the Act of March 28, 1908 (35 Stat. 51), as amended, shall be exempt from the requirements of section 5 of this title.

(d) Sale of Indian produced forest products

The lumber and other forest products produced by Indian enterprises from the forests on Indian reservations may be sold under such regulations as the Secretary of the Interior may

[1] See References in Text note below.

prescribe, without compliance with section 5 of this title.

(June 24, 1940, ch. 412, 54 Stat. 504; Oct. 10, 1940, ch. 851, § 3, 54 Stat. 1111.)

REFERENCES IN TEXT

Sections 148 to 148e of title 7, referred to in subsec. (a), were repealed. Sections 148, 148a, and 148c to 148e were repealed by Pub. L. 106–224, title IV, § 438(a)(6), June 20, 2000, 114 Stat. 454, and section 148b was repealed by Act Oct. 10, 1940, ch. 851, § 4, 54 Stat. 1111.

Act of March 28, 1908 (35 Stat. 51), referred to in subsec. (c), probably means act Mar. 28, 1908, ch. 111, 35 Stat. 51, which is not classified to the Code.

CODIFICATION

Subsecs. (a) to (c) are from act Oct. 10, 1940. Subsec. (b), which related to obligations of Civilian Conservation Corps, was omitted because the Corps was liquidated June 30, 1944.

Subsec. (d) is from act June 24, 1940, which was formerly classified to section 6mm of this title.

Subsec. (e), which related to the employment of experts or consultants in the Canal Zone, was from the General Government Matters Appropriation Act, 1962, Pub. L. 87–125, title III, § 301, Aug. 3, 1961, 75 Stat. 279, and was omitted as not repeated in subsequent appropriation acts. Provisions similar to former subsec. (e) were contained in the following prior appropriation acts:

May 13, 1960, Pub. L. 86–451, title II, § 201, 74 Stat. 101.
July 13, 1959, Pub. L. 86–88, title II, § 201, 73 Stat. 208.
June 25, 1958, Pub. L. 85–469, title II, § 203, 72 Stat. 236.
June 13, 1957, Pub. L. 85–52, title II, § 203, 71 Stat. 79, as amended Mar. 28, 1958, Pub. L. 85–352, ch. II, § 201, 72 Stat. 52.
June 20, 1956, ch. 415, title II, § 203, 70 Stat. 324.
June 30, 1955, ch. 253, title II, § 203, 69 Stat. 236.
June 30, 1954, ch. 425, § 104, 68 Stat. 335.
July 27, 1953, ch. 245, § 104, 67 Stat. 202.
July 11, 1952, ch. 669, § 104, 66 Stat. 584.
Oct. 24, 1951, ch. 556, § 104, 65 Stat. 622.
Sept. 6, 1950, ch. 896, Ch. IX, § 103, 64 Stat. 730.
Oct. 13, 1949, ch. 688, § 4, 63 Stat. 852.
June 25, 1948, ch. 655, § 4, 62 Stat. 1026.
July 31, 1947, ch. 411, § 4, 61 Stat. 694.
May 2, 1946, ch. 247, § 4, 60 Stat. 167.
Mar. 31, 1945, ch. 45, § 4, 59 Stat. 45.
June 26, 1944, ch. 275, § 4, 58 Stat. 333.
June 2, 1943, ch. 115, § 4, 57 Stat. 99.
Apr. 28, 1942, ch. 246, § 5, 56 Stat. 225.
June 24, 1940, ch. 412, 54 Stat. 504.

PRIOR PROVISIONS

A prior section 6b, acts Feb. 23, 1931, ch. 281, 46 Stat. 1363; June 30, 1932, ch. 330, 47 Stat. 460; June 16, 1933, ch. 101, 48 Stat. 292; Mar. 28, 1934, ch. 102, title I, 48 Stat. 514; Feb. 2, 1935, ch. 3, 49 Stat. 11; Mar. 19, 1936, ch. 156, 49 Stat. 1173; June 28, 1937, ch. 396, 50 Stat. 336; May 23, 1938, ch. 259, 52 Stat. 418; Mar. 16, 1939, ch. 11, 53 Stat. 532; Apr. 18, 1940, ch. 107, 54 Stat. 131, excepted General Accounting Office from provisions of section 5 of this title, prior to repeal by act Oct. 10, 1940, ch. 851, § 4, 54 Stat. 1111.

TRANSFER OF FUNCTIONS

Functions of all officers, agencies and employees of Department of Agriculture transferred, with certain exceptions, to Secretary of Agriculture by Reorg. Plan No. 2 of 1953, § 1, eff. June 4, 1953, 18 F.R. 3219, 67 Stat. 633, set out in the Appendix to Title 5, Government Organization and Employees.

§§ 6c to 6jj. Repealed. Oct. 10, 1940, ch. 851, § 4, 54 Stat. 1111

Section 6c, acts June 22, 1936, ch. 689, 49 Stat. 1604; June 28, 1937, ch. 396, 50 Stat. 341; May 23, 1938, ch. 259, 52 Stat. 424; Mar. 16, 1939, ch. 11, 53 Stat. 539; June 25, 1940, ch. 421, 54 Stat. 566, excepted Rural Electrification Administration from provisions of section 5 of this title when aggregate amount involved did not exceed $100.

Section 6d, acts June 22, 1936, ch. 689, 49 Stat. 1605; June 28, 1937, ch. 396, 50 Stat. 344; May 23, 1938, ch. 259, 52 Stat. 426; Mar. 16, 1939, ch. 11, 53 Stat. 540, excepted Social Security Board from provisions of section 5 of this title when aggregate amount involved did not exceed $100.

Section 6e, acts May 14, 1937, ch. 180, title I, 50 Stat. 139; Mar. 28, 1938, ch. 55, 52 Stat. 123; May 6, 1939, ch. 115, title I, 53 Stat. 656; Mar. 25, 1940, ch. 71, title I, 54 Stat. 56, excepted Treasury Department from provisions of section 5 of this title when aggregate amount involved did not exceed $50.

Section 6f, acts June 16, 1937, ch. 359, title I, 50 Stat. 273; Apr. 27, 1938, ch. 180, title I, 52 Stat. 258; June 29, 1939, ch. 248, title I, 53 Stat. 896; May 14, 1940, ch. 189, title I, 54 Stat. 192, excepted Department of State from provisions of section 5 of this title when aggregate amount involved did not exceed certain specified amounts.

Section 6g, acts June 16, 1937, ch. 359, title II, 50 Stat. 275; Apr. 27, 1938, ch. 180, title II, 52 Stat. 260; June 29, 1939, ch. 248, title II, 53 Stat. 898; May 14, 1940, ch. 189, title III, 54 Stat. 201, 202, excepted Federal Bureau of Investigation from provisions of section 5 of this title when aggregate amount did not exceed $50.

Section 6h, acts June 16, 1937, ch. 359, title III, 50 Stat. 285; Apr. 27, 1938, ch. 180, title III, 52 Stat. 272, excepted Bureau of Air Commerce from provisions of section 5 of this title when aggregate amount involved did not exceed $100.

Section 6i, acts June 28, 1937, ch. 396, 50 Stat. 335; May 23, 1938, ch. 259, 52 Stat. 417; Mar. 16, 1939, ch. 11, 53 Stat. 532; Apr. 18, 1940, ch. 107, 54 Stat. 124, excepted Federal Trade Commission from provisions of section 5 of this title when aggregate amount involved did not exceed $50.

Section 6j, acts June 28, 1937, ch. 396, 50 Stat. 338; May 23, 1938, ch. 259, 52 Stat. 420; Mar. 16, 1939, ch. 11, 53 Stat. 534; Apr. 18, 1940, ch. 107, 54 Stat. 133, excepted Interstate Commerce Commission from provisions of section 5 of this title when aggregate amount involved did not exceed $50.

Section 6k, acts June 28, 1937, ch. 396, 50 Stat. 339; May 23, 1938, ch. 259, 52 Stat. 421; Mar. 16, 1939, ch. 11, 53 Stat. 536; Apr. 18, 1940, ch. 107, 54 Stat. 135, excepted National Archives from provisions of section 5 of this title when aggregate amount did not exceed $50.

Section 6*l*, acts June 28, 1937, ch. 396, 50 Stat. 339; May 23, 1938, ch. 259, 52 Stat. 422; Mar. 16, 1939, ch. 11, 53 Stat. 537; June 26, 1940, ch. 428, title IV, 54 Stat. 595, excepted National Labor Relations Board from provisions of section 5 of this title when aggregate amount involved did not exceed $50.

Section 6m, acts June 28, 1937, ch. 396, 50 Stat. 341; May 23, 1938, ch. 259, 52 Stat. 423; Mar. 16, 1939, ch. 11, 53 Stat. 538; June 26, 1940, ch. 428, title VI, 54 Stat. 596, excepted Railroad Retirement Board from provisions of section 5 of this title when aggregate amount involved did not exceed $50.

Section 6n, acts June 28, 1937, ch. 396, 50 Stat. 342; May 23, 1938, ch. 259, 52 Stat. 425; Mar. 16, 1939, ch. 11, 53 Stat. 539; Apr. 18, 1940, ch. 107, 54 Stat. 136, excepted Securities and Exchange Commission from provisions of section 5 of this title when aggregate amount involved did not exceed $50.

Section 6*o*, act Apr. 6, 1937, ch. 69, § 3, as added May 9, 1938, ch. 192, 52 Stat. 344, excepted control of insects and plant diseases from provisions of section 5 of this title.

Section 6p, act May 23, 1938, ch. 259, 52 Stat. 417, Mar. 16, 1939, ch. 11, 53 Stat. 531; Apr. 18, 1940, ch. 107, 54 Stat. 124, excepted Federal Power Commission from provisions of section 5 of this title when aggregate amount involved did not exceed $50.

Section 6q, acts June 25, 1938, ch. 681, title I, 52 Stat. 1117; Mar. 16, 1939, ch. 11, 53 Stat. 535; Apr. 18, 1940, ch.

107, 54 Stat. 134, excepted Maritime Labor Board from provisions of section 5 of this title when aggregate amount involved did not exceed $100.

Section 6r, acts Mar. 16, 1939, ch. 11, 53 Stat. 527; Apr. 18, 1940, ch. 107, 54 Stat. 116, excepted Civil Aeronautics Authority from provisions of section 5 of this title when aggregate amount involved did not exceed $100.

Section 6s, acts Aug. 7, 1935, ch. 455, 49 Stat. 540; Feb. 11, 1936, ch. 49, 49 Stat. 1123; May 15, 1936, ch. 405, 49 Stat. 1316; June 16, 1937, ch. 359, 50 Stat. 267; Apr. 27, 1938, ch. 180, 52 Stat. 254; June 29, 1939, ch. 248, title I, 53 Stat. 892; May 14, 1940, ch. 189, title I, 54 Stat. 188, excepted International Technical Committee of Aerial Legal Experts from provisions of section 5 of this title.

Section 6t, acts May 15, 1936, ch. 405, 49 Stat. 1315; June 16, 1937, ch. 359, 50 Stat. 267; Apr. 27, 1938, ch. 180, 52 Stat. 253; June 29, 1939, ch. 248, title I, 53 Stat. 891, excepted Bureau of Interparliamentary Union for Promotion of International Arbitration from provisions of section 5 of this title.

Section 6u, acts Feb. 20, 1929, ch. 270, 45 Stat. 1243; Apr. 19, 1930, ch. 201, 46 Stat. 243; Feb. 23, 1931, ch. 281, 46 Stat. 1370; Feb. 2, 1935, ch. 3, 49 Stat. 16; Mar. 19, 1936, ch. 156, 49 Stat. 1180; June 28, 1937, ch. 396, 50 Stat. 345; May 23, 1938, ch. 259, 52 Stat. 427; Mar. 16, 1939, ch. 11, 53 Stat. 542; Apr. 18, 1940, ch. 107, 54 Stat. 137, excepted Tariff Commission (now International Trade Commission) from provisions of section 5 of this title when aggregate amount involved did not exceed $50.

Section 6v, acts June 28, 1937, ch. 396, 50 Stat. 331; May 23, 1938, ch. 259, 52 Stat. 412; Mar. 16, 1939, ch. 11, 53 Stat. 525; Apr. 18, 1940, ch. 107, 54 Stat. 113, excepted American Battle Monuments Commission from provisions of section 5 of this title when aggregate amount involved did not exceed $500.

Section 6v–1, act Apr. 18, 1940, ch. 107, 54 Stat. 113, excepted American Battle Monuments Commission, when entering into leases in foreign countries, from provisions of section 5 of this title.

Section 6w, acts June 16, 1938, ch. 464, 52 Stat. 750; June 30, 1939, ch. 253, title II, 53 Stat. 978; June 25, 1940, ch. 421, 54 Stat. 568, excepted Farm Credit Administration from provisions of section 5 of this title when aggregate amount did not exceed $50.

Section 6x, act Aug. 25, 1937, ch. 757, title I, 50 Stat. 759, excepted United States Maritime Commission from provisions of section 5 of this title when aggregate amount did not exceed $100.

Section 6y, acts Aug. 9, 1939, ch. 633, title I, 53 Stat. 1318; June 18, 1940, ch. 395, 54 Stat. 443, excepted Bureau of Mines from provisions of section 5 of this title when aggregate amount did not exceed $500.

Section 6z, act Apr. 18, 1940, ch. 107, 54 Stat. 112, excepted Bureau of the Budget (now Office of Management and Budget) from provisions of section 5 of this title when aggregate amounts involved did not exceed certain specified sums.

Section 6aa, act Apr. 18, 1940, ch. 107, 54 Stat. 118, excepted Federal Communications Commission from provisions of section 5 of this title when aggregate amount did not exceed $50.

Section 6bb, act Apr. 18, 1940, ch. 107, 54 Stat. 119, excepted Federal Loan Agency from provisions of section 5 of this title when aggregate amounts involved did not exceed certain specified sums.

Section 6cc, act Apr. 18, 1940, ch. 107, 54 Stat. 120, excepted Federal Home Loan Bank from provisions of section 5 of this title when aggregate amounts involved did not exceed certain specified sums.

Section 6dd, act Apr. 18, 1940, ch. 107, 54 Stat. 131, excepted General Accounting Office from provisions of section 5 of this title when aggregate amount involved did not exceed $50.

Section 6ee, acts Feb. 11, 1927, ch. 104, 44 Stat. 1081; Apr. 18, 1940, ch. 107, 54 Stat. 137, excepted Tariff Commission (now International Trade Commission) from provisions of section 5 of this title when aggregate amount involved did not exceed $50.

Section 6ff, act May 14, 1940, ch. 189, title I, 54 Stat. 189, excepted International Boundary Commission, United States and Mexico, from provisions of section 5 of this title when aggregate amount involved did not exceed $500.

Section 6gg, act May 14, 1940, ch. 189, title IV, 54 Stat. 211, excepted Administrative Office of United States Courts from provisions of section 5 of this title when aggregate amount involved did not exceed $50.

Section 6hh, act June 11, 1940, ch. 313, title I, 54 Stat. 290, excepted Navy Department from provisions of section 5 of this title when aggregate amount involved did not exceed $50.

Section 6ii, acts Jan. 25, 1929, ch. 102, title III, 45 Stat. 1119; Apr. 18, 1930, ch. 184, title III, 46 Stat. 198; Feb. 23, 1931, ch. 280, title III, 46 Stat. 1334; July 1, 1932, ch. 361, title III, 47 Stat. 502; Mar. 1, 1933, ch. 144, title III, 47 Stat. 1393; Apr. 7, 1934, ch. 104, title III, 48 Stat. 551; Mar. 22, 1935, ch. 39, 49 Stat. 90; May 15, 1936, ch. 405, 49 Stat. 1336; June 16, 1937, ch. 359, title III, 50 Stat. 287; Apr. 27, 1938, ch. 180, title III, 52 Stat. 273; June 29, 1939, ch. 248, title III, 53 Stat. 909, excepted Bureau of Foreign and Domestic Commerce from provisions of section 5 of this title when aggregate amount involved did not exceed $100.

Section 6jj, acts May 13, 1926, ch. 294, 44 Stat. 548; Feb. 23, 1927, ch. 168, 44 Stat. 1157; May 14, 1928, ch. 551, 45 Stat. 528; Feb. 28, 1929, ch. 367, 45 Stat. 1397; June 6, 1930, ch. 407, 46 Stat. 516; Feb. 20, 1931, ch. 234, 46 Stat. 1186; June 30, 1932, ch. 314, 47 Stat. 393; Feb. 28, 1933, ch. 134, 47 Stat. 1362; May 30, 1934, ch. 372, 48 Stat. 828; July 8, 1935, ch. 374, 49 Stat. 471; Apr. 17, 1936, ch. 233, 49 Stat. 1226; May 18, 1937, ch. 223, 50 Stat. 181; May 17, 1938, ch. 236, 52 Stat. 392; June 16, 1939, ch. 208, 53 Stat. 834; June 18, 1940, ch. 396, 54 Stat. 474, excepted Botanic Garden, in purchase of trees and plants, from provisions of section 5 of this title when aggregate amount involved did not exceed $300.

§ 6kk. Omitted

CODIFICATION

Section, acts Apr. 17, 1936, ch. 233, 49 Stat. 1226; May 18, 1937, ch. 223, 50 Stat. 181; May 17, 1938, ch. 236, 52 Stat. 393; June 16, 1939, ch. 208, 53 Stat. 834; June 18, 1940, ch. 396, 54 Stat. 474, which excepted Botanic Garden, in purchase of supplies and equipment, from provisions of section 5 of this title when aggregate amount did not exceed $50, was superseded by subsection (b) of section 6a of this title which was itself repealed by act Oct. 31, 1951, ch. 654, § 1(107), 65 Stat. 705.

§ 6*ll*. Repealed. Oct. 10, 1940, ch. 851, § 4, 54 Stat. 1111

Section, act Apr. 22, 1926, ch. 171, 44 Stat. 314, excepted National Advisory Committee for Aeronautics from provisions of section 5 of this title when aggregate amount involved did not exceed $50.

§ 6mm. Transferred

CODIFICATION

Section, act June 24, 1940, ch. 412, 54 Stat. 504, which excepted forest products by Indian enterprises from the forests on Indian reservations, was transferred to subsec. (d) of section 6b of this title.

§§ 7 to 7d. Repealed. June 30, 1949, ch. 288, title VI, § 602(a)(29)–(31), formerly title V, § 502(a)(29)–(31), 63 Stat. 401; renumbered Sept. 5, 1950, ch. 849, § 6(a), (b), 64 Stat. 583

Section 7, act June 17, 1910, ch. 297, § 4, 36 Stat. 531; Ex. Ord. No. 6166, § 1, eff. June 10, 1933, as amended by Ex. Ord. No. 6623, eff. Mar. 1, 1934, related to advertisements and contracts for miscellaneous supplies for executive departments and other government establishments in Washington; Procurement Division in Department of Treasury; bond of contractor; and purchase or drawing of supplies.

Section 7a, act Feb. 27, 1929, ch. 354, § 1, 45 Stat. 1341; Ex. Ord. No. 6166, § 1, eff. June 10, 1933, as amended by Ex. Ord. No. 6623, eff. Mar. 1, 1934, related to consolidation and coordination of government purchases.

Section 7b, act Feb. 27, 1929, ch. 354, § 2, 45 Stat. 1342; Ex. Ord. No. 6166, § 1, June 10, 1933, as amended by Ex. Ord. No. 6623, Mar. 1, 1934, provided for requisition of supplies and reimbursement.

Section 7c, act Feb. 27, 1929, ch. 354, § 3, 45 Stat. 1342; Ex. Ord. No. 6166, § 1, eff. June 10, 1933, as amended by Ex. Ord. No. 6623, eff. Mar. 1, 1934, provided for a general supply fund and reports and audits.

Section 7c–1, act May 14, 1935, ch. 110, 49 Stat. 234; Ex. Ord. No. 6166, § 1, eff. June 10, 1933, as amended by Ex. Ord. No. 6623, eff. Mar. 1, 1934, related to expenditures incidental to operation of government fuel yards.

Section 7d, act Feb. 27, 1929, ch. 354, § 4, 45 Stat. 1342, related to Secretary of Treasury's authority to prescribe regulations.

EFFECTIVE DATE OF REPEAL

Repeal effective July 1, 1949, see section 605 of act June 30, 1949.

§ 8. Opening bids

Whenever proposals for supplies have been solicited, the parties responding to such solicitation shall be duly notified of the time and place of opening the bids, and be permitted to be present either in person or by attorney, and a record of each bid shall then and there be made.

(R.S. § 3710.)

CODIFICATION

R.S. § 3710 derived from Res. Jan. 31, 1868, No. 8, 15 Stat. 246.

EXEMPTION OF FUNCTIONS

Functions authorized by Foreign Assistance Act of 1961, as amended, as exempt, see Ex. Ord. No. 11223, eff. May 12, 1965, 30 F.R. 6635, set out as a note under section 2393 of Title 22, Foreign Relations and Intercourse.

§ 9. Repealed. Feb. 19, 1948, ch. 65, § 11(a), 62 Stat. 25

Section, R.S. § 3717, related to separate proposals for works or material or labor. See sections 2303 to 2305 of Title 10, Armed Forces.

EFFECTIVE DATE OF REPEAL

Repeal effective 90 days after Feb. 19, 1948, see section 13 of act Feb. 19, 1948.

§ 10. Omitted

CODIFICATION

Section, act Mar. 3, 1875, ch. 133, § 2, 18 Stat. 455, related to preferential treatment of American material in contracts for public improvements, was superseded. See sections 10a to 10d of this title.

§ 10a. American materials required for public use

(a) In general

Notwithstanding any other provision of law, and unless the head of the department or independent establishment concerned shall determine it to be inconsistent with the public interest, or the cost to be unreasonable, only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, shall be acquired for public use. This section shall not apply with respect to articles, materials, or supplies for use outside the United States, or if articles, materials, or supplies of the class or kind to be used or the articles, materials, or supplies from which they are manufactured are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality. This section shall not apply to manufactured articles, materials, or supplies procured under any contract the award value of which is less than or equal to the micro-purchase threshold under section 428 of this title.

(b) Reports

(1) In general

Not later than 180 days after the end of each of fiscal years 2007 through 2011, the head of each Federal agency shall submit to the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Oversight and Government Reform of the House of Representatives a report on the amount of the acquisitions made by the agency in that fiscal year of articles, materials, or supplies purchased from entities that manufacture the articles, materials, or supplies outside of the United States.

(2) Contents of report

The report required by paragraph (1) shall separately include, for the fiscal year covered by such report—

(A) the dollar value of any articles, materials, or supplies that were manufactured outside the United States;

(B) an itemized list of all waivers granted with respect to such articles, materials, or supplies under this Act, and a citation to the treaty, international agreement, or other law under which each waiver was granted;

(C) if any articles, materials, or supplies were acquired from entities that manufacture articles, materials, or supplies outside the United States, the specific exception under this section that was used to purchase such articles, materials, or supplies; and

(D) a summary of—

(i) the total procurement funds expended on articles, materials, and supplies manufactured inside the United States; and

(ii) the total procurement funds expended on articles, materials, and supplies manufactured outside the United States.

(3) Public availability

The head of each Federal agency submitting a report under paragraph (1) shall make the report publicly available to the maximum extent practicable.

(4) Exception for intelligence community

This subsection shall not apply to acquisitions made by an agency, or component thereof, that is an element of the intelligence community as specified in, or designated under, section 401a(4) of title 50.

(Mar. 3, 1933, ch. 212, title III, § 2, 47 Stat. 1520; Pub. L. 100–418, title VII, § 7005(b), Aug. 23, 1988,

102 Stat. 1553; Pub. L. 103–355, title IV, § 4301(b), Oct. 13, 1994, 108 Stat. 3347; Pub. L. 110–28, title VIII, § 8306, May 25, 2007, 121 Stat. 211.)

REFERENCES IN TEXT

This Act, referred to in subsec. (b)(2)(B), probably should be ''this title'', meaning title III of act Mar. 3, 1933, ch. 212, 47 Stat. 1520, known as the Buy American Act, which is classified generally to sections 10a, 10b, and 10c of this title. For complete classification of title III to the Code, see Short Title note below and Tables.

AMENDMENTS

2007—Pub. L. 110–28 designated existing provisions as subsec. (a), inserted heading, and added subsec. (b).

1994—Pub. L. 103–355 inserted at end ''This section shall not apply to manufactured articles, materials, or supplies procured under any contract the award value of which is less than or equal to the micro-purchase threshold under section 428 of this title.''

1988—Pub. L. 100–418, §§ 7004, 7005(b), temporarily substituted ''Federal agency'' for ''department or independent establishment''. See Effective and Termination Dates of 1988 Amendment note below.

EFFECTIVE DATE OF 1994 AMENDMENT

Section 4301(c) of Pub. L. 103–355 provided that: ''Notwithstanding any other provision of law—

''(1) section 32 of the Office of Federal Procurement Policy Act [41 U.S.C. 428], as added by subsection (a); and

''(2) the amendment made by subsection (b) [amending this section];

shall take effect on the date of the enactment of this Act [Oct. 13, 1994] and shall be implemented in the Federal Acquisition Regulation not later than 60 days after such date of enactment.''

EFFECTIVE AND TERMINATION DATES OF 1988 AMENDMENT

Section 7004 of title VII of Pub. L. 100–418 provided that: ''The amendments made by this title [see Short Title of 1988 Amendment note below] shall cease to be effective on April 30, 1996, unless the Congress, after reviewing the report required by section 305(k) of the Trade Agreements Act of 1979 [former 19 U.S.C. 2515(k)], and other relevant information, extends such date. After such date, the President may modify or terminate any or all actions taken pursuant to such amendments.''

Section 7005(f) of title VII of Pub. L. 100–418 provided that: ''The amendments made by this section [amending sections 10a, 10b, 10c, and 10d of this title and section 2511 of Title 19, Customs Duties] shall take effect upon enactment [Aug. 23, 1988].''

SHORT TITLE OF 1988 AMENDMENT

Section 7001 of title VII of Pub. L. 100–418 provided that: ''This title [enacting section 10b–1 of this title, amending this section, sections 10b, 10c, and 10d of this title, and sections 2511 and 2515 of Title 19, Customs Duties, enacting provisions set out as notes under section 10a of this title, and amending provisions set out as notes under section 10c of this title] may be cited as the 'Buy American Act of 1988'.''

SHORT TITLE

Section 7, formerly section 5, of title III of act Mar. 3, 1933, as added by Pub. L. 103–355, title X, § 10005(f)(4), Oct. 13, 1994, 108 Stat. 3409, and renumbered and amended by Pub. L. 104–106, div. D, title XLIII, § 4321(a)(11), Feb. 10, 1996, 110 Stat. 671, provided that: ''This title [enacting this section, sections 10b and 10c of this title, and provisions set out as notes under section 10c of this title] may be cited as the 'Buy American Act'.''

IMPLEMENTATION OF BUY AMERICAN ACT WITH RESPECT TO CERTAIN WATER RESOURCE PROJECTS

Pub. L. 100–371, title V, § 508, July 19, 1988, 102 Stat. 875, provided that:

''(a) GENERAL RULE.—For purposes of title III of the Act of March 3, 1933 (47 Stat. 1520; 41 U.S.C. 10a–10c) [41 U.S.C. 10a, 10b, 10b–1, 10c], commonly known as the Buy American Act, a cofferdam or any other temporary structure to be constructed by the Secretary of the Army, acting through the Chief of Engineers, shall be treated in the same manner as a permanent dam constructed by the Secretary of the Army.

''(b) APPLICABILITY.—Subsection (a) shall only apply to contracts entered into after the date of the enactment of this Act [July 19, 1988].''

EXEMPTION OF FUNCTIONS

Functions authorized by Foreign Assistance Act of 1961, as amended, as exempt, see Ex. Ord. No. 11223, eff. May 12, 1965, 30 F.R. 6635, set out as a note under section 2393 of Title 22, Foreign Relations and Intercourse.

APPLICABILITY OF BUY AMERICAN ACT WITH RESPECT TO EUROPEAN COMMUNITY

For applicability of Buy American Act to procurements covered by agreement with the European Community on government procurement, see Ex. Ord. No. 12849, May 25, 1993, 58 F.R. 30931, set out as a note under section 2511 of Title 19, Customs Duties.

§ 10b. Contracts for public works; specification for use of American materials; blacklisting contractors violating requirements

(a) Every contract for the construction, alteration, or repair of any public building or public work in the United States growing out of an appropriation heretofore made or hereafter to be made shall contain a provision that in the performance of the work the contractor, subcontractors, material men, or suppliers, shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States except as provided in section 10a of this title: *Provided, however*, That if the head of the department or independent establishment making the contract shall find that in respect to some particular articles, materials, or supplies it is impracticable to make such requirement or that it would unreasonably increase the cost, an exception shall be noted in the specifications as to that particular article, material, or supply, and a public record made of the findings which justified the exception.

(b) If the head of a department, bureau, agency, or independent establishment which has made any contract containing the provision required by subsection (a) of this section finds that in the performance of such contract there has been a failure to comply with such provisions, he shall make public his findings, including therein the name of the contractor obligated under such contract, and no other contract for the construction, alteration, or repair of any public building or public work in the United States or elsewhere shall be awarded to such contractor, subcontractors, material men, or suppliers with which such contractor is associated or affiliated, within a period of three years after such findings is made public.

(Mar. 3, 1933, ch. 212, title III, § 3, 47 Stat. 1520; Pub. L. 100–418, title VII, § 7005(c), Aug. 23, 1988, 102 Stat. 1553.)

AMENDMENTS

1988—Subsec. (a). Pub. L. 100–418, §§7004, 7005(c)(1), which directed that this section be temporarily amended by substituting ''Federal agency'' for ''department or independent establishment'', was executed to subsec. (a) as the probable intent of Congress. See Termination Date of 1988 Amendment note below.

Subsec. (b). Pub. L. 100–418, §§7004, 7005(c)(2), temporarily substituted ''Federal agency'' for ''department, bureau, agency, or independent establishment''. See Termination Date of 1988 Amendment note below.

TERMINATION DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100–418 to cease to be effective on Apr. 30, 1996, unless Congress, after reviewing report required by former section 2515(k) of Title 19, Customs Duties, extends such date, see section 7004 of Pub. L. 100–418, set out as an Effective and Termination Dates of 1988 Amendment note under section 10a of this title.

PROHIBITION ON USE OF FUNDS FOR CONSTRUCTION CONTRACTS WITH CONTRACTORS OF FOREIGN COUNTRIES WHICH DENY UNITED STATES CONTRACTORS FAIR OPPORTUNITIES IN CONSTRUCTION PROJECTS OF THAT COUNTRY'S GOVERNMENT

Provisions prohibiting the obligation or expenditure of funds to enter into any contract for construction, alteration, or repair of any public building or public work in the United States or any territory or possession of the United States with any contractor or subcontractor of a foreign country, or any supplier of products of a foreign country, during any period in which such foreign country denies fair and equitable market opportunities for products and services of the United States in procurement or bidding for construction projects that cost more than $500,000 and are funded in whole or in part by the government of such foreign country or by an entity controlled directly or indirectly by such foreign country were contained in the following appropriation acts:

Pub. L. 101–516, title III, §340, Nov. 5, 1990, 104 Stat. 2187.

Pub. L. 101–514, title V, §511, Nov. 5, 1990, 104 Stat. 2098.

Pub. L. 100–202, §109, Dec. 22, 1987, 101 Stat. 1329–434; Pub. L. 105–362, title XIV, §1401(d), Nov. 10, 1998, 112 Stat. 3294.

§ 10b–1. Omitted

CODIFICATION

Section, act Mar. 3, 1933, ch. 212, title III, §4, as added Aug. 23, 1988, Pub. L. 100–418, title VII, §7002(2), 102 Stat. 1545; amended Oct. 13, 1994, Pub. L. 103–355, title VII, §7206(a), 108 Stat. 3382, which related to prohibition on procurement contracts, was omitted in view of section 7004 of Pub. L. 100–418 which provided that the amendment by Pub. L. 100–418 enacting this section ceased to be effective on Apr. 30, 1996. See section 7004 of Pub. L. 100–418, set out as an Effective and Termination Dates of 1988 Amendment note under section 10a of this title.

Another prior section 4 of act Mar. 3, 1933, was temporarily renumbered section 5 and is set out as a note under section 10c of this title.

§ 10b–2. Limitation on authority to waive Buy American Act requirement

(a) Buy American Act waiver rescissions

(1) If the Secretary of Defense, after consultation with the United States Trade Representative, determines that a foreign country which is party to an agreement described in paragraph (2) has violated the terms of the agreement by discriminating against certain types of products produced in the United States that are covered by the agreement, the Secretary of Defense shall rescind the Secretary's blanket waiver of the Buy American Act with respect to such types of products produced in that foreign country.

(2) An agreement referred to in paragraph (1) is any reciprocal defense procurement memorandum of understanding between the United States and a foreign country pursuant to which the Secretary of Defense has prospectively waived the Buy American Act for certain products in that country.

(b) Definition

For purposes of this section, the term ''Buy American Act'' means title III of the Act entitled ''An Act making appropriations for the Treasury and Post Office Departments for the fiscal year ending June 30, 1934, and for other purposes'', approved March 3, 1933 (41 U.S.C. 10a et seq.).

(Pub. L. 103–160, div. A, title VIII, §849(c), (d), Nov. 30, 1993, 107 Stat. 1725.)

REFERENCES IN TEXT

The Buy American Act, referred to in text, is title III of act Mar. 3, 1933, ch. 212, 47 Stat. 1520, as amended, which enacted sections 10a, 10b, and 10c of this title, and enacted provisions set out as notes under section 10c of this title. For complete classification of this Act to the Code, see Short Title note set out under section 10a of this title and Tables.

CODIFICATION

Subsecs. (a) and (b) were in the original subsecs. (c) and (d), respectively, and were editorially redesignated for purposes of codification.

Pub. L. 103–160, §849(c), (d), which comprises this section, was formerly set out as a note under this section.

SIMILAR PROVISIONS

Provisions similar to those in this section and section 10b–3 of this title were contained in the following acts:

Pub. L. 111–118, div. A, title VIII, §8030, Dec. 19, 2009, 123 Stat. 3435.

Pub. L. 110–329, div. C, title VIII, §8030, Sept. 30, 2008, 122 Stat. 3627.

Pub. L. 110–116, div. A, title VIII, §8029, Nov. 13, 2007, 121 Stat. 1321.

Pub. L. 109–289, div. A, title VIII, §8027, Sept. 29, 2006, 120 Stat. 1279.

Pub. L. 109–148, div. A, title VIII, §8030, Dec. 30, 2005, 119 Stat. 2705.

Pub. L. 108–287, title VIII, §8032, Aug. 5, 2004, 118 Stat. 977.

Pub. L. 108–87, title VIII, §8033, Sept. 30, 2003, 117 Stat. 1079.

Pub. L. 107–248, title VIII, §8033, Oct. 23, 2002, 116 Stat. 1544.

Pub. L. 107–117, div. A, title VIII, §8036, Jan. 10, 2002, 115 Stat. 2255.

Pub. L. 106–259, title VIII, §8036, Aug. 9, 2000, 114 Stat. 682.

Pub. L. 106–79, title VIII, §8038, Oct. 25, 1999, 113 Stat. 1239.

Pub. L. 105–262, title VIII, §8038, Oct. 17, 1998, 112 Stat. 2305.

Pub. L. 105–56, title VIII, §8040, Oct. 8, 1997, 111 Stat. 1229.

Pub. L. 104–208, div. A, title I, §101(b) [title VIII, §8042], Sept. 30, 1996, 110 Stat. 3009–71, 3009–97.

Pub. L. 104–61, title VIII, §8051, Dec. 1, 1995, 109 Stat. 662.

Pub. L. 103–335, title VIII, §8058, Sept. 30, 1994, 108 Stat. 2631.

Pub. L. 103–139, title VIII, §8069, Nov. 11, 1993, 107 Stat. 1455.

Pub. L. 102–396, title IX, § 9096, Oct. 6, 1992, 106 Stat. 1924, as amended by Pub. L. 103–355, title VII, § 7206(b), Oct. 13, 1994, 108 Stat. 3382.

Pub. L. 102–190, div. A, title VIII, § 833, Dec. 5, 1991, 105 Stat. 1447.

Pub. L. 102–172, title VIII, § 8123, Nov. 26, 1991, 105 Stat. 1205.

Pub. L. 101–189, div. A, title VIII, § 823, Nov. 29, 1989, 103 Stat. 1504.

§ 10b–3. Annual report relating to Buy American Act

The Secretary of Defense shall submit to Congress, not later than 60 days after the end of each fiscal year, a report on the amount of purchases by the Department of Defense from foreign entities in that fiscal year. Such report shall separately indicate the dollar value of items for which the Buy American Act (41 U.S.C. 10a et seq.) was waived pursuant to any of the following:

(1) Any reciprocal defense procurement memorandum of understanding described in section 10b–2(a)(2) of this title.

(2) The Trade Agreements Act of 1979 (19 U.S.C. 2501 et seq.)

(3) Any international agreement to which the United States is a party.

(Pub. L. 104–201, div. A, title VIII, § 827, Sept. 23, 1996, 110 Stat. 2611; Pub. L. 105–85, div. A, title VIII, § 846, Nov. 18, 1997, 111 Stat. 1845; Pub. L. 105–261, div. A, title VIII, § 812, Oct. 17, 1998, 112 Stat. 2086.)

REFERENCES IN TEXT

The Buy American Act, referred to in text, is title III of act Mar. 3, 1933, ch. 212, 47 Stat. 1520, as amended, which enacted sections 10a, 10b, and 10c of this title, and enacted provisions set out as notes under section 10c of this title. For complete classification of this Act to the Code, see Short Title note set out under section 10a of this title and Tables.

The Trade Agreements Act of 1979, referred to in par. (2), is Pub. L. 96–39, July 26, 1979, 93 Stat. 144. For complete classification of this Act to the Code, see References in Text note set out under section 2501 of Title 19, Customs Duties, and Tables.

AMENDMENTS

1998—Pub. L. 105–261 substituted ''60 days'' for ''90 days'' in introductory provisions.

1997—Pub. L. 105–85 substituted ''90 days'' for ''120 days'' in introductory provisions.

SIMILAR PROVISIONS

Provisions similar to those in this section were contained in the acts listed in the Similar Provisions note set out under section 10b–2 of this title.

§ 10c. Definition of terms used in sections 10a, 10b, and 10c

When used in sections 10a, 10b, and 10c of this title—

(a) The term ''United States'', when used in a geographical sense, includes the United States and any place subject to the jurisdiction thereof;

(b) The terms ''public use'', ''public building'', and ''public work'' shall mean use by, public building of, and public work of, the United States, the District of Columbia, Puerto Rico, American Samoa, the Canal Zone, and the Virgin Islands.

(Mar. 3, 1933, ch. 212, title III, § 1, 47 Stat. 1520; Proc. No. 2695, eff. July 4, 1946, 11 F.R. 7517, 60 Stat. 1352; Pub. L. 86–70, § 43, June 25, 1959, 73 Stat. 151; Pub. L. 86–624, § 28, July 12, 1960, 74 Stat. 419; Pub. L. 100–418, title VII, § 7005(a), Aug. 23, 1988, 102 Stat. 1552.)

REFERENCES IN TEXT

For definition of Canal Zone, referred to in subsec. (b), see section 3602(b) of Title 22, Foreign Relations and Intercourse.

CODIFICATION

Words ''the Philippine Islands'' in subsec. (b) of this section were deleted as obsolete in view of recognition of independence of the Philippines by Proc. No. 2695, which was issued pursuant to section 1394 of Title 22, Foreign Relations and Intercourse, and is set out as a note under section 1394.

AMENDMENTS

1988—Subsec. (c). Pub. L. 100–418, §§ 7004, 7005(a), temporarily added subsec. (c) which read as follows: ''The term 'Federal agency' has the meaning given such term by section 472 of title 40, which includes the Departments of the Army, Navy, and Air Force.'' See Termination Date of 1988 Amendment note below.

1960—Subsec. (b). Pub. L. 86–624 struck out Hawaii.

1959—Subsec. (b). Pub. L. 86–70 struck out Alaska.

TERMINATION DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100–418 to cease to be effective on Apr. 30, 1996, unless Congress, after reviewing report required by former section 2515(k) of Title 19, Customs Duties, extends such date, see section 7004 of Pub. L. 100–418, set out as an Effective and Termination Dates of 1988 Amendment note under section 10a of this title.

EFFECTIVE DATE

Section 4 of title III of act Mar. 3, 1933, as temporarily renumbered § 5 by Pub. L. 100–418, title VII, § 7002(1), Aug. 23, 1988, 102 Stat. 1545, provided: ''This title [enacting this section and sections 10a and 10b of this title] shall take effect on the date of its enactment [Mar. 3, 1933], but shall not apply to any contract entered into prior to such effective date.''

SEPARABILITY

Section 5 of title III of act Mar. 3, 1933, as temporarily renumbered § 6 by Pub. L. 100–418, title VII, § 7002(1), Aug. 23, 1988, 102 Stat. 1545, provided: ''If any provision of this Act [see Tables for classification], or the application thereof to any person or circumstances, is held invalid, the remainder of the Act, and the application thereof to other persons or circumstances, shall not be affected thereby.''

§ 10d. Clarification of Congressional intent regarding sections 10a and 10b(a)

In order to clarify the original intent of Congress, hereafter, section 10a of this title and that part of section 10b(a) of this title preceding the words ''*Provided, however*,'' shall be regarded as requiring the purchase, for public use within the United States, of articles, materials, or supplies manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, unless the head of the department or independent establishment concerned shall determine their purchase to be inconsistent with the public interest or their cost to be unreasonable.

(Oct. 29, 1949, ch. 787, title VI, § 633, 63 Stat. 1024; Pub. L. 100–418, title VII, § 7005(d), Aug. 23, 1988, 102 Stat. 1553.)

AMENDMENTS

1988—Pub. L. 100–418, §§ 7004, 7005(d), temporarily substituted ''Federal agency'' for ''department or independent establishment''. See Termination Date of 1988 Amendment note below.

TERMINATION DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100–418 to cease to be effective on Apr. 30, 1996, unless Congress, after reviewing report required by former section 2515(k) of Title 19, Customs Duties, extends such date, see section 7004 of Pub. L. 100–418, set out as an Effective and Termination Dates of 1988 Amendment note under section 10a of this title.

EX. ORD. NO. 10582. UNIFORM PROCEDURES FOR DETERMINATIONS

Ex. Ord. No. 10582, Dec. 17, 1954, 19 F.R. 8723, as amended by Ex. Ord. No. 11051, Sept. 27, 1962, 27 F.R. 9683; Ex. Ord. No. 12148, July 20, 1979, 44 F.R. 43239; Ex. Ord. No. 12608, Sept. 9, 1987, 52 F.R. 34617, provided:

SECTION 1. As used in this order, (a) the term ''materials'' includes articles and supplies, (b) the term ''executive agency'' includes executive department, independent establishment, and other instrumentality of the executive branch of the Government, and (c) the term ''bid or offered price of materials of foreign origin'' means the bid or offered price of such materials delivered at the place specified in the invitation to bid including applicable duty and all costs incurred after arrival in the United States.

SEC. 2. (a) For the purposes of this order materials shall be considered to be of foreign origin if the cost of the foreign products used in such materials constitutes fifty per centum or more of the cost of all the products used in such materials.

(b) For the purposes of the said act of March 3, 1933 [see Tables for classification], and the other laws referred to in the first paragraph of the preamble of this order, the bid or offered price of materials of domestic origin shall be deemed to be unreasonable, or the purchase of such materials shall be deemed to be inconsistent with the public interest, if the bid or offered price thereof exceeds the sum of the bid or offered price of like materials of foreign origin and a differential computed as provided in subsection (c) of this section.

(c) The executive agency concerned shall in each instance determine the amount of the differential referred to in subsection (b) of this section on the basis of one of the following-described formulas, subject to the terms thereof:

(1) The sum determined by computing six per centum of the bid or offered price of materials of foreign origin.

(2) The sum determined by computing ten per centum of the bid or offered price of materials of foreign origin exclusive of applicable duty and all costs incurred after arrival in the United States: provided that when the bid or offered price of materials of foreign origin amounts to less than $25,000, the sum shall be determined by computing ten per centum of such price exclusive only of applicable duty.

SEC. 3. Nothing in this order shall affect the authority or responsibility of an executive agency:

(a) To reject any bid or offer for reasons of the national interest not described or referred to in this order; or

(b) To place a fair proportion of the total purchases with small business concerns in accordance with section 302(b) of the Federal Property and Administrative Services Act of 1949, as amended [41 U.S.C. 252(b)], section 2(b) of the Armed Services Procurement Act of 1947, as amended [41 U.S.C. 151(b)], and section 202 of the Small Business Act of 1953 [15 U.S.C. 631]; or

(c) To reject a bid or offer to furnish material of foreign origin in any situation in which the domestic supplier offering the lowest price for furnishing the desired materials undertakes to produce substantially all of such materials in areas of substantial unemployment, as determined by the Secretary of Labor in accordance with such appropriate regulations as he may establish and during such period as the President may determine that it is in the national interest to provide to such areas preference in the award of Government contracts: *Provided*, that nothing in this section shall prevent the rejection of a bid or offered price which is excessive; or

(d) To reject any bid or offer for materials of foreign origin if such rejection is necessary to protect essential national-security interests after receiving advice with respect thereto from the President or from the Director [now Administrator] of the Federal Emergency Management Agency. In providing this advice the Director [Administrator] shall be governed by the principle that exceptions under this section shall be made only upon a clear showing that the payment of a greater differential than the procedures of this section generally prescribe is justified by consideration of national security.

SEC. 4. The head of each executive agency shall issue such regulations as may be necessary to insure that procurement practices under his jurisdiction conform to the provisions of this order.

SEC. 5. This order shall apply only to contracts entered into after the date hereof. In any case in which the head of an executive agency proposing to purchase domestic materials determines that a greater differential than that provided in this order between the cost of such materials of domestic origin and materials of foreign origin is not unreasonable or that the purchase of materials of domestic origin is not inconsistent with the public interest, this order shall not apply. A written report of the facts of each case in which such a determination is made shall be submitted to the President through the Director of the Office of Management and Budget by the official making the determination within 30 days thereafter.

§ 11. No contracts or purchases unless authorized or under adequate appropriation; report to the Congress

(a) No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the Department of Defense and in the Department of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy, for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies, which, however, shall not exceed the necessities of the current year.

(b) The Secretary of Defense and the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy shall immediately advise the Congress of the exercise of the authority granted in subsection (a) of this section, and shall report quarterly on the estimated obligations incurred pursuant to the authority granted in subsection (a) of this section.

(R.S. § 3732; June 12, 1906, ch. 3078, 34 Stat. 255; Pub. L. 89–687, title VI, § 612(e), Oct. 15, 1966, 80 Stat. 993; Pub. L. 98–557, § 17(e), Oct. 30, 1984, 98 Stat. 2868; Pub. L. 104–106, div. D, title XLIII, § 4322(b)(4), Feb. 10, 1996, 110 Stat. 677; Pub. L. 109–241, title IX, § 902(c), July 11, 2006, 120 Stat. 566.)

CODIFICATION

R.S. § 3732 derived from act Mar. 2, 1861, ch. 84, § 10, 12 Stat. 220.

AMENDMENTS

2006—Pub. L. 109–241 substituted ''of Homeland Security'' for ''of Transportation'' in subsecs. (a) and (b).

1996—Subsec. (a). Pub. L. 104–106 struck out second comma after ''quarters''.

1984—Subsec. (a). Pub. L. 98–557, §17(e)(1)(A), substituted ''except in the Department of Defense and in the Department of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy'' for ''except in the War and Navy Departments''.

Pub. L. 98–557, §17(e)(1)(B), substituted '', transportation, or medical and hospital supplies'' for ''or transportation'', such change having been made by Act June 12, 1906, thereby requiring no further change in text. See Repeals note below.

Subsec. (b). Pub. L. 98–557, §17(e)(2), inserted provisions relating to the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy.

1966—Pub. L. 89–687 designated existing provisions as subsec. (a) and added subsec (b).

1906—Act June 12, 1906, inserted ''medical and hospital supplies''.

EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104–106, see section 4401 of Pub. L. 104–106, set out as a note under section 251 of this title.

REPEALS

The first proviso under the heading ''MEDICAL DEPARTMENT'' in act June 12, 1906, ch. 3078, 34 Stat. 255, cited as a credit to this section, was repealed by Pub. L. 98–557, §17(e)(3), Oct. 30, 1984, 98 Stat. 2868.

§ 11a. Contracts for fuel by Secretary of the Army without regard to current fiscal year

When, in the opinion of the Secretary of the Army, it is in the interest of the United States so to do, he is authorized to enter into contracts and to incur obligations for fuel in sufficient quantities to meet the requirements for one year without regard to the current fiscal year, and payments for supplies delivered under such contracts may be made from funds appropriated for the fiscal year in which the contract is made, or from funds appropriated or which may be appropriated for such supplies for the ensuing fiscal year.

(June 30, 1921, ch. 33, §1, 42 Stat. 78; July 26, 1947, ch. 343, title II, §205(a), 61 Stat. 501.)

CODIFICATION

Section was formerly classified to section 668 of Title 31 prior to the general revision and enactment of Title 31, Money and Finance, by Pub. L. 97–258, §1, Sept. 13, 1982, 96 Stat. 877.

CHANGE OF NAME

Department of War designated Department of the Army and title of Secretary of War changed to Secretary of the Army by section 205(a) of act July 26, 1947, ch. 343, title II, 61 Stat. 501. Section 205(a) of act July 26, 1947, was repealed by section 53 of act Aug. 10, 1956, ch. 1041, 70A Stat. 641. Section 1 of act Aug. 10, 1956, enacted ''Title 10, Armed Forces'' which in sections 3010 to 3013 continued Department of the Army under administrative supervision of Secretary of the Army.

TRANSFER OF FUNCTIONS

For transfer of certain procurement and related functions and property, and functions relating to finance and fiscal matters, insofar as they pertain to Air Force, from Secretary of the Army to Secretary of the Air Force, see Secretary of Defense Transfer Order Nos. 6, eff. Jan. 15, 1948; 25, Oct. 14, 1948; 39, May 18, 1949; and 40 [App. B(93)], July 22, 1949.

Public Buildings Administration abolished by act June 30, 1949, ch. 288, title I, §103, 63 Stat. 380, and functions transferred to General Services Administration. See Historical and Revision Notes under section 303(b) of Title 40, Public Buildings, Property, and Works. Section 303(b) of Title 40 was amended generally by Pub. L. 109–313, §2(a)(1), Oct. 6, 2006, 120 Stat. 1734, and, as so amended, no longer relates to the Federal Works Agency and Commissioner of Public Buildings. See 2006 Amendment note under section 303 of Title 40.

Public Buildings Branch of Procurement Division (Bureau of Federal Supply) of Treasury Department transferred to Public Buildings Administration within Federal Works Agency, see Reorg. Plan No. I of 1939, §§301, 303, eff. July 1, 1939, 4 F.R. 2729, 53 Stat. 1426, 1427, set out in the Appendix to Title 5, Government Organization and Employees.

Functions of procurement of supplies, services, stores, etc., exercised by any other agency transferred to Procurement Division in Treasury Department by Ex. Ord. No. 6166, §1, June 10, 1933, set out as a note under section 901 of Title 5. Name of Procurement Division changed to Bureau of Federal Supply by Treasury Department Order 73 dated Nov. 19, 1946. Bureau transferred on July 1, 1949, to General Services Administration, where it functions as Federal Supply Service [now Federal Acquisition Service], pursuant to act June 30, 1949, ch. 288, §102, 63 Stat. 380.

§ 12. No contract to exceed appropriation

No contract shall be entered into for the erection, repair, or furnishing of any public building, or for any public improvement which shall bind the Government to pay a larger sum of money than the amount in the Treasury appropriated for the specific purpose.

(R.S. §3733.)

CODIFICATION

R.S. §3733 derived from act July 25, 1868, ch. 233, §3, 15 Stat. 177.

§ 13. Contracts limited to one year

Except as otherwise provided, it shall not be lawful for any of the executive departments to make contracts for stationery or other supplies for a longer term than one year from the time the contract is made.

(R.S. §3735.)

CODIFICATION

R.S. §3735 derived from Res. Jan. 31, 1868, No. 8, 15 Stat. 246; Res. Mar. 24, 1874, No. 6, 18 Stat. 286.

''Except as otherwise provided,'' was first inserted by the Revisers of the 1934 edition of the Code.

EXEMPTION OF FUNCTIONS

Functions authorized by Foreign Assistance Act of 1961, as amended, as exempt, see Ex. Ord. No. 11223, eff. May 12, 1965, 30 F.R. 6635, set out as a note under section 2393 of Title 22, Foreign Relations and Intercourse.

SECTION INAPPLICABLE TO ARMED SERVICES AND NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

Section inapplicable to procurement or sale of property or services by Armed Services and National Aeronautics and Space Administration, see section 2314 of Title 10, Armed Forces.

§ 13a. Repealed. Pub. L. 86–682, §12(c), Sept. 2, 1960, 74 Stat. 710

Section, Joint Res. Mar. 24, 1874, No. 6, 18 Stat. 286, excepted mail bags, mail locks, and keys from provisions of section 13 of this title.

§ 14. Restriction on purchases of land

No land shall be purchased on account of the United States, except under a law authorizing such purchase.

(R.S. § 3736.)

CODIFICATION

R.S. § 3736 derived from act May 1, 1820, ch. 52, § 7, 3 Stat. 568.

§ 15. Transfers of contracts; assignments; assignee not subject to reduction or setoff

(a) Transfer

No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States is concerned. All rights of action, however, for any breach of such contract by the contracting parties, are reserved to the United States.

(b) Assignment

The provisions of subsection (a) of this section shall not apply in any case in which the moneys due or to become due from the United States or from any agency or department thereof, under a contract providing for payments aggregating $1,000 or more, are assigned to a bank, trust company, or other financing institution, including any Federal lending agency, provided:

(1) That, in the case of any contract entered into after October 9, 1940, no claim shall be assigned if it arises under a contract which forbids such assignment.

(2) That, unless otherwise expressly permitted by such contract, any such assignment shall cover all amounts payable under such contract and not already paid, shall not be made to more than one party, and shall not be subject to further assignment, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing.

(3) That, in the event of any such assignment, the assignee thereof shall file written notice of the assignment together with a true copy of the instrument of the assignment with—

(A) the contracting officer or the head of his department or agency;

(B) the surety or sureties upon the bond or bonds, if any, in connection with such contract; and

(C) the disbursing officer, if any, designated in such contract to make payment.

(c) Validity of assignment

Notwithstanding any law to the contrary governing the validity of assignments, any assignment pursuant to this section shall constitute a valid assignment for all purposes.

(d) Assignee liability

In any case in which moneys due or to become due under any contract are or have been assigned pursuant to this section, no liability of any nature of the assignor to the United States or any department or agency thereof, whether arising from or independently of such contract, shall create or impose any liability on the part of the assignee to make restitution, refund, or repayment to the United States of any amount heretofore since July 1, 1950, or hereafter received under the assignment.

(e) Amendment of contract

Any contract of the Department of Defense, the General Services Administration, the Department of Energy, or any other department or agency of the United States designated by the President, except any such contract under which full payment has been made, may, upon a determination of need by the President, provide or be amended without consideration to provide that payments to be made to the assignee of any moneys due or to become due under such contract shall not be subject to reduction or setoff. Each such determination of need shall be published in the Federal Register.

(f) Assignor liability arising independent of contract

If a provision described in subsection (e) of this section or a provision to the same general effect has been at any time heretofore or is hereafter included or inserted in any such contract, payments to be made thereafter to an assignee of any moneys due or to become due under such contract shall not be subject to reduction or setoff for any liability of any nature of the assignor to the United States or any department or agency thereof which arises independently of such contract, or hereafter for any liability of the assignor on account of—

(1) renegotiation under any renegotiation statute or under any statutory renegotiation article in the contract;

(2) fines;

(3) penalties (which term does not include amounts which may be collected or withheld from the assignor in accordance with or for failure to comply with the terms of the contract); or

(4) taxes, social security contributions, or the withholding or non withholding of taxes or social security contributions, whether arising from or independently of such contract.

(g) Accrued rights and obligations

Except as herein otherwise provided, nothing in this section shall be deemed to affect or impair rights or obligations heretofore accrued.

(R.S. § 3737; Oct. 9, 1940, ch. 779, § 1, 54 Stat. 1029; May 15, 1951, ch. 75, 65 Stat. 41; Pub. L. 103–355, title II, § 2451, Oct. 13, 1994, 108 Stat. 3324; Pub. L. 104–106, div. D, title XLIII, § 4321(i)(9), Feb. 10, 1996, 110 Stat. 676.)

CODIFICATION

R.S. § 3737 derived from act July 17, 1862, ch. 200, § 14, 12 Stat. 596.

AMENDMENTS

1996—Subsec. (g). Pub. L. 104–106 substituted ''rights or obligations'' for ''rights of obligations''.

1994—Pub. L. 103–355, § 2451, amended section generally, revising it as follows:

Subsec. (a), designated first par. as subsec. (a) and substituted ''is concerned'' for ''are concerned''.

Subsec. (b), designated second par. as subsec. (b) and inserted subpar. and cl. designations; substituted in introductory provisions ''provisions of subsection (a) of this section'' for ''provisions of the preceding paragraph'' and ''lending agency, provided:'' for ''lending agency: *Provided*,''; in par. designations, ''That,'' for ''That'' and periods for semicolons at end; and struck out former par. 1 which read as follows: ''That in the case of any contract entered into prior to October 9,

1940, no claim shall be assigned without the consent of the head of the department or agency concerned;''.

Subsec. (c), designated third par. as subsec. (c) and substituted ''this section'' for ''this section,''.

Subsec. (d), designated fourth par. as subsec. (d).

Subsec. (e), designated first part of fifth par. as subsec. (e), substituted ''Department of Energy'' for ''Atomic Energy Commission'', ''may, upon a determination of need by the President, provide'' for ''may, in time of war or national emergency proclaimed by the President (including the national emergency proclaimed December 16, 1950) or by Act or joint resolution of the Congress and until such war or national emergency has been terminated in such manner, provide'', and ''subject to reduction or set-off.'' for ''subject to reduction or set-off,'', and inserted ''Each such determination of need shall be published in the Federal Register.''

Subsec. (f), designated last part of fifth par. as subsec. (f), realigned margins of pars. (1) to (4) and substituted semicolons for commas at end, and substituted, in introductory provisions, ''If a provision described in subsection (e) of this section or a provision to the same general effect has been at any time heretofore or is hereafter included or inserted in any such contract, payments to be made thereafter to an assignee of any moneys due or to become due under such contract shall not be subject to reduction or setoff for any liability of any nature of the assignor to the United States or any department or agency thereof which arises independently of such contract, or hereafter for any liability of the assignor on account of—'' for ''and if such provision or one to the same general effect has been at any time heretofore or is hereafter included or inserted in any such contract, payments to be made thereafter to an assignee of any moneys due or to become due under such contract, whether during or after such war or emergency, shall not be subject to reduction or set-off for any liability of any nature of the assignor to the United States or any department or agency thereof which arises independently of such contract, or hereafter for any liability of the assignor on account of'' and, in par. (4), ''non withholding'' for ''nonwithholding''.

Subsec. (g), designated sixth par. as subsec. (g).

1951—Act May 15, 1951, made it clear that a bank or other financing institution taking an assignment of claims pursuant to this section would not be subject to later recovery by the Government of amounts previously paid to the bank by the assignee except in cases of fraud.

1940—Act Oct. 9, 1940, inserted second and third pars.

EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104–106, see section 4401 of Pub. L. 104–106, set out as a note under section 251 of this title.

EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103–355, see section 10001 of Pub. L. 103–355, set out as a note under section 251 of this title.

DELEGATION OF AUTHORITY

Memorandum of President of the United States, Oct. 3, 1995, 60 F.R. 52289, provided:

Memorandum for the Heads of Executive Departments and Agencies

Section 2451 of the Federal Acquisition Streamlining Act of 1994, Public Law 103–355 ([amending] 41 U.S.C. 15) (''Act''), provides, in part, that ''[a]ny contract of the Department of Defense, the General Services Administration, the Department of Energy or any other department or agency of the United States designated by the President, except [contracts where] . . . full payment has been made, may, upon a determination of need by the President, provide or be amended without consideration to provide that payments to be made to the assignee of any moneys due or to become due under [the] contract shall not be subject to reduction or set-off.''

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 301 of title 3, United States Code, I hereby designate all other departments and agencies of the United States as subject to this provision. Furthermore, I hereby delegate to the Secretaries of Defense and Energy, the Administrator of General Services, and the heads of all other departments and agencies, the authority under section 2451 of the Act to make determinations of need for their respective agency's contracts, subject to such further guidance as issued by the Office of Federal Procurement Policy.

The authority delegated by this memorandum may be further delegated within the departments and agencies.

This memorandum shall be published in the Federal Register.

WILLIAM J. CLINTON.

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.

MONEYS DUE UNDER LETTERS OF COMMITMENT ISSUED IN CONNECTION WITH DISPOSITION OF SURPLUS AGRICULTURAL COMMODITIES

Moneys due under letters of commitment issued against funds or guaranties of funds supplied by Commodity Credit Corporation in connection with disposition of surplus agricultural commodities to foreign countries, as assignable under the Assignment of Claims Act of 1940, which constitutes this section and former section 203 of Title 31, Money and Finance, see section 1702 of Title 7, Agriculture.

§ 16. Repealed. Oct. 21, 1941, ch. 452, 55 Stat. 743

Section, R.S. § 3744; acts June 15, 1917, ch. 29, 40 Stat. 198; Feb. 4, 1929, ch. 146, 45 Stat. 1147, related to requirement that contracts made by Secretaries of War, Navy, and Interior be in writing, and that copies thereof be filed in returns office of Department of the Interior.

§§ 16a to 16d. Omitted

CODIFICATION

Section 16a, act Jan. 12, 1927, ch. 27, 44 Stat. 936, authorized purchases by Department of the Interior without compliance with section 16 of this title.

Section 16b, acts Apr. 17, 1936, ch. 233, 49 Stat. 1226; May 18, 1937, ch. 223, 50 Stat. 181; May 17, 1938, ch. 236, 52 Stat. 393; June 16, 1939, ch. 208, 53 Stat. 834; June 18, 1940, ch. 396, 54 Stat. 474, authorized purchases by Botanic Garden without compliance with section 16 of this title.

Section 16c, act May 13, 1926, ch. 294, 44 Stat. 547, authorized purchases by Architect of Capitol without compliance with section 16 of this title.

Section 16d, act Aug. 4, 1939, ch. 418, § 13, 53 Stat. 1197, authorized purchases by Bureau of Reclamation without compliance with section 16 of this title.

§§ 17 to 19. Repealed. Oct. 21, 1941, ch. 452, 55 Stat. 743

Section 17, R.S. § 3745, provided that an affidavit be affixed to the return of contract required by section 16 of this title.

Section 18, R.S. § 3746, provided punishment for failure to make returns of contracts as required by sections 16 and 17 of this title.

Section 19, R.S. § 3747, imposed duty on Secretaries of War, Navy, and Interior to furnish officers with letters of instruction relating to their duties under sections 17 and 18, contract forms, and affidavits, to insure uniformity.

§ 20. Repealed. Pub. L. 103–355, title II, § 2452, Oct. 13, 1994, 108 Stat. 3326

Section, R.S. § 3743; Feb. 27, 1877, ch. 69, 19 Stat. 249; July 31, 1894, ch. 174, § 18, 28 Stat. 210; June 10, 1921, ch. 18, title III, § 304, 42 Stat. 24, provided for deposit of all contracts which required advance money or settlement of public accounts in the General Accounting Office.

EFFECTIVE DATE OF REPEAL

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

§§ 20a, 20b. Repealed. Pub. L. 104–106, div. D, title XLIII, § 4321(i)(10), (11), Feb. 10, 1996, 110 Stat. 676

Section 20a, act June 15, 1940, ch. 367, 54 Stat. 398, provided exemption from section 20 of this title for contracts, etc., concerning national-forest lands.

Section 20b, act Nov. 28, 1943, ch. 328, 57 Stat. 592, provided exemption from section 20 of this title for contracts, etc., concerning use of lands or water under jurisdiction of Department of the Interior.

EFFECTIVE DATE OF REPEAL

For effective date and applicability of repeal, see section 4401 of Pub. L. 104–106, set out as an Effective Date of 1996 Amendment note under section 251 of this title.

§ 21. Repealed. Pub. L. 97–258, § 5(b), Sept. 13, 1982, 96 Stat. 1069

Section, acts July 31, 1894, ch. 174, § 22, 28 Stat. 210; June 10, 1921, ch. 18, §§ 304, 310, 42 Stat. 24, 25, provided that the heads of the several executive departments and the proper officers of other Government establishments, not within the jurisdiction of any executive department, make appropriate rules and regulations to secure a proper administrative examination of all accounts sent to them before their transmission to the General Accounting Office, and for the execution of other requirements of section 20 of this title, insofar as the same related to the several departments or establishments. See section 3521(a) of Title 31, Money and Finance.

§ 22. Interest of Member of Congress

No Member of Congress shall be admitted to any share or part of any contract or agreement made, entered into, or accepted by or on behalf of the United States, or to any benefit to arise thereupon. The provisions of this section shall not apply to any contracts or agreements heretofore or hereafter entered into under the Agricultural Adjustment Act [7 U.S.C. 601 et seq.], the Federal Farm Loan Act, the Emergency Farm Mortgage Act of 1933, the Federal Farm Mortgage Corporation Act, the Farm Credit Act of 1933, and the Home Owners' Loan Act of 1933 [12 U.S.C. 1461 et seq.], and shall not apply to contracts or agreements of a kind which the Secretary of Agriculture may enter into with farmers: *Provided*, That such exemption shall be made a matter of public record.

(R.S. § 3741; Feb. 27, 1877, ch. 69, § 1, 19 Stat. 249; Jan. 25, 1934, ch. 5, 48 Stat. 337; June 27, 1934, ch. 847, title V, § 510, 48 Stat. 1264; Aug. 26, 1937, ch. 821, 50 Stat. 838; Pub. L. 103–355, title VI, § 6004, Oct. 13, 1994, 108 Stat. 3364; Pub. L. 104–106, div. D, title XLIII, § 4321(i)(12), Feb. 10, 1996, 110 Stat. 676.)

REFERENCES IN TEXT

The Agricultural Adjustment Act, referred to in text, is title I of act May 12, 1933, ch. 25, 48 Stat. 31, as amended, which is classified generally to chapter 26 (§ 601 et seq.) of Title 7, Agriculture. For complete classification of this Act to the Code, see Short Title note set out under section 601 of Title 7 and Tables.

The Federal Farm Loan Act, referred to in text, is act July 17, 1916, ch. 245, 39 Stat. 360, as amended, and was classified principally to sections 641 et seq. of Title 12, Banks and Banking. The Federal Farm Loan Act, as amended, was repealed by section 5.26(a) (which was renumbered as section 5.40(a) by Pub. L. 99–205, § 205(a)(2), Dec. 23, 1985, 99 Stat. 1703) of the Farm Credit Act of 1971, Pub. L. 92–181, Dec. 10, 1971, 85 Stat. 624. Section 5.26(a) (now 5.40(a)) of the Farm Credit Act of 1971 also provided that all references in other legislation to the Acts repealed thereby ''shall be deemed to refer to comparable provisions of this Act''. For further details, see notes set out under section 2001 of Title 12. For complete classification of the Federal Farm Loan Act to the Code prior to such repeal, see Tables.

The Emergency Farm Mortgage Act of 1933, referred to in text, is title II of act May 12, 1933, ch. 25, 48 Stat. 31. Such title II was substantially repealed by act June 30, 1947, ch. 166, title II, § 206(c), 61 Stat. 208; act Aug. 6, 1953, ch. 335, § 19, 67 Stat. 400; act Oct. 4, 1961, Pub. L. 87–353, § 3(a), (b), (w), 75 Stat. 773, 774; act Dec. 10, 1971, Pub. L. 92–181, title V, § 5.26(a), 85 Stat. 624. For complete classification of this Act to the Code, see Tables.

The Federal Farm Mortgage Corporation Act, referred to in text, is act Jan. 31, 1934, ch. 7, 48 Stat. 344, which enacted section 992a of Title 12, Banks and Banking, and amended sections 347, 355, 723, 772, 781, 897, 1016, 1020, 1020a, 1020b, 1020c, 1020d to 1020h, 1061, 1131i, 1138b and 1138d of Title 12, has been substantially repealed. For complete classification of this Act to the Code, see Tables.

The Farm Credit Act of 1933, referred to in text, is act June 16, 1933, ch. 98, 48 Stat. 2, as amended, and was classified principally to subchapter IV (§ 1131 et seq.) of chapter 7 of Title 12. The Farm Credit Act of 1933, as amended, was repealed by section 5.26(a) of the Farm Credit Act of 1971, Pub. L. 92–181, Dec. 10, 1971, 85 Stat. 624. Section 5.26(a) of the Farm Credit Act of 1971 also provided that all references in other legislation to the Acts repealed thereby ''shall be deemed to refer to comparable provisions of this Act''. For further details, see notes set out under section 2001 of Title 12. For complete classification of the Farm Credit Act of 1933 to the Code prior to such repeal, see Tables.

The Home Owners' Loan Act of 1933, referred to in text, is act June 13, 1933, ch. 64, 48 Stat. 128, as amended, now known as the Home Owners' Loan Act, which is classified generally to chapter 12 (§ 1461 et seq.) of Title 12. For complete classification of this Act to the Code, see section 1461 of Title 12 and Tables.

CODIFICATION

R.S. § 3741 derived from act Apr. 21, 1808, ch. 48, § 3, 2 Stat. 484.

First sentence of section is based on R.S. § 3741, as amended, and second sentence is based on act Jan. 25, 1934, ch. 5, as amended and as applicable to R.S. § 3741.

AMENDMENTS

1996—Pub. L. 104–106 inserted section number in original and substituted ''Member'' for ''member''.

1994—Pub. L. 103–355 amended first sentence generally. Prior to amendment, first sentence read as follows: ''In every contract or agreement to be made or entered into, or accepted by or on behalf of the United States, there shall be inserted an express condition that no Member of or Delegate to Congress shall be admitted to any share or part of such contract or agreement, or to any benefit to arise thereupon.''

1937—Act Aug. 26, 1937, inserted provision at end of second sentence beginning with ''and shall not apply''.

1934—Act June 27, 1934, inserted in second sentence '', the Federal Farm Loan Act, the Emergency Farm Mortgage Act of 1933, the Federal Farm Mortgage Corporation Act, the Farm Credit Act of 1933, and the Home Owners' Loan Act of 1933''.

Act Jan. 25, 1934, added second sentence providing that this section shall not apply to any contracts or agreements heretofore or hereafter entered into under the Agricultural Adjustment Act.

1877—Act Feb. 27, 1877, inserted ''or Delegate to'' after ''that no Member of'' in first sentence.

EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104–106, see section 4401 of Pub. L. 104–106, set out as a note under section 251 of this title.

EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103–355, see section 10001 of Pub. L. 103–355, set out as a note under section 251 of this title.

§ 23. Orders or contracts for material placed with Government-owned establishments deemed obligations

All orders or contracts for work or material or for the manufacture of material pertaining to approved projects heretofore or hereafter placed with Government-owned establishments shall be considered as obligations in the same manner as provided for similar orders or contracts placed with commercial manufacturers or private contractors, and the appropriations shall remain available for the payment of the obligations so created as in the case of contracts or orders with commercial manufacturers or private contractors.

(June 5, 1920, ch. 240, 41 Stat. 975; July 1, 1922, ch. 259, 42 Stat. 812; June 2, 1937, ch. 293, 50 Stat. 245.)

CODIFICATION

Section is a composite of acts June 5, 1920, ch. 240, and July 1, 1922, ch. 259. The words ''for work or material'' after ''All orders or contracts'', ''or contracts'' after ''similar orders'', and ''or private contractors'' after ''commercial manufacturers'' in two places are based on act July 1, 1922.

AMENDMENTS

1937—Act June 2, 1937, continued this section in effect.

§ 24. Contracts for transportation of moneys, bullion, coin, and securities

Whenever it is practicable contracts for the transportation of moneys, bullion, coin, notes, bonds, and other securities of the United States, and paper shall be let to the lowest responsible bidder therefor, after notice to all parties having means of transportation.

(July 7, 1884, ch. 332, 23 Stat. 204.)

CODIFICATION

Section is from Sundry Civil Appropriation Act July 7, 1884, fiscal year 1885.

§ 24a. Omitted

CODIFICATION

Section, acts June 16, 1933, ch. 101, § 5, 48 Stat. 305; Apr. 24, 1935, ch. 78, 49 Stat. 161; Aug. 29, 1935, ch. 816, 49 Stat. 991, provided for cancellation on or before March 31, 1936, of contracts for transportation entered into prior to June 16, 1933.

§ 25. Repealed. Feb. 19, 1948, ch. 65, § 11(a), 62 Stat. 25

Section, R.S. § 3729, related to contracts for bunting. See section 2301 et seq. of Title 10, Armed Forces.

§ 26. Repealed. June 30, 1949, ch. 288, title VI, § 602(a)(26), formerly title V, § 502(a)(26), 63 Stat. 401; renumbered Sept. 5, 1950, ch. 849, § 6(a), (b), 64 Stat. 583

Section, acts Mar. 4, 1915, ch. 147, § 5, 38 Stat. 1161; May 29, 1928, ch. 901, § 1(5), 45 Stat. 986, related to exchange of typewriters and adding machines in part payment for new machines.

EFFECTIVE DATE OF REPEAL

Repeal effective July 1, 1949, see section 605 of act June 30, 1949.

§ 27. Repealed. Oct. 31, 1951, ch. 654, § 1(109), 65 Stat. 705

Section, act June 5, 1920, ch. 235, § 7, 41 Stat. 947, related to disposition of typewriting machines by Government departments and establishments.

§§ 28 to 34. Omitted

CODIFICATION

Section 28, act June 16, 1934, ch. 553, § 1, 48 Stat. 974, related to adjustment and settlement of claims by persons who entered into contracts with the United States prior to Aug. 10, 1933 and claim loss due to compliance with codes of fair competition.

Section 29, act June 16, 1934, ch. 553, § 2, 48 Stat. 975, related to amount allowed for settlement.

Section 30, act June 16, 1934, ch. 553, § 3, 48 Stat. 975, related to limitation on the amount of profits.

Section 31, act June 16, 1934, ch. 553, § 4, 48 Stat. 975, related to time for presentment of claims.

Section 32, act June 16, 1934, ch. 553, § 5, 48 Stat. 975, authorized appropriations for settlement of claims.

Section 33, act June 16, 1934, ch. 553, § 6, 48 Stat. 975, related to procedure for settlement of claims and reservation of right to prosecute for fraud and criminal conduct.

Section 34, act Aug. 29, 1935, ch. 815, 49 Stat. 990, provided that bids made subject to codes of fair competition prior to Aug. 29, 1935 should not be rejected where bidder agreed to be subject to Acts of Congress requiring observance of minimum wages, maximum hours, or limitations as to age of employees in performance of contracts, with Federal agencies.

§ 35. Contracts for materials, etc., exceeding $10,000; representations and stipulations

In any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States (all the foregoing being hereinafter designated as agencies of the United States), for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000, there shall be included the following representations and stipulations:

(a) That all persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract;

(b) That no person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract shall be permitted to work in excess of forty hours in any one week: *Provided*, That the provisions of this subsection shall not apply to any employer who shall have entered into an agreement with his employees pursuant to the provisions of paragraphs (1) or (2) of subsection (b) of section 207 of title 29;

(c) That no male person under sixteen years of age and no female person under eighteen years of age and no convict labor will be employed by the contractor in the manufacture or production or furnishing of any of the materials, supplies, articles, or equipment included in such contract, except that this section, or any other law or Executive order containing similar prohibitions against purchase of goods by the Federal Government, shall not apply to convict labor which satisfies the conditions of section 1761(c) of title 18; and

(d) That no part of such contract will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of said contract. Compliance with the safety, sanitary, and factory inspection laws of the State in which the work or part thereof is to be performed shall be prima-facie evidence of compliance with this subsection.

(June 30, 1936, ch. 881, § 1, 49 Stat. 2036; May 13, 1942, ch. 306, 56 Stat. 277; Pub. L. 90–351, title I, § 819(b), formerly § 827(b), as added Pub. L. 96–157, § 2, Dec. 27, 1979, 93 Stat. 1215; renumbered Pub. L. 98–473, title II, § 609B(f), Oct. 12, 1984, 98 Stat. 2093; Pub. L. 99–145, title XII, § 1241(b), Nov. 8, 1985, 99 Stat. 734; Pub. L. 103–355, title VII, § 7201(1), Oct. 13, 1994, 108 Stat. 3378.)

AMENDMENTS

1994—Subsecs. (a) to (e). Pub. L. 103–355 redesignated subsecs. (b) to (e) as (a) to (d), respectively, and struck out former subsec. (a) which read as follows: ''That the contractor is the manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract;''.

1985—Subsec. (c). Pub. L. 99–145 struck out ''eight hours in any one day or in excess of'' before ''forty hours''.

1979—Subsec. (d). Pub. L. 90–351, § 827(b), as added by Pub. L. 96–157, inserted provisions relating to convict labor which satisfies the conditions of section 1761(c) of title 18.

1942—Subsec. (c). Act May 13, 1942, inserted proviso.

EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103–355, see section 10001 of Pub. L. 103–355, set out as a note under section 251 of this title.

EFFECTIVE DATE OF 1985 AMENDMENT

Section 1241(c) of Pub. L. 99–145 provided that: ''The amendments made by this section [amending this section and section 328 of former Title 40, Public Buildings, Property, and Works] shall take effect on January 1, 1986.''

SHORT TITLE

Section 14, formerly section 12, of act June 30, 1936, as added by Pub. L. 103–355, title X, § 10005(f)(5), Oct. 13, 1994, 108 Stat. 3409, and renumbered by Pub. L. 104–106, div. D, title XLIII, § 4321(f)(1)(B), Feb. 10, 1996, 110 Stat. 675, provided that: ''This Act [enacting this section and sections 36 to 45 of this title] may be cited as the 'Walsh-Healey Act'.''

EXEMPTIONS TO FEDERAL RESTRICTIONS ON MARKETABILITY OF PRISON MADE GOODS

Provisions of this section creating exemptions to Federal regulations on marketability of prison made goods are not applicable unless representatives of local union central bodies or similar labor union organizations have been consulted prior to the initiation of any project qualifying of any exemption created by this section and such paid inmate employment will not result in the displacement of employed workers, or be applied in skills, crafts, or trades in which there is a surplus of available gainful labor in the locality, or impair existing contracts for services, see section 819(c) of Pub. L. 90–351, set out as a note under section 1761 of Title 18, Crimes and Criminal Procedure.

EXCEPTIONS AND EXEMPTIONS

7 F.R. 9399 (amending Exemption Order Apr. 21, 1942, 7 F.R. 3003), which exempted female persons under 18 years of age from the provisions of subsec. (d) of this section, was superseded by 10 F.R. 10438.

CONTRACTING AUTHORITY OF GOVERNMENT AGENCIES IN CONNECTION WITH NATIONAL DEFENSE FUNCTIONS

Provisions of sections 35 to 45 of this title as applicable to Government agencies exercising certain contracting authority in connection with national-defense functions, see section 13 of Ex. Ord. No. 10789, set out as a note under section 1431 of Title 50, War and National Defense.

EX. ORD. NO. 13126. PROHIBITION OF ACQUISITION OF PRODUCTS PRODUCED BY FORCED OR INDENTURED CHILD LABOR

Ex. Ord. No. 13126, June 12, 1999, 64 F.R. 32383, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to continue the executive branch's commitment to fighting abusive child labor practices, it is hereby ordered as follows:

SECTION. 1. *Policy*. It shall be the policy of the United States Government, consistent with the Tariff Act of 1930, 19 U.S.C. 1307, the Fair Labor Standards Act [of 1938], 29 U.S.C. 201 *et. seq.*, and the Walsh-Healey Public Contracts Act [Walsh-Healey Act], 41 U.S.C. 35 *et seq.*, that executive agencies shall take appropriate actions to enforce the laws prohibiting the manufacture or importation of goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part by forced or indentured child labor.

SEC. 2. *Publication of List*. Within 120 days after the date of this order, the Department of Labor, in consultation and cooperation with the Department of the Treasury and the Department of State, shall publish in the Federal Register a list of products, identified by their country of origin, that those Departments have a reasonable basis to believe might have been mined, produced, or manufactured by forced or indentured child labor. The Department of Labor may conduct hearings to assist in the identification of those products.

SEC. 3. *Procurement Regulations*. Within 120 days after the date of this order, the Federal Acquisition Regulatory Council shall issue proposed rules to implement the following:

(a) *Required Solicitation Provisions*. Each solicitation of offers for a contract for the procurement of a product included on the list published under section 2 of this order shall include the following provisions:

(1) A provision that requires the contractor to certify to the contracting officer that the contractor or, in the case of an incorporated contractor, a responsible official of the contractor has made a good faith effort to determine whether forced or indentured child labor was used to mine, produce, or manufacture any product furnished under the contract and that, on the basis of those efforts, the contractor is unaware of any such use of child labor; and

(2) A provision that obligates the contractor to cooperate fully in providing reasonable access to the contractor's records, documents, persons, or premises if reasonably requested by authorized officials of the contracting agency, the Department of the Treasury, or the Department of Justice, for the purpose of determining whether forced or indentured child labor was used to mine, produce, or manufacture any product furnished under the contract.

(b) *Investigations*. Whenever a contracting officer of an executive agency has reason to believe that forced or indentured child labor was used to mine, produce, or manufacture a product furnished pursuant to a contract subject to the requirements of subsection 3(a) of this order, the head of the executive agency shall refer the matter for investigation to the Inspector General of the executive agency and, as the head of the executive agency or the Inspector General determines appropriate, to the Attorney General and the Secretary of the Treasury.

(c) *Remedies*.

(1) The head of an executive agency may impose remedies as provided in this subsection in the case of a contractor under a contract of the executive agency if the head of the executive agency finds that the contractor:

(i) Has furnished under the contract products that have been mined, produced, or manufactured by forced or indentured child labor or uses forced or indentured child labor in the mining, production, or manufacturing operations of the contractor;

(ii) Has submitted a false certification under subsection 3(a)(1) of this order; or

(iii) Has failed to cooperate in accordance with the obligation imposed pursuant to subsection 3(a)(2) of this order.

(2) The head of an executive agency, in his or her sole discretion, may terminate a contract on the basis of any finding described in subsection 3(c)(1) of this order for any contract entered into after the date the regulation called for in section 3 of this order is published in final.

(3) The head of an executive agency may debar or suspend a contractor from eligibility for Federal contracts on the basis of a finding that the contractor has engaged in an act described in subsection 3(c)(1) of this order. The provision for debarment may not exceed 3 years.

(4) The Administrator of General Services shall include on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs (maintained by the Administrator as described in the Federal Acquisition Regulation) each party that is debarred, suspended, proposed for debarment or suspension, or declared ineligible by the head of an agency on the basis that the person has engaged in an act described in subsection 3(c)(1) of this order.

(5) This section shall not be construed to limit the use of other remedies available to the head of an executive agency or any other official of the Federal Government on the basis of a finding described in subsection 3(c)(1) of this order.

SEC. 4. *Report*. Within 2 years after implementation of any final rule under this order, the Administrator of General Services, with the assistance of other executive agencies, shall submit to the Office of Management and Budget a report on the actions taken pursuant to this order.

SEC. 5. *Scope*. (a) Any proposed rules issued pursuant to section 3 of this order shall apply only to acquisitions for a total amount in excess of the micro-purchase threshold as defined in section 32(f) of the Office of Federal Procurement Policy Act (41 U.S.C. 428(f)).

(b) This order does not apply to a contract that is for the procurement of any product, or any article, material, or supply contained in a product that is mined, produced, or manufactured in any foreign country if:

(1) the foreign country is a party to the Agreement on Government Procurement annexed to the WTO Agreement or a party to the North American Free Trade Agreement (''NAFTA''); and

(2) the contract is of a value that is equal to or greater than the United States threshold specified in the Agreement on Government Procurement annexed to the WTO Agreement or NAFTA, whichever is applicable.

SEC. 6. *Definitions*. (a) ''Executive agency'' and ''agency'' have the meaning given to ''executive agency'' in section 4(1) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(1)).

(b) ''WTO Agreement'' means the Agreement Establishing the World Trade Organization, entered into on April 15, 1994.

(c) ''Forced or indentured child labor'' means all work or service (1) exacted from any person under the age of 18 under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily; or (2) performed by any person under the age of 18 pursuant to a contract the enforcement of which can be accomplished by process or penalties.

SEC. 7. *Judicial Review*. This order is intended only to improve the internal management of the executive branch and does not create any rights or benefits, substantive or procedural, enforceable by law by a party against the United States, its agencies, its officers, or any other person.

WILLIAM J. CLINTON.

§ 36. Liability for contract breach; cancellation; completion by Government agency; employee's wages

Any breach or violation of any of the representations and stipulations in any contract for the purposes set forth in section 35 of this title shall render the party responsible therefor liable to the United States of America for liquidated damages, in addition to damages for any other breach of such contract, the sum of $10 per day for each male person under sixteen years of age or each female person under eighteen years of age, or each convict laborer knowingly employed in the performance of such contract, and a sum equal to the amount of any deductions, rebates, refunds, or underpayment of wages due to any employee engaged in the performance of such contract; and, in addition, the agency of the United States entering into such contract shall have the right to cancel same and to make open-market purchases or enter into other contracts for the completion of the original contract, charging any additional cost to the original contractor. Any sums of money due to the United States of America by reason of any violation of any of the representations and stipulations of said contract set forth in section 35 of this title may be withheld from any amounts due on any such contracts or may be recovered in suits brought in the name of the United States of America by the Attorney General thereof. All sums withheld or recovered as deductions, rebates, refunds, or underpayments of wages shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employees who have been paid less than minimum rates of pay as set forth in such contracts and on whose account such

sums were withheld or recovered: *Provided*, That no claims by employees for such payments shall be entertained unless made within one year from the date of actual notice to the contractor of the withholding or recovery of such sums by the United States of America.

(June 30, 1936, ch. 881, § 2, 49 Stat. 2037.)

§ 37. Distribution of list of persons breaching contract; future contracts prohibited

The Comptroller General is authorized and directed to distribute a list to all agencies of the United States containing the names of persons or firms found by the Secretary of Labor to have breached any of the agreements or representations required by sections 35 to 45 of this title. Unless the Secretary of Labor otherwise recommends no contracts shall be awarded to such persons or firms or to any firm, corporation, partnership, or association in which such persons or firms have a controlling interest until three years have elapsed from the date the Secretary of Labor determines such breach to have occurred.

(June 30, 1936, ch. 881, § 3, 49 Stat. 2037.)

§ 38. Administration of Walsh-Healey provisions; officers and employees; appointment; investigations; rules and regulations

The Secretary of Labor is authorized and directed to administer the provisions of sections 35 to 45 of this title and to utilize such Federal officers and employees and, with the consent of the State, such State and local officers and employees as he may find necessary to assist in the administration of said sections and to prescribe rules and regulations with respect thereto. The Secretary shall appoint, subject to chapter 51 and subchapter III of chapter 53 of title 5, an administrative officer, and such attorneys and experts, and other employees with regard to existing laws applicable to the employment and compensation of officers and employees of the United States, as he may from time to time find necessary for the administration of sections 35 to 45 of this title. The Secretary of Labor or his authorized representatives shall have power to make investigations and findings as provided in sections 35 to 45 of this title, and prosecute any inquiry necessary to his functions in any part of the United States. The Secretary of Labor shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of sections 35 to 45 of this title.

(June 30, 1936, ch. 881, § 4, 49 Stat. 2038; Oct. 28, 1949, ch. 782, title XI, § 1106(a), 63 Stat. 972.)

CODIFICATION

Provisions of second sentence of this section that authorized the Secretary to appoint an administrative officer and such attorneys and experts ''without regard to the provisions of the civil service laws'' were omitted as obsolete. Such appointments are subject to the civil service laws unless specifically excepted by such laws or by laws enacted subsequent to Executive Order 8743, Apr. 23, 1941, issued by the President pursuant to the Act of Nov. 26, 1940, ch. 919, title I, § 1, 54 Stat. 1211, which covered most excepted positions into the classified (competitive) civil service. The Order is set out as a note under section 3301 of Title 5, Government Organization and Employees.

''Chapter 51 and subchapter III of chapter 53 of title 5'' substituted in text for ''the Classification Act of 1949, as amended'' on authority of Pub. L. 89–554, § 7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5.

AMENDMENTS

1949—Act Oct. 28, 1949, substituted ''Classification Act of 1949'' for ''Classification Act of 1923''.

REPEALS

Act Oct. 28, 1949, ch. 782, cited as a credit to this section, was repealed (subject to a savings clause) by Pub. L. 89–554, Sept. 6, 1966, § 8, 80 Stat. 632, 655.

TRANSFER OF FUNCTIONS

For transfer of functions of all other officers, employees, and agencies of Department of Labor, with certain exceptions, to Secretary of Labor, with power to delegate, see Reorg. Plan No. 6 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3174, 64 Stat. 1263, set out in the Appendix to Title 5, Government Organization and Employees.

§ 39. Hearings on Walsh-Healey provisions by Secretary of Labor; witness fees; failure to obey order; punishment

Upon his own motion or on application of any person affected by any ruling of any agency of the United States in relation to any proposal or contract involving any of the provisions of sections 35 to 45 of this title, and on complaint of a breach or violation of any representation or stipulation as provided in said sections, the Secretary of Labor, or an impartial representative designated by him, shall have the power to hold hearings and to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy, failure, or refusal of any person to obey such an order, any District Court of the United States or of any Territory or possession within the jurisdiction of which the inquiry is carried on, or within the jurisdiction of which said person who is guilty of contumacy, failure, or refusal is found, or resides or transacts business, upon the application by the Secretary of Labor or representative designated by him, shall have jurisdiction to issue to such person an order requiring such person to appear before him or representative designated by him, to produce evidence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof; and shall make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States; and the Secretary of Labor or authorized representative shall have the power, and is authorized, to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of sections 35 to 45 of this title.

(June 30, 1936, ch. 881, § 5, 49 Stat. 2038; June 25, 1948, ch. 646, § 32(b), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107.)

CODIFICATION

As originally enacted, the words ", or the district court of the United States for the District of Columbia," were set out following "Territory or possession". Act June 25, 1948, as amended by act May 24, 1949, substituted "United States District Court for the District of Columbia" for "district court of the United States for the District of Columbia". The words "United States District Court for the District of Columbia" have been deleted entirely as superfluous in view of section 132(a) of Title 28, Judiciary and Judicial Procedure, which states that "There shall be in each judicial district a district court which shall be a court of record known as the United States District Court for the district", and section 88 of title 28 which states that "the District of Columbia constitutes one judicial district".

§ 40. Exceptions from Walsh-Healey provisions; modification of contracts; variations; overtime; suspension of representations and stipulations

Upon a written finding by the head of the contracting agency or department that the inclusion in the proposal or contract of the representations or stipulations set forth in section 35 of this title will seriously impair the conduct of Government business, the Secretary of Labor shall make exceptions in specific cases or otherwise when justice or public interest will be served thereby. Upon the joint recommendation of the contracting agency and the contractor, the Secretary of Labor may modify the terms of an existing contract respecting minimum rates of pay and maximum hours of labor as he may find necessary and proper in the public interest or to prevent injustice and undue hardship. The Secretary of Labor may provide reasonable limitations and may make rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of sections 35 to 45 of this title respecting minimum rates of pay and maximum hours of labor or the extent of the application of said sections to contractors, as hereinbefore described. Whenever the Secretary of Labor shall permit an increase in the maximum hours of labor stipulated in the contract, he shall set a rate of pay for any overtime, which rate shall be not less than one and one-half times the basic hourly rate received by any employee affected: *Provided*, That whenever in his judgment such course is in the public interest, the President is authorized to suspend any or all of the representations and stipulations contained in section 35 of this title.

(June 30, 1936, ch. 881, § 6, 49 Stat. 2038; June 28, 1940, ch. 440, title I, § 13, 54 Stat. 681.)

AMENDMENTS

1940—Act June 28, 1940, inserted proviso.

§ 41. "Person" defined in Walsh-Healey provisions

Whenever used in sections 35 to 45 of this title, the word "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under title 11, or receivers.

(June 30, 1936, ch. 881, § 7, 49 Stat. 2039; Pub. L. 95–598, title III, § 326, Nov. 6, 1978, 92 Stat. 2679.)

AMENDMENTS

1978—Pub. L. 95–598 substituted "trustees in cases under title 11" for "trustees in bankruptcy".

EFFECTIVE DATE OF 1978 AMENDMENT

Amendment by Pub. L. 95–598 effective Oct. 1, 1979, see section 402(a) of Pub. L. 95–598, set out as an Effective Date note preceding section 101 of Title 11, Bankruptcy.

§ 42. Effect of Walsh-Healey provisions on other laws

The provisions of sections 35 to 45 of this title shall not be construed to modify or amend Title III of the act entitled "An Act making appropriations for the Treasury and Post Office Departments for the fiscal year ending June 30, 1934, and for other purposes", approved May 3, 1933 (commonly known as the Buy American Act) [41 U.S.C. 10a et seq.], nor shall the provisions of sections 35 to 45 of this title be construed to modify or amend sections 3141–3144, 3146, and 3147 of title 40, nor the labor provisions of Title II of the National Industrial Recovery Act, approved June 16, 1933, as extended, or of section 7 of the Emergency Relief Appropriation Act, approved April 8, 1935; nor shall the provisions of sections 35 to 45 of this title be construed to modify or amend chapter 307 and section 4162[1] of title 18.

(June 30, 1936, ch. 881, § 8, 49 Stat. 2039.)

REFERENCES IN TEXT

The Buy American Act, referred to in text, is title III of act Mar. 3, 1933, ch. 212, 47 Stat. 1520, as amended, which is classified generally to sections 10a, 10b, and 10c of this title. For complete classification of this Act to the Code, see Short Title note set out under section 10a of this title and Tables.

The National Industrial Recovery Act, referred to in text, is act June 16, 1933, ch. 90, 48 Stat. 195. Title II of the National Industrial Recovery Act was classified principally to subchapter I (§ 401 et seq.) of chapter 8 of former Title 40, Public Buildings, Property, and Works, and was terminated June 30, 1943, by act June 27, 1942, ch. 450, § 1, 56 Stat. 410. Provisions of title II of the Act which were classified to former Title 40 were repealed by section 6(b) of Pub. L. 107–217, Aug. 21, 2002, 116 Stat. 1304. For complete classification of this Act to the Code, see Tables.

Section 7 of the Emergency Relief Appropriation Act, approved April 8, 1935, referred to in text, is act Apr. 8, 1935, ch. 48, § 7, 49 Stat. 115, which is not classified to the Code.

Section 4162 of title 18, referred to in text, was repealed by Pub. L. 98–473, title II, § 218(a)(4), Oct. 12, 1984, 98 Stat. 2027.)

CODIFICATION

"Sections 3141–3144, 3146, and 3147 of title 40" substituted in text for "the Act entitled 'An Act relating to the rate of wages for laborers and mechanics employed on public buildings of the United States and the District of Columbia by contractors and subcontractors, and for other purposes', approved March 3, 1931 (commonly known as the Bacon-Davis Act), as amended from time to time" 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.

"Chapter 307 and section 4162 of title 18" substituted for "the Act entitled 'An Act to provide for the diversification of employment of Federal prisoners, for their training and schooling in trades and occupations, and for other purposes', approved May 27, 1930, as amended and supplemented by the Act approved June 23, 1934" on authority of act June 25, 1948, ch. 645, 62 Stat. 683,

[1] See References in Text note below.

the first section of which enacted Title 18, Crimes and Criminal Procedure. Prior to the enactment of Title 18, the act of May 27, 1930, as amended, had been classified to sections 744a to 744n of Title 18.

§ 43. Walsh-Healey provisions not applicable to certain contracts

Sections 35 to 45 of this title shall not apply to purchases of such materials, supplies, articles, or equipment as may usually be bought in the open market; nor shall they apply to perishables, including dairy, livestock and nursery products, or to agricultural or farm products processed for first sale by the original producers; nor to any contracts made by the Secretary of Agriculture for the purchase of agricultural commodities or the products thereof. Nothing in said sections shall be construed to apply to carriage of freight or personnel by vessel, airplane, bus, truck, express, or railway line where published tariff rates are in effect or to common carriers subject to the Communications Act of 1934 [47 U.S.C. 151 et seq.].

(June 30, 1936, ch. 881, § 9, 49 Stat. 2039.)

REFERENCES IN TEXT

The Communications Act of 1934, referred to in text, is act June 19, 1934, ch. 652, 48 Stat. 1064, as amended, which is classified principally to chapter 5 (§ 151 et seq.) of Title 47, Telegraphs, Telephones, and Radiotelegraphs. For complete classification of this Act to the Code see section 609 of Title 47 and Tables.

§ 43a. Administrative procedure provisions

(a) Applicability

Notwithstanding any provision of section 553 of title 5, subchapter II of chapter 5, and chapter 7, of title 5 shall be applicable in the administration of sections 35 to 39 and 41 to 43 of this title.

(b) Wage determination; administrative review

All wage determinations under section 35(a) of this title shall be made on the record after opportunity for a hearing. Review of any such wage determination, or of the applicability of any such wage determination, may be had within ninety days after such determination is made in the manner provided in chapter 7 of title 5 by any person adversely affected or aggrieved thereby, who shall be deemed to include any supplier of materials, supplies, articles or equipment purchased or to be purchased by the Government from any source, who is in any industry to which such wage determination is applicable.

(c) Judicial review

Notwithstanding the inclusion of any stipulations required by any provision of sections 35 to 45 of this title in any contract subject to said sections, any interested person shall have the right of judicial review of any legal question which might otherwise be raised, including, but not limited to, wage determinations and the interpretation of the terms ''locality'' and ''open market''.

(June 30, 1936, ch. 881, § 10, as added June 30, 1952, ch. 530, title III, § 301, 66 Stat. 308; amended Pub. L. 103–355, title VII, § 7201(2), (3), Oct. 13, 1994, 108 Stat. 3378; Pub. L. 104–106, div. D, title XLIII, § 4321(f)(2), Feb. 10, 1996, 110 Stat. 675.)

CODIFICATION

''Section 553 of title 5'', ''subchapter II of chapter 5, and chapter 7, of title 5'', and ''chapter 7 of title 5'' substituted for ''section 1003 of title 5'', ''such Act [meaning the Administrative Procedure Act]'', and ''section 1009 of title 5'', respectively, on authority of Pub. L. 89–554, § 7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5, Government Organization and Employees.

PRIOR PROVISIONS

A prior section 10 of act June 30, 1936, was renumbered section 12, and is classified to section 44 of this title.

AMENDMENTS

1996—Subsec. (b). Pub. L. 104–106, § 4321(f)(2)(A), substituted ''section 35(a)'' for ''section 35(b)''.

Subsec. (c). Pub. L. 104–106, § 4321(f)(2)(B), struck out comma after '' 'locality' ''.

1994—Subsec. (b). Pub. L. 103–355, § 7201(2), substituted ''supplier of materials'' for ''manufacturer of, or regular dealer in, materials''.

Subsec. (c). Pub. L. 103–355, § 7201(3), struck out '' 'regular dealer', 'manufacturer','' before ''and 'open market' ''.

EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104–106, see section 4401 of Pub. L. 104–106, set out as a note under section 251 of this title.

EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103–355, see section 10001 of Pub. L. 103–355, set out as a note under section 251 of this title.

§ 43b. Manufacturers and regular dealers

(a) The Secretary of Labor may prescribe in regulations the standards for determining whether a contractor is a manufacturer of or a regular dealer in materials, supplies, articles, or equipment to be manufactured or used in the performance of a contract entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States, for the manufacture or furnishing of materials, supplies, articles, and equipment.

(b) Any interested person shall have the right of judicial review of any legal question regarding the interpretation of the terms ''regular dealer'' and ''manufacturer'', as defined pursuant to subsection (a) of this section.

(June 30, 1936, ch. 881, § 11, as added Pub. L. 103–355, title VII, § 7201(4), Oct. 13, 1994, 108 Stat. 3378; amended Pub. L. 104–106, div. D, title XLIII, § 4321(f)(1)(A), Feb. 10, 1996, 110 Stat. 675.)

PRIOR PROVISIONS

A prior section 11 of act June 30, 1936, was renumbered section 12, and is classified to section 44 of this title.

Another prior section 11 of act June 30, 1936, was renumbered section 13, and is classified to section 45 of this title.

AMENDMENTS

1996—Pub. L. 104–106 transferred section in original so as to appear after section 43a of this title.

EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104–106, see section 4401 of Pub. L. 104–106, set out as a note under section 251 of this title.

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.

§ 44. Separability of Walsh-Healey provisions

If any provision of sections 35 to 45 of this title, or the application thereof to any persons or circumstances, is held invalid, the remainder of said sections, and the application of such provisions to other persons or circumstances, shall not be affected thereby.

(June 30, 1936, ch. 881, § 12, formerly § 10, 49 Stat. 2039; renumbered § 11, June 30, 1952, ch. 530, title III, § 301, 66 Stat. 308; renumbered § 12, Pub. L. 104–106, div. D, title XLIII, § 4321(f)(1)(B), Feb. 10, 1996, 110 Stat. 675.)

PRIOR PROVISIONS

A prior section 12 of act June 30, 1936, was renumbered section 13, and is classified to section 45 of this title.

Another prior section 12 of act June 30, 1936, was renumbered section 14, and is set out as a Short Title note under section 35 of this title.

§ 45. Effective date of Walsh-Healey provisions; exception as to representations with respect to minimum wages

Sections 35 to 45 of this title shall apply to all contracts entered into pursuant to invitations for bids issued on or after ninety days from June 30, 1936: *Provided, however*, That the provisions requiring the inclusion of representations with respect to minimum wages shall apply only to purchases or contracts relating to such industries as have been the subject matter of a determination by the Secretary of Labor.

(June 30, 1936, ch. 881, § 13, formerly § 11, 49 Stat. 2039; renumbered § 12, June 30, 1952, ch. 530, title III, § 301, 66 Stat. 308; renumbered § 13, Pub. L. 104–106, div. D, title XLIII, § 4321(f)(1)(B), Feb. 10, 1996, 110 Stat. 675.)

§ 46. Committee for Purchase From People Who Are Blind or Severely Disabled

(a) Establishment

There is established a committee to be known as the Committee for Purchase From People Who Are Blind or Severely Disabled (hereafter in sections 46 to 48c of this title referred to as the ''Committee''). The Committee shall be composed of fifteen members appointed as follows:

(1) The President shall appoint as a member one officer or employee from each of the following: The Department of Agriculture, the Department of Defense, the Department of the Army, the Department of the Navy, the Department of the Air Force, the Department of Education, the Department of Commerce, the Department of Veterans Affairs, the Department of Justice, the Department of Labor, and the General Services Administration. The head of each such department and agency shall nominate one officer or employee in his department or agency for appointment under this paragraph.

(2)(A) The President shall appoint one member from persons who are not officers or employees of the Government and who are conversant with the problems incident to the employment of the blind.

(B) The President shall appoint one member from persons who are not officers or employees of the Government and who are conversant with the problems incident to the employment of other severely handicapped individuals.

(C) The President shall appoint one member from persons who are not officers or employees of the Government and who represent blind individuals employed in qualified nonprofit agencies for the blind.

(D) The President shall appoint one member from persons who are not officers or employees of the Government and who represent severely handicapped individuals (other than blind individuals) employed in qualified nonprofit agencies for other severely handicapped individuals.

(b) Vacancy

A vacancy in the membership of the Committee shall be filled in the manner in which the original appointment was made.

(c) Chairman

The members of the Committee shall elect one of their number to be Chairman.

(d) Terms

(1) Except as provided in paragraphs (2), (3), and (4), members appointed under paragraph (2) of subsection (a) of this section shall be appointed for terms of five years. Any member appointed to the Committee under such paragraph may be reappointed to the Committee if he meets the qualifications prescribed by that paragraph.

(2) Of the members first appointed under paragraph (2) of subsection (a) of this section—

(A) one shall be appointed for a term of three years,

(B) one shall be appointed for a term of four years, and

(C) one shall be appointed for a term of five years,

as designated by the President at the time of appointment.

(3) Any member appointed under paragraph (2) of subsection (a) of this section to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the remainder of such term. A member appointed under such paragraph may serve after the expiration of his term until his successor has taken office.

(4) The member first appointed under paragraph (2)(B) of subsection (a) of this section shall be appointed for a term of three years.

(e) Pay and travel expenses

(1) Except as provided in paragraph (2), members of the Committee shall each be entitled to receive the daily equivalent of the annual rate of basic pay in effect for grade GS–18 of the General Schedule for each day (including travel-time) during which they are engaged in the actual performance of services for the Committee.

(2) Members of the Committee who are officers or employees of the Government shall receive no additional pay on account of their service on the Committee.

(3) While away from their homes or regular places of business in the performance of services for the Committee, members of the Committee shall be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the Government service are allowed expenses under section 5703(b)[1] of title 5.

(f) Staff

(1) Subject to such rules as may be adopted by the Committee, the Chairman may appoint and fix the pay of such personnel as the Committee determines are necessary to assist it in carrying out its duties and powers under sections 46 to 48c of this title.

(2) Upon request of the Committee, the head of any entity of the Government is authorized to detail, on a reimbursable basis, any of the personnel of such entity to the Committee to assist it in carrying out its duties and powers under section 46 to 48c of this title.

(3) The staff of the Committee appointed under paragraph (1) shall be appointed subject to the provisions of title 5 governing appointments in the competitive service, and shall be paid in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of such title 5 relating to classification and General Schedule pay rates.

(g) Obtaining official data

The Committee may secure directly from any entity of the Government information necessary to enable it to carry out sections 46 to 48c of this title. Upon request of the Chairman of the Committee, the head of such Government entity shall furnish such information to the Committee.

(h) Administrative support services

The Administrator of General Services shall provide to the Committee on a reimbursable basis such administrative support services as the Committee may request.

(i) Annual report

The Committee shall, not later than December 31 of each year, transmit to the President and to the Congress a report which shall include the names of the Committee members serving in the preceding fiscal year, the dates of Committee meetings in that year, a description of its activities under sections 46 to 48c of this title in that year, and any recommendations for changes in sections 46 to 48c of this title which it determines are necessary.

(June 25, 1938, ch. 697, § 1, 52 Stat. 1196; Pub. L. 92–28, § 1, June 23, 1971, 85 Stat. 77; Pub. L. 93–358, § 1(1), (2), July 25, 1974, 88 Stat. 392, 393; Pub. L. 94–273, § 8(2), Apr. 21, 1976, 90 Stat. 378; Pub. L. 96–88, title V, § 509(b), Oct. 17, 1979, 93 Stat. 695; Pub. L. 102–54, § 13(p), June 13, 1991, 105 Stat. 278; Pub. L. 102–569, title IX, § 911(a), Oct. 29, 1992, 106 Stat. 4486; Pub. L. 103–73, title III, § 301, Aug. 11, 1993, 107 Stat. 736.)

REFERENCES IN TEXT

Section 5703 of title 5, referred to in subsec. (e)(3), was amended generally by Pub. L. 94–22, § 4, May 19, 1975, 89 Stat. 85, and, as so amended, does not contain a subsec. (b).

AMENDMENTS

1993—Subsec. (a). Pub. L. 103–73 substituted ''Blind or Severely Disabled'' for ''Blind and Severely Disabled'' in introductory provisions.

1992—Subsec. (a). Pub. L. 102–569 substituted ''From People Who Are Blind and Severely Disabled'' for ''from the Blind and Other Severely Handicapped'' in introductory provisions.

1991—Subsec. (a)(1). Pub. L. 102–54 substituted ''Department of Veterans Affairs'' for ''Veterans' Administration''.

1976—Subsec. (i). Pub. L. 94–273 substituted ''December 31'' for ''September 30''.

1974—Subsec. (a). Pub. L. 93–358, § 1(1)(A), (B), substituted ''Committee for Purchase from Blind and Other Severely Handicapped'' for ''Committee for Purchase of Products and Services of the Blind and Other Severely Handicapped'' and ''fifteen'' for ''fourteen'' in provisions preceding par. (1).

Subsec. (a)(2). Pub. L. 93–358, § 1(1)(C), (D), struck out ''and other severely handicapped individuals'' after ''employment of the blind'' in subpar. (A), added subpar. (B), and redesignated former subpars. (B) and (C) as (C) and (D), respectively.

Subsec. (d)(1). Pub. L. 93–358, § 1(2)(A), substituted ''paragraphs (2), (3), and (4)'' for ''paragraphs (2) and (3)''.

Subsec. (d)(4). Pub. L. 93–358, § 1(2)(B), added par. (4).

1971—Pub. L. 92–28, in substituting subsecs. (a) to (i) for former paragraph, among other changes: renamed Committee on Purchases of Blind-made Products as Committee for Purchase of Products and Services of the Blind and Other Severely Handicapped; increased membership of Committee from seven to fourteen members; provided for appointments from Departments of Defense, Air Force, Health, Education, and Welfare, Justice, and Labor and from Veterans' Administration and General Services Administration; eliminated appointments from Treasury Department and Department of Interior; substituted appointment from Department of the Army for appointment from War Department; required one appointee to be also conversant with problems incident to employment of other severely handicapped individuals; substituted requirement that such appointment be from persons not officers or employees of the Government rather than that he be a private citizen; reenacted provision for Presidential appointment; substituted subsec. (e) pay and travel expenses provisions for former requirement for service of Committee members without additional compensation; incorporated in subsec. (c) provision for selection of a Chairman, substituting ''election'' for ''designation''; and inserted provisions incorporated in subsecs. (a)(1) (for nomination by head of each department and agency of one officer or employee of the department or agency for appointment under par. (1)), (a)(2)(B), (C), (b), (d), and (f) to (i).

EFFECTIVE DATE OF 1971 AMENDMENT

Section 2 of Pub. L. 92–28 provided that: ''The amendment made by the first section of this Act [amending this section and sections 47 and 48 and enacting sections 48a to 48c of this title] shall take effect on the first day of the first month which begins more than thirty days after the date of enactment of this Act [June 23, 1971].''

SHORT TITLE

Section 7 of act June 25, 1938, as added by Pub. L. 103–355, title X, § 10005(f)(6), Oct. 13, 1994, 108 Stat. 3409, provided that: ''This Act [enacting this section and sections 47 to 48c of this title] may be cited as the 'Javits-Wagner-O'Day Act'.''

TERMINATION OF REPORTING REQUIREMENTS

For termination, effective May 15, 2000, of provisions in subsec. (i) of this section relating to the requirement

[1] See References in Text note below.

that the Committee transmit a report to Congress each year, see section 3003 of Pub. L. 104–66, as amended, set out as a note under section 1113 of Title 31, Money and Finance, and page 199 of House Document No. 103–7.

REFERENCES IN OTHER LAWS TO GS–16, 17, OR 18 PAY RATES

References in laws to the rates of pay for GS–16, 17, or 18, or to maximum rates of pay under the General Schedule, to be considered references to rates payable under specified sections of Title 5, Government Organization and Employees, see section 529 [title I, § 101(c)(1)] of Pub. L. 101–509, set out in a note under section 5376 of Title 5.

TRANSFER OF FUNCTIONS

''Department of Education'' substituted for ''Department of Health, Education, and Welfare'' in subsec. (a)(1) pursuant to sections 301(a)(4)(A), (C), (b)(3) and 507 of Pub. L. 96–88, which are classified to sections 3441(a)(4)(A), (C), (b)(3) and 3507 of Title 20, Education, and which transferred to the Department of Education the functions and offices of the Department of Health, Education, and Welfare that had the major governmental function in the field of vocational rehabilitation for the blind and other severely handicapped and administered related vocational rehabilitation programs for individuals with disabilities.

CONTRACTING WITH EMPLOYERS OF PERSONS WITH DISABILITIES

Pub. L. 109–364, div. A, title VIII, § 856(a), (d), Oct. 17, 2006, 120 Stat. 2347, 2349, provided that:

''(a) INAPPLICABILITY OF CERTAIN LAWS.—

''(1) INAPPLICABILITY OF THE RANDOLPH-SHEPPARD ACT TO CONTRACTS AND SUBCONTRACTS FOR MILITARY DINING FACILITY SUPPORT SERVICES COVERED BY JAVITS-WAGNER-O'DAY ACT.—The Randolph-Sheppard Act (20 U.S.C. 107 et seq.) does not apply to full food services, mess attendant services, or services supporting the operation of a military dining facility that, as of the date of the enactment of this Act [Oct. 17, 2006], were services on the procurement list established under section 2 of the Javits-Wagner-O'Day Act (41 U.S.C. 47).

''(2) INAPPLICABILITY OF THE JAVITS-WAGNER-O'DAY ACT TO CONTRACTS FOR THE OPERATION OF A MILITARY DINING FACILITY.—(A) The Javits-Wagner-O'Day Act (41 U.S.C. 46 et seq.) does not apply at the prime contract level to any contract entered into by the Department of Defense as of the date of the enactment of this Act [Oct. 17, 2006] with a State licensing agency under the Randolph-Sheppard Act (20 U.S.C. 107 et seq.) for the operation of a military dining facility.

''(B) The Javits-Wagner-O'Day Act shall apply to any subcontract entered into by a Department of Defense contractor for full food services, mess attendant services, and other services supporting the operation of a military dining facility.

''(3) REPEAL OF SUPERSEDED LAW.—[Repealed section 853(a), (b) of Pub. L. 108–375, 118 Stat. 2021.]

''(d) DEFINITIONS.—In this section:

''(1) The term 'State licensing agency' means any agency designated by the Secretary of Education under section 2(a)(5) of the Randolph-Sheppard Act (20 U.S.C. 107a(a)(5)).

''(2) The term 'military dining facility' means a facility owned, operated, leased, or wholly controlled by the Department of Defense and used to provide dining services to members of the Armed Forces, including a cafeteria, military mess hall, military troop dining facility, or any similar dining facility operated for the purpose of providing meals to members of the Armed Forces.''

STATEMENT OF POLICY AND REPORT CONCERNING THE OPERATION AND MANAGEMENT OF CERTAIN MILITARY FACILITIES REGARDING THE BLIND OR SEVERELY DISABLED

Pub. L. 109–163, div. A, title VIII, § 848(b), (c), Jan. 6, 2006, 119 Stat. 3395, provided that:

''(b) STATEMENT OF POLICY.—The Secretary of Defense, the Secretary of Education, and the Chairman of the Committee for Purchase From People Who Are Blind or Severely Disabled shall jointly issue a statement of policy related to the implementation of the Randolph-Sheppard Act (20 U.S.C. 107 et seq.) and the Javits-Wagner-O'Day Act (41 U.S.C. 48 [46 et seq.]) within the Department of Defense and the Department of Education. The joint statement of policy shall specifically address the application of those Acts to both operation and management of all or any part of a military mess hall, military troop dining facility, or any similar dining facility operated for the purpose of providing meals to members of the Armed Forces, and shall take into account and address, to the extent practicable, the positions acceptable to persons representing programs implemented under each Act.

''(c) REPORT.—Not later than April 1, 2006, the Secretary of Defense, the Secretary of Education, and the Chairman of the Committee for Purchase From People Who Are Blind or Severely Disabled shall submit to the Committees on Armed Services of the Senate and the House of Representatives, the Committee on Health, Education, Labor and Pensions of the Senate, and the Committee on Education and the Workforce [now Committee on Education and Labor] of the House of Representatives a report describing the joint statement of policy issued under subsection (b), with such findings and recommendations as the Secretaries consider appropriate.''

§ 47. Duties and powers of the Committee

(a) Procurement list: publication in Federal Register; additions and removals

(1) The Committee shall establish and publish in the Federal Register a list (hereafter in sections 46 to 48c of this title referred to as the ''procurement list'') of—

(A) the commodities produced by any qualified nonprofit agency for the blind or by any qualified nonprofit agency for other severely handicapped, and

(B) the services provided by any such agency,

which the Committee determines are suitable for procurement by the Government pursuant to sections 46 to 48c of this title. Such list shall be established and published in the Federal Register before the expiration of the thirty-day period beginning on Aug. 1, 1971, and shall initially consist of the commodities contained, on such date, in the schedule of blind-made products issued by the former Committee on Purchases of Blind-Made Products under its regulations.

(2) The Committee may, by rule made in accordance with the requirements of subsections (b), (c), (d), and (e) of section 553 of title 5, add to and remove from the procurement list commodities so produced and services so provided.

(b) Fair market price; price revisions

The Committee shall determine the fair market price of commodities and services which are contained on the procurement list and which are offered for sale to the Government by any qualified nonprofit agency for the blind or any such agency for other severely handicapped. The Committee shall also revise from time to time in accordance with changing market conditions its price determinations with respect to such commodities and services.

(c) Central nonprofit agency; designation

The Committee shall designate a central nonprofit agency or agencies to facilitate the dis-

tribution (by direct allocation, subcontract, or any other means) of orders of the Government for commodities and services on the procurement list among qualified nonprofit agencies for the blind or such agencies for other severely handicapped.

(d) Rules and regulations; blind-made products, priority

(1) The Committee may make rules and regulations regarding (A) specifications for commodities and services on the procurement list, (B) the time of their delivery, and (C) such other matters as may be necessary to carry out the purposes of sections 46 to 48c of this title.

(2) The Committee shall prescribe regulations providing that—

(A) in the purchase by the Government of commodities produced and offered for sale by qualified nonprofit agencies for the blind or such agencies for other severely handicapped, priority shall be accorded to commodities produced and offered for sale by qualified nonprofit agencies for the blind, and

(B) in the purchase by the Government of services offered by nonprofit agencies for the blind or such agencies for other severely handicapped, priority shall, until the end of the calendar year ending December 31, 1976, be accorded to services offered for sale by qualified nonprofit agencies for the blind.

(e) Problems and production methods; study and evaluation

The Committee shall make a continuing study and evaluation of its activities under sections 46 to 48c of this title for the purpose of assuring effective and efficient administration of sections 46 to 48c of this title. The Committee may study (on its own or in cooperation with other public or nonprofit private agencies) (1) problems related to the employment of the blind and of other severely handicapped individuals, and (2) the development and adaptation of production methods which would enable a greater utilization of the blind and other severely handicapped individuals.

(June 25, 1938, ch. 697, § 2, 52 Stat. 1196; Pub. L. 92–28, § 1, June 23, 1971, 85 Stat. 79.)

AMENDMENTS

1971—Pub. L. 92–28, in substituting subsecs. (a) to (e) for former paragraph, among other changes: extended provisions to cover commodities and services of agencies for the blind and other severely handicapped, previously limited to brooms and mops and other suitable commodities manufactured by agencies for the blind; inserted provisions incorporated in subsecs. (a) and (e); incorporated in subsec. (b) provisions for determination of fair market price and price revisions; incorporated in subsec. (c) provisions for designation of a central nonprofit agency, providing for distribution by direct allocation, subcontract, or any other means; incorporated existing provisions in subsec. (d)(1), adding par. (2) thereof; and struck out provision that no change in prices shall become effective prior to expiration of fifteen days from date on which such change is made by the Committee.

EFFECTIVE DATE OF 1971 AMENDMENT

Amendment by Pub. L. 92–28 effective Aug. 1, 1971, see section 2 of Pub. L. 92–28, set out as a note under section 46 of this title.

§ 48. Procurement requirements for the Government; nonapplication to prison-made products

If any entity of the Government intends to procure any commodity or service on the procurement list, that entity shall, in accordance with rules and regulations of the Committee, procure such commodity or service, at the price established by the Committee, from a qualified nonprofit agency for the blind or such an agency for other severely handicapped if the commodity or service is available within the period required by that Government entity; except that this section shall not apply with respect to the procurement of any commodity which is available for procurement from an industry established under chapter 307 of title 18, and which, under section 4124 of such title 18, is required to be procured from such industry.

(June 25, 1938, ch. 697, § 3, 52 Stat. 1196; Pub. L. 92–28, § 1, June 23, 1971, 85 Stat. 80.)

AMENDMENTS

1971—Pub. L. 92–28 extended provisions to cover any commodity or service on the procurement list for former provision for brooms and mops and other suitable commodities, excepted section from application to prison-made products, and deleted provision for nonapplicability of sections 46 to 58 of this title to cases where brooms and mops were available for procurement from and Federal department or agency and procurement therefrom was required under provisions of any law in effect on June 25, 1938, or to cases where brooms and mops were procured outside continental United States.

EFFECTIVE DATE OF 1971 AMENDMENT

Amendment by Pub. L. 92–28 effective Aug. 1, 1971, see section 2 of Pub. L. 92–28, set out as a note under section 46 of this title.

§ 48a. Audit

The Comptroller General of the United States, or any of his duly authorized representatives, shall have access, for the purpose of audit and examination, to any books, documents, papers, and other records of the Committee and of each agency designated by the Committee under section 47(c) of this title. This section shall also apply to any qualified nonprofit agency for the blind and any such agency for other severely handicapped which have sold commodities or services under sections 46 to 48c of this title but only with respect to the books, documents, papers, and other records of such agency which relate to its activities in a fiscal year in which a sale was made under sections 46 to 48c of this title.

(June 25, 1938, ch. 697, § 4, as added Pub. L. 92–28, § 1, June 23, 1971, 85 Stat. 81.)

EFFECTIVE DATE

Section effective Aug. 1, 1971, see section 2 of Pub. L. 92–28, set out as an Effective Date of 1971 Amendment note under section 46 of this title.

§ 48b. Definitions

For purposes of sections 46 to 48c of this title—

(1) The term ''blind'' refers to an individual or class of individuals whose central visual acuity does not exceed 20/200 in the better eye with cor-

recting lenses or whose visual acuity, if better than 20/200, is accompanied by a limit to the field of vision in the better eye to such a degree that its widest diameter subtends an angle of no greater than 20 degrees.

(2) The terms ''other severely handicapped'' and ''severely handicapped individuals'' mean an individual or class of individuals under a physical or mental disability, other than blindness, which (according to criteria established by the Committee after consultation with appropriate entities of the Government and taking into account the views of non-Government entities representing the handicapped) constitutes a substantial handicap to employment and is of such a nature as to prevent the individual under such disability from currently engaging in normal competitive employment.

(3) The term ''qualified nonprofit agency for the blind'' means an agency—

(A) organized under the laws of the United States or of any State, operated in the interest of blind individuals, and the net income of which does not inure in whole or in part to the benefit of any shareholder or other individual;

(B) which complies with any applicable occupational health and safety standard prescribed by the Secretary of Labor; and

(C) which in the production of commodities and in the provision of services (whether or not the commodities or services are procured under sections 46 to 48c of this title) during the fiscal year employs blind individuals for not less than 75 per centum of the man-hours of direct labor required for the production or provision of the commodities or services.

(4) The term ''qualified nonprofit agency for other severely handicapped'' means an agency—

(A) organized under the laws of the United States or of any State, operated in the interest of severely handicapped individuals who are not blind, and the net income of which does not inure in whole or in part to the benefit of any shareholder or other individual;

(B) which complies with any applicable occupational health and safety standard prescribed by the Secretary of Labor; and

(C) which in the production of commodities and in the provision of services (whether or not the commodities or services are procured under sections 46 to 48c of this title) during the fiscal year employs blind or other severely handicapped individuals for not less than 75 per centum of the man-hours of direct labor required for the production or provision of the commodities or services.

(5) The term ''direct labor'' includes all work required for preparation, processing, and packing of a commodity, or work directly relating to the performance of a service, but not supervision, administration, inspection, or shipping.

(6) The term ''fiscal year'' means the twelve-month period beginning on October 1 of each year.

(7) The terms ''Government'' and ''entity of the Government'' include any entity of the legislative branch or the judicial branch, any executive agency or military department (as such agency and department are respectively defined by sections 102 and 105 of title 5), the United States Postal Service, and any nonappropriated fund instrumentality under the jurisdiction of the Armed Forces.

(8) The term ''State'' includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Trust Territory of the Pacific Islands.

(June 25, 1938, ch. 697, § 5, as added Pub. L. 92–28, § 1, June 23, 1971, 85 Stat. 81; amended Pub. L. 93–358, § 1(3), July 25, 1974, 88 Stat. 393; Pub. L. 94–273, § 3(22), Apr. 21, 1976, 90 Stat. 377.)

AMENDMENTS

1976—Pub. L. 94–273 substituted ''October'' for ''July'' in par. (6).

1974—Pub. L. 93–358 added par. (5) defining ''direct labor'', struck out former par. (6) which defined ''direct labor'' without reference to work directly relating to the performance of a service, and redesignated former pars. (7), (8), and (9) as (6), (7), and (8), respectively.

EFFECTIVE DATE

Section effective Aug. 1, 1971, see section 2 of Pub. L. 92–28, set out as an Effective Date of 1971 Amendment note under section 46 of this title.

TERMINATION OF TRUST TERRITORY OF THE PACIFIC ISLANDS

For termination of Trust Territory of the Pacific Islands, see note set out preceding section 1681 of Title 48, Territories and Insular Possessions.

§ 48c. Authorization of appropriations

There are authorized to be appropriated to the Committee to carry out sections 46 to 48c of this title $240,000 for the fiscal year ending June 30, 1974, and such sums as may be necessary for the succeeding fiscal years.

(June 25, 1938, ch. 697, § 6, as added Pub. L. 92–28, § 1, June 23, 1971, 85 Stat. 82; amended Pub. L. 93–76, July 30, 1973, 87 Stat. 176; Pub. L. 93–358, § 1(4), July 25, 1974, 88 Stat. 393.)

AMENDMENTS

1974—Pub. L. 93–358 substituted ''$240,000 for the fiscal year ending June 30, 1974, and such sums as may be necessary for the succeeding fiscal years'' for ''$200,000 each for the fiscal year ending June 30, 1972, and the next succeeding fiscal year, and $240,000 for the fiscal year ending June 30, 1974''.

1973—Pub. L. 93–76 increased authorization of appropriation to $240,000 for fiscal year ending June 30, 1974.

EFFECTIVE DATE

Section effective Aug. 1, 1971, see section 2 of Pub. L. 92–28, set out as an Effective Date of 1971 Amendment note under section 46 of this title.

§ 49. Defense employment; honorable discharge from land and naval forces as equivalent to birth certificate

No defense contractor shall deny employment, on account of failure to produce a birth certificate, to any person who submits, in lieu of a birth certificate, an honorable discharge certificate or certificate issued in lieu thereof from the Army, Air Force, Navy, Marine Corps, or Coast Guard of the United States, unless such honorable discharge certificate shows on its face that such person may have been an alien at the time of its issuance.

(June 22, 1942, ch. 432, § 1, 56 Stat. 375; July 26, 1947, ch. 343, title II, §§ 205(a), 207(a), (f), 61 Stat. 501–503.)

CHANGE OF NAME

Air Force inserted in text under authority of section 207(a), (f) of act July 26, 1947, ch. 343, title II, 61 Stat. 502, 503. Department of War designated Department of the Army and title of Secretary of War changed to Secretary of the Army by section 205(a) of such act July 26, 1947. Sections 205(a) and 207(a), (f) of act July 26, 1947 were repealed by section 53 of act Aug. 10, 1956, ch. 1041, 70A Stat. 641. Section 1 of act Aug. 10, 1956, enacted ''Title 10, Armed Forces'', which in sections 3010 to 3013 and 8010 to 8013 continued Departments of the Army and Air Force under administrative supervision of Secretary of the Army and Secretary of the Air Force, respectively.

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.

§ 50. "Defense contractor" defined

As used in sections 49 and 50 of this title the term ''defense contractor'' means an employer engaged in—

(1) the production, maintenance, or storage of arms, armament, ammunition, implements of war, munitions, machinery, tools, clothing, food, fuel, or any articles or supplies, or parts or ingredients of any articles or supplies; or

(2) the construction, reconstruction, repair, or installation of a building, plant, structure, or facility;

under a contract with the United States or under any contract which the President, the Secretary of the Army, the Secretary of the Air Force, the Secretary of the Navy, or the Secretary of Transportation certifies to such employer to be necessary to the national defense.

(June 22, 1942, ch. 432, § 2, 56 Stat. 376; July 26, 1947, ch. 343, title II, §§ 205(a), 207(a), (f), 61 Stat. 501–503; Pub. L. 97–31, § 12(16), Aug. 6, 1981, 95 Stat. 154.)

AMENDMENTS

1981—Pub. L. 97–31 substituted reference to Secretary of Transportation for reference to United States Maritime Commission.

CHANGE OF NAME

Secretary of the Air Force inserted in text under authority of section 207(a), (f) of act July 26, 1947, ch. 343, title II, 61 Stat. 501. Department of War designated Department of the Army and title of Secretary of War changed to Secretary of the Army by section 205(a) of such act July 26, 1947. Sections 205(a) and 207(a), (f) of act July 26, 1947 were repealed by section 53 of act Aug. 10, 1956, ch. 1041, 70A Stat. 641. Section 1 of act Aug. 10, 1956, enacted ''Title 10, Armed Forces'', which in sections 3010 to 3013 and 8010 to 8013 continued Departments of the Army and Air Force under administrative supervision of Secretary of the Army and Secretary of the Air Force, respectively.

§ 51. Short title

Sections 51 to 58 of this title may be cited as the ''Anti-Kickback Act of 1986''.

(Mar. 8, 1946, ch. 80, § 1, 60 Stat. 37; Pub. L. 86–695, Sept. 2, 1960, 74 Stat. 740; Pub. L. 99–634, § 2(a), Nov. 7, 1986, 100 Stat. 3523.)

AMENDMENTS

1986—Pub. L. 99–634 amended section generally, substituting short title provision for provisions relating to fees or kick-backs by subcontractors on negotiated contracts, recovery thereof by the United States, conclusive presumption that such payments by such subcontractors were included in the price of the subcontract or order and ultimately borne by the United States, and withholding by the prime contractor of such amounts from sums otherwise due a subcontractor.

1960—Pub. L. 86–695 inserted ''negotiated'' before ''contract'' and struck out '', on a cost-plus-a-fixed-fee or other cost reimbursable basis'' after ''whatsoever'' in cl. (1), and substituted ''setoff'' for ''set-off'' and ''contract'' for ''cost-plus-a-fixed-fee or cost reimbursable contract,'' before ''or by an action''.

EFFECTIVE DATE OF 1986 AMENDMENT

Section 3 of Pub. L. 99–634 provided that:

''(a) Except as provided in subsection (b), the Anti-Kickback Act of 1986 (as set out in section 2(a)) [sections 51 to 58 of this title] shall take effect with respect to conduct described in section 3 of such Act [section 53 of this title] which occurs on or after the date of the enactment of this Act [Nov. 7, 1986].

''(b) Subsections (a) and (b) of section 7 of the Anti-Kickback Act of 1986 (as set out in section 2(a)) [section 57(a) and (b) of this title] shall take effect with respect to contract solicitations issued by an agency, department, or other establishment of the Federal Government on or after the date which is 90 days after the date of the enactment of this Act [Nov. 7, 1986].''

SHORT TITLE OF 1986 AMENDMENT

Section 1 of Pub. L. 99–634 provided: ''That this Act [enacting sections 55 to 58 of this title, amending this section and sections 52 to 54 of this title, and enacting provisions set out as a note above] may be cited as the 'Anti-Kickback Enforcement Act of 1986'.''

§ 52. Definitions

As used in sections 51 to 58 of this title:

(1) The term ''contracting agency'', when used with respect to a prime contractor, means any department, agency, or establishment of the United States which enters into a prime contract with a prime contractor.

(2) The term ''kickback'' means any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly, to any prime contractor, prime contractor employee, subcontractor, or subcontractor employee for the purpose of improperly obtaining or rewarding favorable treatment in connection with a prime contract or in connection with a subcontract relating to a prime contract.

(3) The term ''person'' means a corporation, partnership, business association of any kind, trust, joint-stock company, or individual.

(4) The term ''prime contract'' means a contract or contractual action entered into by the United States for the purpose of obtaining supplies, materials, equipment, or services of any kind.

(5) The term ''prime contractor'' means a person who has entered into a prime contract with the United States.

(6) The term ''prime contractor employee'' means any officer, partner, employee, or agent of a prime contractor.

(7) The term ''subcontract'' means a contract or contractual action entered into by a

prime contractor or subcontractor for the purpose of obtaining supplies, materials, equipment, or services of any kind under a prime contract.

(8) The term ''subcontractor''—

(A) means any person, other than the prime contractor, who offers to furnish or furnishes any supplies, materials, equipment, or services of any kind under a prime contract or a subcontract entered into in connection with such prime contract; and

(B) includes any person who offers to furnish or furnishes general supplies to the prime contractor or a higher tier subcontractor.

(9) The term ''subcontractor employee'' means any officer, partner, employee, or agent of a subcontractor.

(Mar. 8, 1946, ch. 80, § 2, 60 Stat. 38; Pub. L. 86–695, Sept. 2, 1960, 74 Stat. 740; Pub. L. 99–634, § 2(a), Nov. 7, 1986, 100 Stat. 3523.)

AMENDMENTS

1986—Pub. L. 99–634 amended section generally. Prior to amendment, section read as follows: ''For the purpose of sections 51 to 54 of this title, the term 'subcontractor' is defined as any person, including a corporation, partnership, or business association of any kind, who holds an agreement or purchase order to perform all or any part of the work or to make or to furnish any article or service required for the performance of a negotiated contract or of a subcontract entered into thereunder; the term 'person' shall include any subcontractor, corporation, association, trust, joint-stock company, partnership, or individual; and the term 'negotiated contract' means made without formal advertising.''

1960—Pub. L. 86–695 substituted ''negotiated contract'' for ''cost-plus-a-fixed-fee or cost reimbursable contract'' in definition of ''subcontractor'' and defined ''negotiated contract''.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–634 effective with respect to conduct described in section 53 of this title which occurs on or after Nov. 7, 1986, see section 3(a) of Pub. L. 99–634, set out as a note under section 51 of this title.

§ 53. Prohibited conduct

It is prohibited for any person—

(1) to provide, attempt to provide, or offer to provide any kickback;

(2) to solicit, accept, or attempt to accept any kickback; or

(3) to include, directly or indirectly, the amount of any kickback prohibited by clause (1) or (2) in the contract price charged by a subcontractor to a prime contractor or a higher tier subcontractor or in the contract price charged by a prime contractor to the United States.

(Mar. 8, 1946, ch. 80, § 3, 60 Stat. 38; Pub. L. 86–695, Sept. 2, 1960, 74 Stat. 741; Pub. L. 99–634, § 2(a), Nov. 7, 1986, 100 Stat. 3524.)

AMENDMENTS

1986—Pub. L. 99–634 amended section generally. Prior to amendment, section read as follows: ''For the purpose of ascertaining whether such fees, commissions, compensation, gifts, or gratuities have been paid or granted by a subcontractor, the General Accounting Office shall have the power to inspect the plants and to audit the books and records of any prime contractor or subcontractor engaged in the performance of a negotiated contract.''

1960—Pub. L. 86–695 substituted ''negotiated contract'' for ''cost-plus-a-fixed-fee or cost reimbursable contract''.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–634 effective with respect to conduct described in this section which occurs on or after Nov. 7, 1986, see section 3(a) of Pub. L. 99–634, set out as a note under section 51 of this title.

§ 54. Criminal penalties

Any person who knowingly and willfully engages in conduct prohibited by section 53 of this title shall be imprisoned for not more than 10 years or shall be subject to a fine in accordance with title 18, or both.

(Mar. 8, 1946, ch. 80, § 4, 60 Stat. 38; Pub. L. 86–695, Sept. 2, 1960, 74 Stat. 741; Pub. L. 99–634, § 2(a), Nov. 7, 1986, 100 Stat. 3524.)

AMENDMENTS

1986—Pub. L. 99–634 amended section generally. Prior to amendment, section read as follows: ''Any person who shall knowingly, directly or indirectly, make or receive any such prohibited payment shall be fined not more than $10,000 or be imprisoned for not more than two years, or both.''

1960—Pub. L. 86–695 reenacted section without change.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–634 effective with respect to conduct described in section 53 of this title which occurs on or after Nov. 7, 1986, see section 3(a) of Pub. L. 99–634, set out as a note under section 51 of this title.

§ 55. Civil actions

(a)(1) The United States may, in a civil action, recover a civil penalty from any person who knowingly engages in conduct prohibited by section 53 of this title. The amount of such civil penalty shall be—

(A) twice the amount of each kickback involved in the violation; and

(B) not more than $10,000 for each occurrence of prohibited conduct.

(2) The United States may, in a civil action, recover a civil penalty from any person whose employee, subcontractor or subcontractor employee violates section 53 of this title by providing, accepting, or charging a kickback. The amount of such civil penalty shall be the amount of that kickback.

(b) A civil action under this section shall be barred unless the action is commenced within 6 years after the later of (1) the date on which the prohibited conduct establishing the cause of action occurred, and (2) the date on which the United States first knew or should reasonably have known that the prohibited conduct had occurred.

(Mar. 8, 1946, ch. 80, § 5, as added Pub. L. 99–634, § 2(a), Nov. 7, 1986, 100 Stat. 3524.)

EFFECTIVE DATE

Section effective with respect to conduct described in section 53 of this title which occurs on or after Nov. 7, 1986, see section 3(a) of Pub. L. 99–634, set out as an Effective Date of 1986 Amendment note under section 51 of this title.

§ 56. Administrative offsets

(a) Offset authority

A contracting officer of a contracting agency may offset the amount of a kickback provided, accepted, or charged in violation of section 53 of this title against any moneys owed by the United States to the prime contractor under the prime contract to which such kickback relates.

(b) Duties of prime contractor

(1) Upon direction of a contracting officer of a contracting agency with respect to a prime contract, the prime contractor shall withhold from any sums owed to a subcontractor under a subcontract of the prime contract the amount of any kickback which was or may be offset against that prime contractor under subsection (a) of this section.

(2) Such contracting officer may order that sums withheld under paragraph (1)—

(A) be paid over to the contracting agency; or

(B) if the United States has already offset the amount of such sums against that prime contractor, be retained by the prime contractor.

(3) The prime contractor shall notify the contracting officer when an amount is withheld and retained under paragraph (2)(B).

(c) Claim of Government

An offset under subsection (a) of this section or a direction or order of a contracting officer under subsection (b) of this section is a claim by the Government for the purposes of the Contract Disputes Act of 1978 [41 U.S.C. 601 et seq.].

(d) "Contracting officer" defined

As used in this section, the term ''contracting officer'' has the meaning given that term for the purposes of the Contract Disputes Act of 1978 [41 U.S.C. 601 et seq.].

(Mar. 8, 1946, ch. 80, § 6, as added Pub. L. 99–634, § 2(a), Nov. 7, 1986, 100 Stat. 3524.)

REFERENCES IN TEXT

The Contract Disputes Act of 1978, referred to in subsecs. (c) and (d), is Pub. L. 95–563, Nov. 1, 1978, 92 Stat. 2383, as amended, which is classified principally to chapter 9 (§ 601 et seq.) of this title. For complete classification of this Act to the Code see Short Title note set out under section 601 of this title and Tables.

EFFECTIVE DATE

Section effective with respect to conduct described in section 53 of this title which occurs on or after Nov. 7, 1986, see section 3(a) of Pub. L. 99–634, set out as an Effective Date of 1986 Amendment note under section 51 of this title.

§ 57. Contractor responsibilities

(a) Procedural requirements for prevention and detection of violations

Each contracting agency shall include in each prime contract awarded by such agency a requirement that the prime contractor shall have in place and follow reasonable procedures designed to prevent and detect violations of section 53 of this title in its own operations and direct business relationships.

(b) Cooperation in investigations requirement

Each contracting agency shall include in each prime contract awarded by such agency a requirement that the prime contractor shall cooperate fully with any Federal Government agency investigating a violation of section 53 of this title.

(c) Reporting requirement; supplying information as favorable evidence of responsibility

(1)(A) Whenever a prime contractor or subcontractor has reasonable grounds to believe that a violation of section 53 of this title may have occurred, the prime contractor or subcontractor shall promptly report the possible violation in writing.

(B) A contractor shall make the reports required by subparagraph (A) to the inspector general of the contracting agency, the head of the contracting agency if the agency does not have an inspector general, or the Department of Justice.

(2) In the case of an administrative or contractual action to suspend or debar any person who is eligible to enter into contracts with the Federal Government, evidence that such person has supplied information to the United States pursuant to paragraph (1) shall be favorable evidence of such person's responsibility for the purposes of Federal procurement laws and regulations.

(d) Partial inapplicability to small contracts

Subsections (a) and (b) of this section do not apply to a prime contract that is not greater than $100,000 or to a prime contract for the acquisition of commercial items (as defined in section 403(12) of this title).

(e) Cooperation in investigations regardless of contract amount

Notwithstanding subsection (d) of this section, a prime contractor shall cooperate fully with any Federal Government agency investigating a violation of section 53 of this title.

(Mar. 8, 1946, ch. 80, § 7, as added Pub. L. 99–634, § 2(a), Nov. 7, 1986, 100 Stat. 3525; amended Pub. L. 103–355, title IV, § 4104(a), title VIII, § 8301(c)(1), Oct. 13, 1994, 108 Stat. 3341, 3397; Pub. L. 104–106, div. D, title XLIII, § 4321(g), Feb. 10, 1996, 110 Stat. 675.)

AMENDMENTS

1996—Subsec. (d). Pub. L. 104–106 made technical amendment to reference in original act which appears in text as reference to section 403(12) of this title and struck out second period at end.

1994—Subsec. (d). Pub. L. 103–355, § 8301(c)(1), inserted before period at end ''or to a prime contract for the acquisition of commercial items (as defined in section 403(12) of this title).''

Pub. L. 103–355, § 4104(a), added subsec. (d).

Subsec. (e). Pub. L. 103–355, § 4104(a), added subsec. (e).

EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104–106, see section 4401 of Pub. L. 104–106, set out as a note under section 251 of this title.

EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103–355, see section 10001 of Pub. L. 103–355, set out as a note under section 251 of this title.

EFFECTIVE DATE

Subsecs. (a) and (b) effective with respect to contract solicitations issued by an agency, department, or other

establishment of the Federal Government on or after the date which is 90 days after Nov. 7, 1986, and subsec. (c) effective with respect to conduct described in section 53 of this title which occurs on or after Nov. 7, 1986, see section 3 of Pub. L. 99–634, set out as an Effective Date of 1986 Amendment note under section 51 of this title.

§ 58. Inspection authority

For the purpose of ascertaining whether there has been a violation of section 53 of this title with respect to any prime contract, the Government Accountability Office and the inspector general of the contracting agency, or a representative of such contracting agency designated by the head of such agency if the agency does not have an inspector general, shall have access to and may inspect the facilities and audit the books and records, including any electronic data or records, of any prime contractor or subcontractor under a prime contract awarded by such agency. This section does not apply with respect to a prime contract for the acquisition of commercial items (as defined in section 403(12) of this title).

(Mar. 8, 1946, ch. 80, § 8, as added Pub. L. 99–634, § 2(a), Nov. 7, 1986, 100 Stat. 3525; amended Pub. L. 103–355, title VIII, § 8301(c)(2), Oct. 13, 1994, 108 Stat. 3397; Pub. L. 108–271, § 8(b), July 7, 2004, 118 Stat. 814.)

AMENDMENTS

2004—Pub. L. 108–271 substituted ''Government Accountability Office'' for ''General Accounting Office''.

1994—Pub. L. 103–355 inserted at end ''This section does not apply with respect to a prime contract for the acquisition of commercial items (as defined in section 403(12) of this title).''

EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103–355, see section 10001 of Pub. L. 103–355, set out as a note under section 251 of this title.

EFFECTIVE DATE

Section effective with respect to conduct described in section 53 of this title which occurs on or after Nov. 7, 1986, see section 3(a) of Pub. L. 99–634, set out as an Effective Date of 1986 Amendment note under section 51 of this title.

CHAPTER 2—TERMINATION OF WAR CONTRACTS

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119. Fraudulent claims, vouchers, statements, etc.; jurisdiction.
120. Powers and duties of contracting agencies.
121. Administrator of General Services; additional duties.
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123. Delegation of authority by Administrator of General Services.
124. Effective date; applicability to lend lease contracts.
125. Exemption of certain contracts outside continental United States or in Alaska.

§ 101. Declaration of policy

The Congress declares that the objectives of this chapter are—

(a) to facilitate maximum war production during the war, and to expedite reconversion from war production to civilian production as war conditions permit;

(b) to assure to prime contractors and subcontractors, small and large, speedy and equitable final settlement of claims under terminated war contracts, and adequate interim financing until such final settlement;

(c) to assure uniformity among Government agencies in basic policies and administration with respect to such termination settlements and interim financing;

(d) to facilitate the efficient use of materials, manpower, and facilities for war and civilian purposes by providing prime contractors and subcontractors with notice of termination of their war contracts as far in advance of the cessation of work thereunder as is feasible and consistent with the national security;

(e) to assure the expeditious removal from the plants of prime contractors and subcontractors of termination inventory not to be retained or sold by the contractor;

(f) to use all practicable methods compatible with the foregoing objectives to prevent improper payments and to detect and prosecute fraud.

(July 1, 1944, ch. 358, § 1, 58 Stat. 649.)

SHORT TITLE

Section 27 of act July 1, 1944, provided that: ''This Act [enacting this chapter] may be cited as the 'Contract Settlement Act of 1944'.''

SEPARABILITY

Section 26 of act July 1, 1944, provided: ''If any provision of this Act [enacting this chapter], or the application of such provision to any person or circumstance, is held invalid, the remainder of this Act or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.''

§ 102. Surveillance by Congress

(a) To assist the Congress in appraising the administration of this chapter and in developing such amendments or related legislation as may further be necessary to accomplish the objectives of this chapter, the appropriate committees of the Senate and the House of Representatives shall study each report submitted to the Congress under this chapter and shall otherwise maintain continuous surveillance of the oper-

ations of the Government agencies under this chapter.

(b) Repealed. Oct. 31, 1951, ch. 654, § 1(110), 65 Stat. 705.

(July 1, 1944, ch. 358, § 2, 58 Stat. 649; Oct. 31, 1951, ch. 654, § 1(110), 65 Stat. 705.)

AMENDMENTS

1951—Subsec. (b). Act Oct. 31, 1949, repealed subsec. (b) which related to reports to Congress.

§ 103. Definitions

As used in this chapter—

(a) The term ''prime contract'' means any contract, agreement, or purchase order heretofore or hereafter entered into by a contracting agency and connected with or related to the prosecution of the war; and the term ''prime contractor'' means any holder of one or more prime contracts.

(b) The term ''subcontract'' means any contract, agreement, or purchase order heretofore or hereafter entered into to perform any work, or to make or furnish any material to the extent that such work or material is required for the performance of any one or more prime contracts or of any one or more other subcontracts; and the term ''subcontractor'' means any holder of one or more subcontracts.

(c) The term ''war contract'' means a prime contract or a subcontract; and the term ''war contractor'' means any holder of one or more war contracts.

(d) The terms ''termination'', ''terminate'' and ''terminated'' refer to the termination or cancellation, in whole or in part, of work under a prime contract for the convenience or at the option of the Government (except for default of the prime contractor) or of work under a subcontract for any reason except the default of the subcontractor.

(e) The term ''material'' includes any article, commodity, machinery, equipment, accessory, part, component, assembly, work in process, maintenance, repair, and operating supplies, and any product of any kind.

(f) The term ''Government agency'' means any executive department of the Government, or any administrative unit or subdivision thereof, any independent agency or any corporation owned or controlled by the United States in the executive branch of the Government, and includes any contracting agency.

(g) The term ''contracting agency'' means any Government agency, which has been or hereafter may be authorized to make contracts pursuant to section 611[1] of Appendix to title 50, and includes the Reconstruction Finance Corporation and any corporation organized pursuant to the Reconstruction Finance Corporation Act, and the Secretary of Commerce.

(h) The term ''termination claim'' means any claim or demand by a war contractor for fair compensation for the termination of any war contract and any other claim under a terminated war contract, which regulations prescribed under this chapter authorize to be asserted and settled in connection with any termination settlement.

(i) The term ''interim financing'' includes advance payments, partial payments, loans, discounts, advances, and commitments in connection therewith, and guaranties of loans, discounts, advances, and commitments in connection therewith and any other type of financing made in contemplation of or related to termination of war contracts.

(j) The term ''Administrator'' means the Administrator of General Services.

(k) The term ''person'' means any individual, corporation, partnership, firm, association, trust, estate, or other entity.

(*l*) The term ''termination inventory'' means any materials (including a proper part of any common materials), properly allocable to the terminated portion of a war contract, except any machinery or equipment subject to a separate contract specifically governing the use or disposition thereof.

(m) The term ''final and conclusive'', as applied to any settlement, finding, or decision, means that such settlement, finding, or decision shall not be reopened, annulled, modified, set aside, or disregarded by any officer, employee, or agent of the United States or in any suit, action, or proceeding except as provided in this chapter.

(July 1, 1944, ch. 358, § 3, 58 Stat. 650; Ex. Ord. No. 9638, § 1, eff. Oct. 4, 1945, 10 F.R. 12591; Ex. Ord. No. 9809, §§ 1, 8 eff. Dec. 12, 1946, 11 F.R. 14281; Ex. Ord. No. 9841, §§ 101, 203, eff. Apr. 23, 1947, 12 F.R. 2645; June 30, 1947, ch. 166, title II, § 207, 61 Stat. 209; 1947 Reorg. Plan No. 1, § 201, eff. July 1, 1947, 12 F.R. 4534, 61 Stat. 951; June 30, 1949, ch. 288, title I, § 102(b), 63 Stat. 380.)

REFERENCES IN TEXT

Section 611 of Appendix to title 50, referred to in subsec. (g), was repealed by Pub. L. 89–554, § 8(a), Sept. 6, 1966, 80 Stat. 651. See section 1431 et seq. of Title 50, War and National Defense.

The Reconstruction Finance Corporation Act, referred to in subsec. (g), is act Jan. 22, 1932, ch. 8, 47 Stat. 5, as amended, which was classified to chapter 14 (§ 601 et seq.) of Title 15, Commerce and Trade, and has been eliminated from the Code. For complete classification of this Act to the Code prior to its elimination from the Code, see Tables.

CODIFICATION

In subsec. (g), the Smaller War Plants Corporation was omitted from the definition of the term ''contracting agency,'' in subsec. (g) on the authority of section 207 of Act June 30, 1947, which provided: ''The liquidation of the affairs of the Smaller War Plants Corporation administered by the Reconstruction Finance Corporation pursuant to Executive Order 9665 shall be carried out by the Reconstruction Finance Corporation, notwithstanding the provisions of the last paragraph of section 5 of the First War Powers Act, 1941 [section 605 of Title 50, Appendix, War and National Defense]. The Smaller War Plants Corporation is hereby abolished.''

TRANSFER OF FUNCTIONS

In subsec. (g), ''Secretary of Commerce'' substituted for ''War Production Board'' in view of transfer of War Production Board functions to Civilian Production Administration, then to Office of Temporary Controls, and then to Secretary of Commerce by Ex. Ord. Nos. 9638, 9809, and 9841.

In subsec. (j), functions of Director of Contract Settlement transferred to Secretary of the Treasury by Ex. Ord. No. 9809, § 8, and Reorg. Plan No. 1 of 1947, § 201,

[1] See References in Text note below.

were retransferred to Administrator of General Services by section 102(b) of act June 30, 1949, ch. 288, 63 Stat. 380, which was classified to section 752(b) of former Title 40, Public Buildings, Property, and Works, and was repealed by Pub. L. 107–217, § 6(b), Aug. 21, 2002, 116 Stat. 1304.

EFFECTIVE DATE OF TRANSFER OF FUNCTIONS

Transfer of functions by act June 30, 1949, 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.

ABOLITION OF RECONSTRUCTION FINANCE CORPORATION

Reorg. Plan No. 1 of 1957, § 6(a), eff. June 30, 1957, 22 F.R. 4633, 71 Stat. 647, set out in the Appendix to Title 5, Government Organization and Employees, abolished Reconstruction Finance Corporation.

§ 104. Administration of chapter

(a) Repealed. Pub. L. 89–554, § 8(a), Sept. 6, 1966, 80 Stat. 652

(b) Rules and regulations

In order to insure uniform and efficient administration of the provisions of this chapter, the Administrator of General Services, subject to such provisions, by general orders or general regulations—

(1) shall prescribe policies, principles, methods, procedures, and standards to govern the exercise of the authority and discretion and the performance of the duties and functions of all Government agencies under this chapter; and

(2) may require or restrict the exercise of any such authority and discretion, or the performance of any such duty or function, to such extent as he deems necessary to carry out the provisions of this chapter.

(c) Compliance

The exercise of any authority or discretion and the performance of any duty or function, conferred or imposed on any Government agency by this chapter, shall be subject to such orders and regulations prescribed by the Administrator of General Services pursuant to subsection (b) of this section. Each Government agency shall carry out such orders and regulations of the Administrator of General Services expeditiously, and shall issue such regulations with respect to its operations and procedures as may be necessary to carry out the policies, principles, methods, procedures, and standards prescribed by the Administrator of General Services. Any Government agency may issue such further regulations not inconsistent with the general orders or regulations of the Administrator of General Services as it deems necessary or desirable to carry out the provisions of this chapter.

(d) Personnel; supplies, facilities, and services

The Administrator of General Services may, within the limits of funds which may be made available, employ and fix the compensation of necessary personnel in accordance with the provisions of the civil-service laws and chapter 51 and subchapter III of chapter 53 of title 5, and make expenditures for supplies, facilities, and services necessary for the performance of his functions under this chapter. Without regard to the provisions of the civil-service laws, he may employ certified public accountants, qualified cost accountants, industrial engineers, appraisers, and other experts, and contract with certified public accounting firms and qualified firms of engineers in the discharge of the duties imposed upon him and in furtherance of the objectives and policies of this chapter. The Administrator of General Services shall perform the duties imposed upon him through the personnel and facilities of the contracting agencies and other established Government agencies, to the extent that this does not interfere with the function of the Administrator of General Services to insure uniform and efficient administration of the provisions of this chapter.

(e) Publication in Federal Register

All orders and regulations prescribed by the Administrator of General Services or any Government agency under this chapter shall be published in the Federal Register.

(July 1, 1944, ch. 358, § 4, 58 Stat. 651; Ex. Ord. No. 9809, § 8, eff. Dec. 12, 1946, 11 F.R. 14281; 1947 Reorg. Plan No. 1, § 201, eff. July 1, 1947, 12 F.R. 4534, 61 Stat. 951; June 30, 1949, ch. 288, title I, § 102(b), 63 Stat. 380; Oct. 28, 1949, ch. 782, title XI, § 1106(a), 63 Stat. 972; Pub. L. 89–554, § 8(a), Sept. 6, 1966, 80 Stat. 652.)

REFERENCES IN TEXT

The civil-service laws, referred to in subsec. (d), are set forth in Title 5, Government Organization and Employees. See, particularly, section 3301 et seq. of Title 5.

CODIFICATION

In subsec. (d) of this section, ''chapter 51 and subchapter III of chapter 53'' substituted for ''the Classification Act of 1949'' on authority of Pub. L. 89–554, § 7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5, Government Organization and Employees.

In the second sentence of this section, provisions that authorized the appointment of a Deputy Director and that authorized the employment of certified public accountants, qualified cost accountants, industrial engineers, appraisers, and other experts without regard to ''the Classification Act of 1923'', were omitted as obsolete. Sections 1202 and 1204 of the Classification Act of 1949, 63 Stat. 972, 973, repealed the 1923 Act and all laws or parts of laws inconsistent with the 1949 Act. While section 1106(a) of the 1949 Act provided that references in other laws to the 1923 Act should be held and considered to mean the 1949 Act, it did not have the effect of continuing the exceptions contained in this sentence because of section 1106(b) which provided that the application of the 1949 Act to any position, officer, or employee shall not be affected by section 1106(a). The Classification Act of 1949 was repealed by Pub. L. 89–554, Sept. 6, 1966, § 8(a), 80 Stat. 632 (of which section 1 revised and enacted Title 5 into law). Section 5102 of Title 5 contains the applicability provisions of the 1949 Act, and section 5103 of Title 5 authorizes the Office of Personnel Management to determine the applicability to specific positions and employees.

AMENDMENTS

1966—Subsec. (a). Pub. L. 89–554 repealed subsec. (a) which provided for the appointment, pay, and term of the Director of Contract Settlement. This office was abolished previously by Reorg. Plan No. 1 of 1947.

1949—Subsec. (d). Act Oct. 28, 1949, substituted ''Classification Act of 1949'' for ''Classification Act of 1923''.

REPEALS

Act Oct. 28, 1949, ch. 782, cited as a credit to this section, was repealed (subject to a savings clause) by Pub. L. 89–554, Sept. 6, 1966, § 8, 80 Stat. 632, 655.

TRANSFER OF FUNCTIONS

Functions of Secretary of the Treasury transferred to Administrator of General Services by section 102(b) of act June 30, 1949, ch. 288, 63 Stat. 380, which was classified to section 752(b) of former Title 40, Public Buildings, Property, and Works, and was repealed by Pub. L. 107–217, §6(b), Aug. 21, 2002, 116 Stat. 1304.

Subsec. (a), establishing the Office of Contract Settlement to be headed by the Director of Contract Settlement and providing for the appointment of the Director by the President with the advice and consent of the Senate with compensation of $12,000 per year and a term of two years, was repealed, and references in the remainder of this section to ''Director'' were changed to ''Secretary'' by section 8 of Ex. Ord. No. 9809 and section 201 of Reorg. Plan No. 1 of 1947. Reorg. Plan No. 1 of 1947 is set out in the Appendix to Title 5, Government Organization and Employees.

EFFECTIVE DATE OF TRANSFER OF FUNCTIONS

Transfer of functions by act June 30, 1949, 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.

§105. Contract Settlement Advisory Board; composition; duties

There is created a Contract Settlement Advisory Board, with which the Administrator of General Services shall advise and consult. The Board shall be composed of the Administrator of General Services who shall act as its Chairman, and of the Secretary of the Army, the Secretary of the Navy, the Secretary of Transportation, the Secretary of State, the chairman of the board of directors of the Reconstruction Finance Corporation, Secretary of Commerce, and the Attorney General or any alternate or representative designated by any of them. The Administrator of General Services shall request other Government agencies to participate in the deliberations of the Board whenever matters specially affecting them are under consideration.

(July 1, 1944, ch. 358, §5, 58 Stat. 651; Ex. Ord. No. 9630, §1, eff. Sept. 27, 1945, 10 F.R. 12245; Ex. Ord. No. 9638, §1, eff. Oct. 4, 1945, 10 F.R. 12591; Ex. Ord. No. 9665, §2, eff. Dec. 27, 1945, 10 F.R. 15365; Ex. Ord. No. 9730, §1, eff. May 27, 1946, 11 F.R. 5777; Ex. Ord. No. 9809, §8, eff. Dec. 12, 1946, 11 F.R. 14281; Ex. Ord. No. 9841, §§101, 203, eff. Apr. 23, 1947, 12 F.R. 2645; 1947 Reorg. Plan No. 1, §201, eff. July 1, 1947, 12 F.R. 4534, 61 Stat. 951; July 26, 1947, ch. 343, title II, §205(a), 61 Stat. 501; June 30, 1949, ch. 288, title I, §102(b), 63 Stat. 380; Pub. L. 97–31, §12(17), Aug. 6, 1981, 95 Stat. 154.)

AMENDMENTS

1981—Pub. L. 97–31 substituted ''Secretary of Transportation'' for ''Chairman of the Maritime Commission''.

CHANGE OF NAME

Department of War designated Department of the Army and title of Secretary of War changed to Secretary of the Army by section 205(a) of act July 26, 1947, ch. 343, title II, 61 Stat. 501. Section 205(a) of act July 26, 1947, was repealed by section 53 of act Aug. 10, 1956, ch. 1041, 70A Stat. 641. Section 1 of act Aug. 10, 1956, enacted ''Title 10, Armed Forces'' which in sections 3010 to 3013 continued Department of the Army under administrative supervision of Secretary of the Army.

TRANSFER OF FUNCTIONS

Contract Settlement Advisory Board and all its property, records, etc., transferred to General Services Administration, but with the functions of the Board to be performed by the Board under conditions and limitations prescribed by law, by section 102(b) of act June 30, 1949, ch. 288, 63 Stat. 380, which was classified to section 752(b) of former Title 40, Public Buildings, Property, and Works, and was repealed by Pub. L. 107–217, §6(b), Aug. 21, 2002, 116 Stat. 1304.

Functions of Secretary of the Treasury transferred to Administrator of General Services by section 102(b) of act June 30, 1949, ch. 288, 63 Stat. 380, which was classified to section 752(b) of former Title 40, and was repealed by Pub. L. 107–217, §6(b), Aug. 21, 2002, 116 Stat. 1304.

Contract Settlement Advisory Board transferred to Department of the Treasury by section 8 of Ex. Ord. No. 9809 and section 201 of Reorg. Plan No. 1 of 1947. Reorg. Plan No. 1 of 1947 is set out in the Appendix to Title 5, Government Organization and Employees.

In text of this section, references to ''Director'' changed to ''Secretary of the Treasury'' and phrase ''the Secretary of the Treasury'' following reference to Secretary of the Navy was omitted by section 8 of Ex. Ord. No. 9809, and section 201 of Reorg. Plan No. 1 of 1947.

Administrator of Foreign Economic Administration changed to Secretary of State in view of Ex. Ord. No. 9630, as amended by Ex. Ord. No. 9730.

''Secretary of Commerce'' substituted for references to Chairman of War Production Board and chairman and board of directors of Smaller War Plants Corporation. War Production Board functions transferred to Civilian Production Administration, to Office of Temporary Controls, and then to Secretary of Commerce by Ex. Ord. Nos. 9638, 9809, and 9481, respectively. Functions of chairman and Board of Directors of Smaller War Plants Corporation transferred to Secretary of Commerce by Ex. Ord. No. 9665.

EFFECTIVE DATE OF TRANSFER OF FUNCTIONS

Transfer of functions by act June 30, 1949, 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.

SECRETARY OF THE AIR FORCE

For transfer of certain procurement and related functions and property, insofar as they pertain to the Air Force, from Secretary of the Army and Department of the Army, to Secretary of the Air Force and Department of the Air Force, see Secretary of Defense Transfer Order No. 6, eff. Jan. 15, 1948.

ABOLITION OF RECONSTRUCTION FINANCE CORPORATION

Reorg. Plan No. 1 of 1957, §6(a), eff. June 30, 1957, 22 F.R. 4633, 71 Stat. 647, set out in the Appendix to Title 5, Government Organization and Employees, abolished Reconstruction Finance Corporation.

TERMINATION OF ADVISORY BOARDS

Advisory boards in existence on Jan. 5, 1973, to terminate not later than the expiration of the 2-year period following Jan. 5, 1973, unless, in the case of a board established by the President or an officer of the Federal Government, such board is renewed by appropriate action prior to the expiration of such 2-year period, or in the case of a board established by the Congress, its duration is otherwise provided by law. See sections 3(2) and 14 of Pub. L. 92–463, Oct. 6, 1972, 86 Stat. 770, 776, set out in the Appendix to Title 5, Government Organization and Employees.

§106. Basis for settlement of termination claims

(a) Priority to private contractors

It is the policy of the Government, and it shall be the responsibility of the contracting agencies and the Administrator of General Services to provide war contractors with speedy and fair

compensation for the termination of any war contract, in accordance with and subject to the provisions of this chapter, giving priority to contractors whose facilities are privately owned or privately operated. Such fair compensation for the termination of subcontracts shall be based on the same principles as compensation for the termination of prime contracts.

(b) Establishment of methods and standards

Each contracting agency shall establish methods and standards, suitable to the conditions of various war contractors, for determining fair compensation for the termination of war contracts on the basis of actual, standard, average, or estimated costs, or of a percentage of the contract price based on the estimated percentage of completion of work under the terminated contract, or on any other equitable basis, as it deems appropriate. To the extent that such methods and standards require accounting, they shall be adapted, so far as practicable, to the accounting systems used by war contractors, if consistent with recognized commercial accounting practice.

(c) Conclusiveness of settlement

Any contracting agency may settle all or any part of any termination claim under any war contract by agreement with the war contractor, or by determination of the amount due on the claim or part thereof without such agreement, or by any combination of these methods. Where any such settlement is made by agreement, the settlement shall be final and conclusive, except (1) to the extent otherwise agreed in the settlement; (2) for fraud; (3) upon renegotiation to eliminate excessive profits under section 1191 of Appendix to title 50, unless exempt or exempted under such section; or (4) by mutual agreement before or after payment. Where any such settlement is made by determination without agreement, it shall likewise be final and conclusive, subject to the same exceptions as if made by agreement, unless the war contractor appeals or brings suit in accordance with section 113 of this title: *Provided*, That no settlement agreement hereunder involving payment to a war contractor of an amount in excess of $50,000 (or such lesser amount as the Administrator of General Services may from time to time determine) shall become binding upon the Government until the agreement has been reviewed and approved by a settlement review board of three or more members established by the contracting agency in the bureau, division, regional or district office, or other unit of the contracting agency authorized to make such settlement, or in the event of disapproval by the settlement review board, unless approved by the head of such bureau, division, regional or district office, or other unit. Failure of the settlement review board to act upon any settlement within thirty days after its submission to the board shall operate as approval by the board. The sole function of settlement review boards shall be to determine the over-all reasonableness of proposed settlement agreements from the point of view of protecting the interests of the Government. In determining, for purposes of this subsection, whether review of any settlement agreement is required because of the amounts involved, no deduction shall be made on account of credits for property chargeable to the Government or for advance or partial payments, but amounts payable under such settlement agreement for completed articles or work at the contract price and for the discharge of the termination claims of subcontractors shall be deducted.

(d) Allowable costs

Except as hereinafter provided, the methods and standards established under subsection (b) of this section for determining fair compensation for termination claims which are not settled by agreement shall be designed to compensate the war contractor fairly for the termination of the war contract, taking into account—

(1) the direct and indirect manufacturing, selling and distribution, administrative and other costs and expenses incurred by the war contractor which are reasonably necessary for the performance of the war contract and properly allocable to the terminated portion thereof under recognized commercial accounting practices; and

(2) reasonable costs and expenses of settling termination claims of subcontractors related to the terminated portion of the war contract; and

(3) reasonable accounting, legal, clerical, and other costs and expenses incident to termination and settlement of the terminated war contract; and

(4) reasonable costs and expenses of removing, preserving, storing and disposing of termination inventories; and

(5) such allowance for profit on the preparations made and work done for the terminated portion of the war contract as is reasonable under the circumstances; and

(6) interest on the termination claim in accordance with subsection (f) of this section; and

(7) the contract price and all amounts otherwise paid or payable under the contract.

The following shall not be included as elements of cost:

(i) Losses on other contracts, or from sales or exchanges of capital assets, fees and other expenses in connection with reorganization or recapitalization, antitrust or Federal income-tax litigation, or prosecution of Federal income-tax claims or other claims against the Government (except as provided in paragraph (3) of this subsection); losses on investments; provisions for contingencies; and premiums on life insurance where the contractor is the beneficiary.

(ii) The expense of conversion of the contractor's facilities to uses other than the performance of the contract.

(iii) Expenses due to the negligence or willful failure of the contractor to discontinue with reasonable promptness the incurring of expenses after the effective date of the termination notice.

(iv) Costs incurred in respect to facilities, materials, or services purchased or work done in excess of the reasonable quantitative requirements of the entire contract.

The failure specifically to mention in this subsection any item of cost is not intended to imply

that it should be allowed or disallowed. The Administrator of General Services may interpret the provisions of this subsection and may provide for the inclusion or exclusion of other costs in accordance with recognized commercial accounting practice.

Where the small size of claims or the nature of production or performance or other factors make it impracticable to apply the principles stated in this subsection to any class of settlements which are subject to this subsection, the contracting agencies may establish alternative methods and standards for determining fair compensation for that class of termination claims. The aggregate amount of compensation allowed in accordance with this subsection (excluding amounts allowed under paragraphs (3) and (4) of this subsection) shall not exceed the total contract price reduced by the amount of payments otherwise made or to be made under the contract.

(e) Settlement by agreement

In order to carry out the objectives of this chapter, termination claims shall be settled by agreement to the maximum extent feasible and the methods and standards established under subsection (b) of this section shall be designed to facilitate such settlements. To the extent that he deems it practicable to do so without impeding expeditious settlements, the Administrator of General Services shall require the contracting agencies to take into account the factors enumerated in subsection (d) of this section in establishing methods and standards for determining fair compensation in the settlement of termination claims by agreement.

(f) Interest

Each contracting agency shall allow and pay interest on the amount due and unpaid from time to time on any termination claim under a prime contract at the rate of 2½ per centum per annum for the period beginning thirty days after the date fixed for termination and ending with the date of final payment, except that (1) if the prime contractor unreasonably delays the settlement of his claim, interest shall not accrue for the period of such delay, (2) if interest for the period after termination on any advance payment or loan, made or guaranteed by the Government, has been waived for the benefit of the contractor, the amount of the interest so waived allocable to the terminated contract or the terminated part of the contract shall be deducted from the interest otherwise payable hereunder, and (3) if after delivery of findings by a contracting agency, the contractor appeals or sues as provided in section 113 of this title, interest shall not accrue after the thirtieth day following the delivery of the findings on any amount allowed by such findings, unless such amount is increased upon such appeal or suit. In approving, ratifying, authorizing, or making termination settlements with subcontractors, each contracting agency shall allow interest on the termination claim of the subcontractor on the same basis and subject to the same conditions as are applicable to a prime contractor.

(g) Amendment of contracts

Where any war contract does not provide for or provides against such fair compensation for its termination, the contracting agency, either before or after its termination, shall amend such war contract by agreement with the war contractor, or shall authorize, approve, or ratify an amendment of such war contract by the parties thereto, to provide for such fair compensation.

(July 1, 1944, ch. 358, § 6, 58 Stat. 652; Ex. Ord. No. 9809, § 8, eff. Dec. 12, 1946, 11 F.R. 14281; 1947 Reorg. Plan No. 1, § 201, eff. July 1, 1947, 12 F.R. 4534, 61 Stat. 951; June 30, 1949, ch. 288, title I, § 102(b), 63 Stat. 380.)

REFERENCES IN TEXT

Section 1191 of the Appendix to title 50, referred to in subsec. (c), was omitted from the Code. See note set out under section 1191 of Title 50, Appendix, War and National Defense.

TRANSFER OF FUNCTIONS

Functions of Secretary of the Treasury transferred to Administrator of General Services by section 102(b) of act June 30, 1949, ch. 288, 63 Stat. 380, which was classified to section 752(b) of former Title 40, Public Buildings, Property, and Works, and was repealed by Pub. L. 107–217, § 6(b), Aug. 21, 2002, 116 Stat. 1304.

''Secretary'' substituted for ''Director'' by section 8 of Ex. Ord. No. 9809 and section 201 of Reorg. Plan No. 1 of 1947. Reorg. Plan No. 1 of 1947 is set out in the Appendix to Title 5, Government Organization and Employees.

EFFECTIVE DATE OF TRANSFER OF FUNCTIONS

Transfer of functions by act June 30, 1949, 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.

APPLICATION TO TERMINATED WAR CONTRACTS

For application of this section to war contracts terminated at or before July 21, 1944, see section 124 of this title.

SETTLEMENT OF CLAIMS FOR WAR CONTRACT LOSSES INCURRED BETWEEN SEPTEMBER 16, 1940, AND AUGUST 14, 1945

Act Aug. 7, 1946, ch. 864, 60 Stat. 902, as amended by June 25, 1948, ch. 646, § 37, 62 Stat. 992; Aug. 30, 1954, ch. 1076, § 1(2), 68 Stat. 966, provided that if work, supplies, or services were provided for any department or agency of the Government, under a contract or subcontract, between Sept. 16, 1940, and Aug. 14, 1945, and a loss was incurred by the contractors or subcontractors without fault or negligence on their part, then those departments or agencies were authorized to adjust and settle these losses on a fair and equitable basis, if claims were filed within six months after Aug. 7, 1946, and granted claimants dissatisfied with the settlement the right of judicial review.

§ 107. Settlement of subcontractors' claims

(a) Conclusiveness of settlement

Where, in connection with the settlement of any termination claim by a contracting agency, any war contractor makes settlements of the termination claims of his subcontractors, the contracting agency shall limit or omit its review of such settlements with subcontractors to the maximum extent compatible with the public interest. Any contracting agency (1) may approve, ratify, or authorize such settlements with subcontractors upon such evidence, terms, and conditions as it deems proper; (2) shall vary the scope and intensity of its review of such settlements according to the reliability of the war

contractor, the size, number, and complexity of such claims, and other relevant factors; and (3) shall authorize war contractors to make such settlements with subcontractors without review by the contracting agency, whenever the reliability of the war contractor, the amount or nature of the claims, or other reasons appear to the contracting agency to justify such action. Any such settlement of a subcontract approved, ratified, or authorized by a contracting agency shall be final and conclusive as to the amount due to the same extent as a settlement under subsection (c) of section 106 of this title, and no war contractor shall be liable to the United States on account of any amounts paid thereon except for his own fraud.

(b) Supervision of payments to war contractors

Whenever any contracting agency is satisfied of the inability of a war contractor to meet his obligations it shall exercise supervision or control over payments to the war contractor on account of termination claims of subcontractors of such war contractor to such extent and in such manner as it deems necessary or desirable for the purpose of assuring the receipt of the benefit of such payments by the subcontractors.

(c) Group settlements

The Administrator of General Services shall prescribe policies and methods for the settlement as a group, or otherwise, by any contracting agency of some or all of the termination claims of a war contractor under war contracts with one or more (1) bureaus or divisions within a contracting agency, (2) contracting agencies, or (3) prime contractors and subcontractors, to the extent he deems such action necessary or desirable for expeditious and equitable settlement of such claims. After consulting with the contracting agencies concerned, the Administrator of General Services may provide for assigning any war contractor to a contracting agency for such settlement, and such agency shall have authority to settle, on behalf of any other contracting agency, some or all of the termination claims of such war contractor.

(d) Direct settlement by contracting agency

Any contracting agency may settle directly termination claims of subcontractors to the extent that it deems such action necessary or desirable for the expeditious and equitable settlement of such claims. In making such termination settlements any contracting agency may discharge the claim of the subcontractor by payment or may purchase such claim, and may agree to assume, or indemnify the subcontractor against, any claims by any person in connection with such claim or the termination settlement. Any contracting agency undertaking to settle the termination claim of any subcontractor shall deliver to the subcontractor and the war contractor liable to him written notice stating its acceptance of responsibility for settling his claim and the conditions applicable thereto, which may include the release, or assignment to the contracting agency, of his claim against the war contractor liable to him; upon consent thereto by the subcontractor, the Government shall become liable for the settlement of his claims upon the conditions specified in the notice.

(e) Amount of settlement

Any contracting agency may make settlements with subcontractors in accordance with any of the provisions of this chapter without regard to any limitation on the amount payable by the Government to the prime contractor.

(f) Equitable payments

If any contracting agency determines that in the circumstances of a particular case equity and good conscience require fair compensation for the termination of a war contract to be paid to a subcontractor who has been deprived of and cannot otherwise reasonably secure such fair compensation, the contracting agency concerned may pay such compensation to him although such compensation already has been included and paid as part of a settlement with another war contractor.

(July 1, 1944, ch. 358, § 7, 58 Stat. 654; Ex. Ord. No. 9809, § 8, eff. Dec. 12, 1946, 11 F.R. 14281; 1947 Reorg. Plan No. 1, § 201, eff. July 1, 1947, 12 F.R. 4534, 61 Stat. 951; June 30, 1949, ch. 288, title I, § 102(b), 63 Stat. 380.)

TRANSFER OF FUNCTIONS

Functions of Secretary of the Treasury transferred to Administrator of General Services by section 102(b) of act June 30, 1949, ch. 288, 63 Stat. 380, which was classified to section 752(b) of former Title 40, Public Buildings, Property, and Works, and was repealed by Pub. L. 107–217, § 6(b), Aug. 21, 2002, 116 Stat. 1304.

''Secretary'' substituted for ''Director'' by section 8 of Ex. Ord. No. 9809 and section 201 of Reorg. Plan No. 1 of 1947. Reorg. Plan No. 1 of 1947 is set out in the Appendix to Title 5, Government Organization and Employees.

EFFECTIVE DATE OF TRANSFER OF FUNCTIONS

Transfer of functions by act June 30, 1949, 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.

APPLICATION TO TERMINATED WAR CONTRACTS

For application of this section to war contracts terminated at or before July 21, 1944, see section 124 of this title.

§ 108. Interim financing

(a) Prime contractors

It is the policy of the Government, and it shall be the responsibility of the contracting agencies and the Administrator of General Services, in accordance with and subject to the provisions of this chapter, to provide war contractors having any termination claim or claims, pending their settlement, with adequate interim financing, within thirty days after proper application therefor.

(b) Method of financing; amounts payable

Each contracting agency shall, to the greatest extent it deems practicable, make available interim financing through loans and discounts, and commitments and guaranties in connection therewith, in contemplation of or related to termination of war contracts. Where interim financing is made by advance payments or partial payments, it shall, insofar as practicable, consist of the following:

(1) An amount equal to 100 per centum of the amount payable, at the contract price, on ac-

count of acceptable items completed prior to the termination date under the terms of the contract, or completed thereafter with the approval of the contracting agency; plus

(2) An amount equal to 90 per centum of the cost of raw materials, purchased parts, supplies, direct labor, and manufacturing overhead allocable to the terminated portion of the war contract; plus

(3) A reasonable percentage of other allowable costs, including administrative overhead, allocable to the terminated portion of the war contract not included in the foregoing; plus

(4) Such additional amounts, if any, as the contracting agency deems necessary to provide the war contractor with adequate interim financing.

(5) In lieu of the costs referred to in clauses (2) and (3) of this subsection, where a detailed ascertainment of such costs is not suitable to the conditions of any war contractor and is apt to cause delay in the obtaining of interim financing by him, that portion of such interim financing shall be equal to an amount not greater than 90 per centum of the estimated costs which are allocable to the terminated part or parts of the war contract or group of war contracts, and are ascertained in accordance with such methods and standards as the Administrator of General Services shall prescribe.

(6) There shall be deducted from the amount of such interim financing any unliquidated balances of advance and partial payments theretofore made to such war contractor, which are allocable to the terminated war contract or the terminated part of the war contract.

(c) Evidence to support financing

The Administrator of General Services shall prescribe (1) the types of estimates, certificates, or other evidence to be required to support such interim financing; (2) the terms and conditions upon which such interim financing shall be made including the use of standard forms for agreements with respect to such interim financing to the extent practicable; (3) the classes of cases in which such interim financing shall be refused; and (4) such methods of supervision and control over such interim financing as he deems necessary or desirable to assure adequate and speedy interim financing to subcontractors of the war contractor.

(d) Penalty for overstatement of claims

In case of an overstatement by any war contractor of the amount due on his termination claim or claims in connection with any interim financing under this chapter, such contractor shall pay to the United States, as a penalty, an amount equal to 6 per centum of the amount of the overstatement, but the Administrator of General Services may suspend or modify any such penalty if in his opinion the imposition thereof would be inequitable. Any penalty may be deducted from any amounts due the war contractor upon such termination claim or claims, or otherwise, or may be collected from the war contractor by suit. The obligation to pay any penalty imposed and to repay any interim financing made or assumed by the United States under this chapter shall constitute a debt due to the United States within the meaning of section 3713(a) of title 31.

(e) Advance payments as part of termination settlement

Any contracting agency may allow any advance payments, previously made or authorized by it in connection with the performance of a war contract, to be used for payments and expenses related to the termination settlement of such contract, upon such terms and conditions as it deems necessary or appropriate to protect the interest of the Government.

(f) Liquidation of loans, etc., prior to final settlement

No interim financing shall be made by any contracting agency under this chapter unless the terms of such financing provide for the liquidation by the war contractor of all loans, discounts, advance payments, or partial payments thereunder not later than the time of final payment of the amount due on the settlement of the termination claim or claims of the war contractor involved or such time thereafter as the contracting agency deems necessary for the liquidation of such interim financing in an orderly manner.

(g) Settlement of claims; validation of prior financing

Any contracting agency may settle, upon such terms and conditions as it deems proper, any claim or obligation due by or to the Government arising from or related to any interim financing made, acquired, or authorized by it. Any interim financing made, acquired, or authorized by any contracting agency before July 21, 1944, shall be valid to the extent it would be authorized under the provisions of this chapter if made after its effective date.

(July 1, 1944, ch. 358, §8, 58 Stat. 655; Ex. Ord. No. 9809, §8, eff. Dec. 12, 1946, 11 F.R. 14281; 1947 Reorg. Plan No. 1, §201, eff. July 1, 1947, 12 F.R. 4534, 61 Stat. 951; June 30, 1949, ch. 288, title I, §102(b), 63 Stat. 380.)

CODIFICATION

In subsec. (d), ''section 3713(a) of title 31'' substituted for ''Revised Statutes, section 3466 (31 U.S.C., sec. 191)'' on authority of Pub. L. 97–258, §4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

TRANSFER OF FUNCTIONS

Functions of Secretary of the Treasury transferred to Administrator of General Services by section 102(b) of act June 30, 1949, ch. 288, 63 Stat. 380, which was classified to section 752(b) of former Title 40, Public Buildings, Property, and Works, and was repealed by Pub. L. 107–217, §6(b), Aug. 21, 2002, 116 Stat. 1304.

''Secretary'' substituted for ''Director'' by section 8 of Ex. Ord. No. 9809 and section 201 of Reorg. Plan No. 1 of 1947, set out in the Appendix to Title 5, Government Organization and Employees.

EFFECTIVE DATE OF TRANSFER OF FUNCTIONS

Transfer of functions by act June 30, 1949, 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.

APPLICATION TO TERMINATED WAR CONTRACTS

For application of this section to war contracts terminated at or before July 21, 1944, see section 124 of this title.

§ 109. Advance or partial payments to subcontractors; excessive payments, interest, liability of war contractor

(a) Any contracting agency may make advance or partial payments to any war contractor on account of any termination claim or claims, and may authorize, approve, or ratify any such advance or partial payments by any war contractor to his subcontractors, upon such conditions as it deems necessary to insure compliance with the provisions of subsection (b) of this section. Each contracting agency shall make final payments from time to time on partial settlements or on settlements fixing a minimum amount due before complete settlement, or as tentative payments before any settlement of the claim or claims.

(b) Where any such advance or partial payment is made to any war contractor by any contracting agency or by another war contractor under this section, except a final payment on a partial settlement, any amount in excess of the amount finally determined to be due on the termination claim shall be treated as a loan from the Government to the war contractor receiving it, and shall be payable upon demand together with a penalty computed at the rate of 6 per centum per annum, for the period from the date such excess advance or partial payment is received to the date on which such excess is repaid or extinguished. Where the advance or partial payment was made by a war contractor and authorized, approved, or ratified by any contracting agency, the war contractor making it shall not be liable for any such excess payment in the absence of fraud on his part and shall receive payment or credit from the Government for the amount of such excess payment.

(July 1, 1944, ch. 358, § 9, 58 Stat. 657.)

APPLICATION TO TERMINATED WAR CONTRACTS

For application of this section to war contracts terminated at or before July 21, 1944, see section 124 of this title.

§ 110. Guarantee of loans, advances, etc.

(a) By contract

Any contracting agency is authorized—

(1) to enter into contracts with any Federal Reserve bank, or other public or private financing institution, guaranteeing such financing institution against loss of principal or interest on loans, discounts, or advances or on commitments in connection therewith, which such financing institution may make to any war contractor or to any person who is or has been engaged in performing any operation deemed by such contracting agency to be connected with or related to war production, for the purpose of financing such war contractor or other person in connection with or in contemplation of the termination of one or more such war contracts or operations; and

(2) to make, enter into contracts to make, or to participate with any Government agency, any Federal Reserve bank or public or private financing institution in making loans, discounts, or advances, or commitments in connection therewith, for the purpose of financing any such war contractor or other person in connection with or in contemplation of the termination of such war contracts or operations.

(b) By assignment

Any such loan, discount, advance, guaranty, or commitment in connection therewith may be secured by assignment of, or covenants to assign, some or all of the rights of such war contractor or other person in connection with the termination of such war contracts or operations, or in such other manner as the contracting agency may prescribe.

(c) Federal Reserve bank as fiscal agent

Subject to such regulations as the Board of Governors of the Federal Reserve System may prescribe with the approval of the Administrator of General Services, any Federal Reserve bank is authorized to act, on behalf of the contracting agencies, as fiscal agent of the United States in carrying out the purposes of this chapter.

(d) Application of other laws

This section shall not limit or affect any authority of any contracting agency, under any other statute, to make loans, discounts, or advances, or commitments in connection therewith or guaranties thereof.

(July 1, 1944, ch. 358, § 10, 58 Stat. 657; Ex. Ord. No. 9809, § 8, eff. Dec. 12, 1946, 11 F.R. 14281; 1947 Reorg. Plan No. 1, § 201, eff. July 1, 1947, 12 F.R. 4534, 61 Stat. 951; June 30, 1949, ch. 288, title I, § 102(b), 63 Stat. 380.)

TRANSFER OF FUNCTIONS

Functions of Secretary of the Treasury transferred to Administrator of General Services by section 102(b) of act June 30, 1949, ch. 288, 63 Stat. 380, which was classified to section 752(b) of former Title 40, Public Buildings, Property, and Works, and was repealed by Pub. L. 107–217, § 6(b), Aug. 21, 2002, 116 Stat. 1304.

''Secretary'' substituted for ''Director'' by section 8 of 1946 Ex. Ord. No. 9809 and section 201 of Reorg. Plan No. 1 of 1947, set out in the Appendix to Title 5, Government Organization and Employees.

EFFECTIVE DATE OF TRANSFER OF FUNCTIONS

Transfer of functions by act June 30, 1949, 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.

APPLICATION TO TERMINATED WAR CONTRACTS

For application of this section to war contracts terminated at or before July 21, 1944, see section 124 of this title.

§ 111. Termination of contracts

(a) Advance notice; prime contracts

In order to facilitate the efficient use of materials, manpower, and facilities for war and civilian purposes, each contracting agency—

(1) shall provide its prime contractors with notice of termination of their prime contracts as far in advance of the cessation of work thereunder as is feasible and consistent with

the national security without permitting unneeded production or performance;

(2) shall establish procedures whereby prime contractors shall provide affected subcontractors with immediate notice of termination; and

(3) shall permit the continuation of some or all of the work under a terminated prime contract whenever the agency deems that such continuation will benefit the Government or is necessary to avoid substantial injury to the plant or property.

(b) Cessation of work without termination

Whenever a contracting agency hereafter directs a prime contractor to cease or suspend all or a substantial part of the work under a prime contract, without terminating the contract, then, unless the contract provides otherwise, (1) the contracting agency shall compensate the contractor for reasonable costs and expenses resulting from such cessation or suspension, and (2) if the cessation or suspension extends for thirty days or more, the contractor may elect to treat it as a termination by delivering written notice of his election so to do to the contracting agency, at any time before the contracting agency directs the prime contractor to resume work under the contract.

(c) Authority of Administrator of General Services; classes of contracts

The Administrator of General Services shall have no authority under this chapter to regulate or control the classes of contracts to be terminated by the contracting agencies.

(July 1, 1944, ch. 358, §11, 58 Stat. 658; Ex. Ord. No. 9809, §8, eff. Dec. 12, 1946, 11 F.R. 14281; 1947 Reorg. Plan No. 1, §201, eff. July 1, 1947, 12 F.R. 4534, 61 Stat. 951; June 30, 1949, ch. 288, title I, §102(b), 63 Stat. 380.)

TRANSFER OF FUNCTIONS

Functions of Secretary of the Treasury transferred to Administrator of General Services by section 102(b) of act June 30, 1949, ch. 288, 63 Stat. 380, which was classified to section 752(b) of former Title 40, Public Buildings, Property, and Works, and was repealed by Pub. L. 107–217, §6(b), Aug. 21, 2002, 116 Stat. 1304.

''Secretary'' substituted for ''Director'' by section 8 of Ex. Ord. No. 9809 and section 201 of Reorg. Plan No. 1 of 1947, set out in the Appendix to Title 5, Government Organization and Employees.

EFFECTIVE DATE OF TRANSFER OF FUNCTIONS

Transfer of functions by act June 30, 1949, 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.

§112. Removal and storage of materials

(a) Termination inventory

It is the policy of the Government, upon the termination of any war contract, to assure the expeditious removal from the plant of the war contractor of the termination inventory not to be retained or sold by the war contractor.

(b) Statement on material of inventory

Any war contractor may submit to the contracting agency concerned or to any other Government agency designated by the Administrator of General Services, one or more statements showing the materials which such war contractor claims to be termination inventory under one or more war contracts and desires to have removed by the Government. Such statements shall be prepared in such form and detail, shall be submitted in such manner, through the prime contractor or otherwise, and shall be supported by such certificates or other data, as may be prescribed under this chapter.

(c) Removal and storage by Government agency

Within sixty days after the submission of any such statement by a war contractor, or such shorter period as may be prescribed under this chapter, or within such longer period as the war contractor may agree, the Government agency concerned (1) shall arrange, upon such terms and conditions as may be agreed, for the storage by the war contractor on his own premises or elsewhere of all such claimed termination inventory which the war contractor does not retain or dispose of, except any part which may be determined not to be allocable to the terminated war contract or contracts, or (2) shall remove from the plant or plants of the war contractor all of such claimed termination inventory not retained, disposed of, or stored by the war contractor or determined not to be allocable to the terminated war contract or contracts.

(d) Removal and storage by war contractor

Upon the failure of the Government so to arrange for storage by the war contractor or to remove any termination inventory within the period specified under subsection (c) of this section, the war contractor, subject to regulations prescribed under this chapter, may remove some or all of such termination inventory from his plant or plants and may store it on his own premises or elsewhere for the account and at the risk and expense of the Government, using reasonable care for its transportation and preservation. If any war contractor intends so to remove any claimed termination inventory, he shall deliver to the Government agency concerned written notice of the date fixed for removal and a statement showing the quantities and condition of the materials so to be removed, certified on behalf of the war contractor to have been prepared in accordance with a concurrent physical inventory of such materials. Such notice and statement shall be delivered at least twenty days in advance of the date fixed for removal and may be delivered before or after the expiration of the period specified under subsection (c) of this section. If the Government agency fails to check such materials, at or before the time of their removal by the war contractor, a certificate of the war contractor specifying the materials shown on such statement which were so removed, and filed with the Government agency concerned within thirty days after the date fixed for removal, shall constitute prima facie evidence against the United States as to the quantities and condition of the materials so removed, and the fact of their removal.

(e) Acquisition by Government agency of inventory material; liability

Notwithstanding any other provisions of law, but subject to subsection (h) of this section, the

contracting agency concerned or the Administrator of General Services, or any Government agency designated by him, on behalf of the United States, may, by the exercise of any contract rights or otherwise, acquire and take possession of any termination inventory of any war contractor, and any materials removed by the Government or stored for its account under subsections (c) and (d) of this section, whether or not such materials are finally determined not to constitute termination inventory. With respect to any such materials, the Government shall be liable to any war contractor concerned only for their return to such war contractor or for their disposal value at the time of their removal or for the proceeds realized by the Government from their disposal, at the election of the Government agency concerned, unless the Government agency and the war contractor agree or have agreed on a different basis. Any amount so paid or payable to a war contractor for materials allocable to a terminated war contract shall be credited against the termination claim under such contract but shall not otherwise affect the amount due on the claim, unless the Government agency concerned and the war contractor agree or have agreed otherwise. Any materials to which the Administrator of General Services takes title under this section shall be delivered for disposal to any appropriate Government agency authorized to make such disposal.

(f) Postponement or delay of termination settlement

No contracting agency shall postpone or delay any termination settlement beyond the period specified in subsection (c) of this section for the purpose of awaiting disposal by the war contractor or the Government of any termination inventory reported in accordance with subsection (b) of this section.

(g) Government-owned machinery

Whenever any war contractor no longer requires, for the performance of any war contract, any Government-owned machinery, tools, or equipment installed in his plant for the performance of one or more war contracts, the Government agency concerned, upon written demand by the war contractor, and within sixty days after such demand or such other period as may be prescribed under this chapter, and upon such conditions as may be so prescribed, shall remove or provide for the removal of such machinery, tools, or equipment from such plant, unless the Government agency concerned and the war contractor, by facilities contract or otherwise, have made or make other provisions for the retention, storage, maintenance, or disposition of such machinery, tools or equipment. The Government agency concerned may waive or release on behalf of the United States any obligation of the war contractor with respect to such machinery, tools, or equipment upon such terms and conditions as the agency deems appropriate. Upon the failure of the Government so to remove or provide for removal of any such machinery, tools, or equipment, the war contractor, subject to regulations prescribed under this chapter, may remove all or part of such machinery, tools, or equipment from his plant and may store it on his own premises or elsewhere, for the account and at the risk and expense of the Government, using reasonable care for its transportation and preservation.

(h) Limitation on Government acquisition of inventories

Nothing in this chapter shall limit or affect the authority of the Department of the Army, Department of the Air Force, Navy Department, or the Department of Transportation, respectively, to take over any termination inventories and to retain them for their use for any purpose or to dispose of such termination inventories for the purpose of war production, or to authorize any war contractor to retain or dispose of such termination inventories for the purpose of war production.

(i) Removal and storage by war contractor at own risk

Nothing in this section shall be construed to prevent the removal and storage of any termination inventory by any war contractor, at his own risk, at any time after termination of any war contract to which it is allocable.

(July 1, 1944, ch. 358, § 12, 58 Stat. 658; Ex. Ord. No. 9809, § 8, eff. Dec. 12, 1946, 11 F.R. 14281; 1947 Reorg. Plan No. 1, § 201, eff. July 1, 1947, 12 F.R. 4534, 61 Stat. 951; July 26, 1947, ch. 343, title II, §§ 205(a), 207(a), (f), 61 Stat. 501–503; June 30, 1949, ch. 288, title I, § 102(b), 63 Stat. 380; Pub. L. 97–31, § 12(18), Aug. 6, 1981, 95 Stat. 154.)

AMENDMENTS

1981—Subsec. (h). Pub. L. 97–31 substituted ''the Department of Transportation'' for ''Maritime Commission''.

CHANGE OF NAME

Department of the Air Force inserted under the authority of section 207(a), (f) of act July 26, 1947, ch. 343, title II, 61 Stat. 502, 503, and Secretary of Defense Transfer Order No. 6, eff. Jan. 15, 1948. Department of War designated Department of the Army and title of Secretary of War changed to Secretary of the Army by section 205(a) of such act July 26, 1947. Sections 205(a) and 207(a), (f) of act July 26, 1947, were repealed by section 53 of act Aug. 10, 1956, ch. 1041, 70A Stat. 641. Section 1 of act Aug. 10, 1956, enacted ''Title 10, Armed Forces'', which in sections 3010 to 3013 and 8010 to 8013 continued Departments of the Army and Air Force under administrative supervision of Secretary of the Army and Secretary of the Air Force, respectively.

TRANSFER OF FUNCTIONS

Functions of Secretary of the Treasury transferred to Administrator of General Services by section 102(b) of act June 30, 1949, ch. 288, 63 Stat. 380, which was classified to section 752(b) of former Title 40, Public Buildings, Property, and Works, and was repealed by Pub. L. 107–217, § 6(b), Aug. 21, 2002, 116 Stat. 1304.

''Secretary'' substituted for ''Director'' by section 8 of Ex. Ord. No. 9809 and section 201 of Reorg. Plan No. 1 of 1947, set out in the Appendix to Title 5, Government Organization and Employees.

EFFECTIVE DATE OF TRANSFER OF FUNCTIONS

Transfer of functions by act June 30, 1949, 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.

APPLICATION TO TERMINATED WAR CONTRACTS

For application of subsecs. (b) to (e) of this section to war contracts terminated at or before July 21, 1944, see section 124 of this title.

§ 113. Appeals

(a) Failure to settle claims by agreement; preparation of findings; notice to war contractor

Whenever the contracting agency responsible for settling any termination claim has not settled the claim by agreement or has so settled only a part of the claim, (1) the contracting agency at any time may determine the amount due on such claim or such unsettled part, and prepare written findings indicating the basis of the determination, and deliver a copy of such findings to the war contractor, or (2) if the termination claim has been submitted in the manner and substantially the form prescribed under this chapter, the contracting agency, upon written demand by the war contractor for such findings, shall determine the amount due on the claim or unsettled part and prepare and deliver such findings to the war contractor within ninety days after the receipt by the agency of such demand. In preparing such findings, the contracting agency may require the war contractor to furnish such information and to submit to such audits as may be reasonably necessary for that purpose. Within thirty days after the delivery of any such findings, the contracting agency shall pay to the war contractor at least 90 per centum of the amount thereby determined to be due, after deducting the amount of any outstanding interim financing applicable thereto.

(b) Rights of war contractor

Whenever any war contractor is aggrieved by the findings of a contracting agency on his claim or part thereof or by its failure to make such findings in accordance with subsection (a) of this section, he may bring suit against the United States for such claim or such part thereof, in the United States Court of Federal Claims or in a United States district court, in accordance with sections 1346, 2401, and 2402 of title 28, except that, if the contracting agency is the Reconstruction Finance Corporation, or any corporation organized pursuant to the Reconstruction Finance Corporation Act, or any corporation owned or controlled by the United States, the suit shall be brought against such corporation in any court of competent jurisdiction in accordance with existing law.

(c) Procedure

Any proceeding under subsection (b) of this section shall be governed by the following conditions:

(1) When any contracting agency provides a procedure within the agency for protest against such findings or for other appeal therefrom by the war contractor, the war contractor, before proceeding under subsection (b) of this section, (i) in his discretion may resort to such procedure within the time specified in his contract or, if no time is specified, within thirty days after the delivery to him of the findings; and (ii) shall resort to such procedure for protest or other appeal to the extent required by the Administrator of General Services, but failure of the contracting agency to act on any such required protest or appeal within thirty days shall operate as a refusal by the agency to modify its findings. Any revision of the findings by the contracting agency, upon protest or appeal within the agency, shall be treated as the findings of the agency for the purpose of appeal or suit under subsection (b) of this section. Notwithstanding any contrary provision in any war contract, no war contractor shall be required to protest or appeal from such findings within the contracting agency except in accordance with this paragraph.

(2) A war contractor may initiate proceedings in accordance with subsection (b) of this section (i) within ninety days after delivery to him of the findings by the contracting agency, or (ii) in case of protests or appeal within the agency, within ninety days after the determination of such protest or appeal, or (iii) in case of failure to deliver such findings, within one year after his demand therefor. If he does not initiate such proceedings within the time specified, he shall be precluded thereafter from initiating any proceedings in accordance with subsection (b) of this section, and the findings of the contracting agency shall be final and conclusive, or if no findings were made, he shall be deemed to have waived such termination claim.

(3) Notwithstanding any contrary provision in any war contract, the court shall not be bound by the findings of the contracting agency, but shall treat such findings as prima facie correct, and the burden shall be on the war contractor to establish that the amount due on his claim or part thereof exceeds the amount allowed by the findings of the contracting agency. Whenever the court finds that the war contractor failed to negotiate in good faith with the contracting agency for the settlement of his claim or part thereof before appeal or suit thereon, or failed to furnish to the agency any information reasonably requested by it regarding his termination claim or part thereof, or failed to prosecute diligently any protest or appeal required to be taken under subsection (c)(1)(ii) of this section, the court (i) may refuse to receive in evidence any information not submitted to the contracting agency; (ii) may deny interest on the claim or part thereof for such period as it deems proper; or (iii) may remand the case to the contracting agency for further proceedings upon such terms as the court may prescribe. Unless the case is remanded, the court shall enter the appropriate award or judgment on the basis of the law and facts, and may increase or decrease the amount allowed by the findings of the contracting agency.

(4) Any such proceedings shall not affect the authority of the contracting agency concerned to make a settlement of the termination claim, or any part thereof, by agreement with the war contractor at any time before such proceedings are concluded.

(d) Omitted

(e) Arbitration

The contracting agency responsible for settling any claim and the war contractor asserting the claim, by agreement, may submit all or any part of the termination claim to arbitration, without regard to the amount in dispute. Such arbitration proceedings shall be governed by the

provisions of United States Arbitration Act to the same extent as if authorized by an effective agreement in writing between the Government and the war contractor. Any such arbitration award shall be final and conclusive upon the United States to the same extent as a settlement under subsection (c) of section 106 of this title, but shall not be subject to approval by any settlement review board.

(f) Conclusiveness of decisions

Whenever any dispute exists between any war contractor and a subcontractor regarding any termination claim, either of them, by agreement with the other, may submit the dispute to a contracting agency for mediation or arbitration whenever authorized by the agency or required by the Administrator of General Services.

Any award or decision in such proceedings shall be final and conclusive as to the parties so submitting any such dispute and shall not be questioned by the United States in settling any related claim, in the absence of fraud or collusion.

(July 1, 1944, ch. 358, § 13, 58 Stat. 660; Ex. Ord. No. 9809, § 8, eff. Dec. 12, 1946, 11 F.R. 14281; 1947 Reorg. Plan No. 1, § 201, eff. July 1, 1947, 12 F.R. 4534, 61 Stat. 951; June 30, 1949, ch. 288, title I, § 102(b), 63 Stat. 380; July 14, 1952, ch. 739, 66 Stat. 627; Pub. L. 97–164, title I, § 160(a)(14), Apr. 2, 1982, 96 Stat. 48; Pub. L. 102–572, title IX, § 902(b)(1), Oct. 29, 1992, 106 Stat. 4516.)

REFERENCES IN TEXT

The Reconstruction Finance Corporation Act, referred to in subsec. (b), is act Jan. 22, 1932, ch. 8, 47 Stat. 5, as amended, which was classified to chapter 14 (§ 601 et seq.) of Title 15, Commerce and Trade, and has been eliminated from the Code. For complete classification of this Act prior to its elimination from the Code, see Tables.

United States Arbitration Act, referred to in subsec. (e), is classified generally to Title 9, Arbitration.

CODIFICATION

In subsec. (b), ''sections 1346, 2401, and 2402 of title 28'' substituted for ''subsection (20) of section 41 of title 28'' on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

Subsec. (d), which provided for appointment and duties of an Appeal Board, was omitted on authority of act July 14, 1952, ch. 739, 66 Stat. 627, set out as a note below, which abolished the Appeal Board and terminated all appeals, effective nine months after July 14, 1952. References in other subsections of this section to the Appeal Board were omitted in view of act July 14, 1952. As a result of these omissions, cl. (1) of subsec. (b), which authorized a war contractor to appeal to the Appeal Board, was deleted, and cl. (2), which permitted suits against the United States, became a part of subsec. (b) without numerical designation.

AMENDMENTS

1992—Subsec. (b). Pub. L. 102–572 substituted ''United States Court of Federal Claims'' for ''United States Claims Court''.

1982—Subsec. (b). Pub. L. 97–164 substituted ''United States Claims Court'' for ''Court of Claims''.

EFFECTIVE DATE OF 1992 AMENDMENT

Amendment by Pub. L. 102–572 effective Oct. 29, 1992, see section 911 of Pub. L. 102–572, set out as a note under section 171 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97–164 effective Oct. 1, 1982, see section 402 of Pub. L. 97–164, set out as a note under section 171 of Title 28, Judiciary and Judicial Procedure.

TRANSFER OF FUNCTIONS

Functions of Secretary of the Treasury transferred to Administrator of General Services by section 102(b) of act June 30, 1949, ch. 288, 63 Stat. 380, which was classified to section 752(b) of former Title 40, Public Buildings, Property, and Works, and was repealed by Pub. L. 107–217, § 6(b), Aug. 21, 2002, 116 Stat. 1304.

''Secretary'' substituted for ''Director'' by section 8 of Ex. Ord. No. 9809 and section 201 of Reorg. Plan No. 1 of 1947, set out in the Appendix to Title 5, Government Organization and Employees.

EFFECTIVE DATE OF TRANSFER OF FUNCTIONS

Transfer of functions by act June 30, 1949, 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.

ABOLITION OF RECONSTRUCTION FINANCE CORPORATION

Reorg. Plan No. 1 of 1957, § 6(a), eff. June 30, 1957, 22 F.R. 4633, 71 Stat. 647, set out in the Appendix to Title 5, Government Organization and Employees, abolished Reconstruction Finance Corporation.

ABOLITION OF APPEALS BOARD; TERMINATION OF APPEALS; NO FURTHER APPEALS ACCEPTED; RETURN OF ERRONEOUS FILED APPEALS

Act July 14, 1952, ch. 739, 66 Stat. 627, provided: ''That the Appeal Board established under section 13(d) of the Contract Settlement Act of 1944 [41 U.S.C. 113(d)] is hereby abolished: *Provided, however*, That said abolition shall not become effective until six months after the enactment of this Act [July 14, 1952] or such later date, nor more than nine months after the enactment of this Act, as may be fixed by written order of the Director of Contract Settlement published in the Federal Register. Such an order shall be made only in case the Director finds that it is impracticable for the Appeal Board to dispose of its pending business before the date fixed for abolition of the Board by this Act or a previous order of the Director. No such order shall be made less than thirty days prior to the date theretofore fixed for abolition of the Appeal Board.

''SEC. 2. (a) Upon the effective date of the abolition of the Appeal Board all appeals and disputes pending therein shall be terminated without prejudice and the right of the parties to pursue such other remedies as are provided by law shall not be affected thereby.

''(b) In any such terminated appeal, timely initiated in the Appeal Board, where the period for pursuit of any other remedy pursuant to section 13(b)(2) of the Contract Settlement Act of 1944 [41 U.S.C. 113(b)(2)] shall have expired or would expire within sixty days after the effective date of the abolition of the Appeal Board, the period within which proceedings may be initiated in accordance with the said section shall be extended to sixty days after said effective date.

''(c) Effective thirty days after the enactment of this Act [July 14, 1952] no further appeals or submitted disputes shall be accepted for determination by said Appeal Board.

''(d) Where an attempt is erroneously made to file an appeal with the Appeal Board after the time limited therefor by section 1(c) of this Act but prior to the effective date of the abolition of the Appeal Board, said Board shall forthwith return the papers to the person therein named as appellant together with a notice in writing that, pursuant to the terms of section 1(c) of this Act, it can no longer accept such an appeal. Where such an attempt is made in good faith and the appeal would, except for the provisions of section 1(c) of this Act, have been timely and the period for pursuit of any

other remedy pursuant to section 13(b)(2) of the Contract Settlement Act of 1944 [41 U.S.C. 113(b)(2)] expires or would expire prior to the expiration of sixty days after the receipt of such notice, the period within which proper proceedings may be initiated in accordance with said section 13(b)(2) shall be extended to sixty days after the receipt of such notice.''

APPLICATION TO TERMINATED WAR CONTRACTS

For application of this section to war contracts terminated at or before July 21, 1944, see section 124 of this title.

§114. Court of Federal Claims

(a) Appointment of auditors

For the purpose of expediting the adjudication of termination claims, the United States Court of Federal Claims is authorized to appoint not more than ten auditors.

(b) Procedure

The United States Court of Federal Claims, on motion of either of the parties, or on its own motion, may summon any and all persons with legal capacity to be sued to appear as a party or parties in any suit or proceeding of any nature whatsoever pending in said court to assert and defend their interests, if any, in such suits or proceedings, within such period of time prior to judgment as the United States Court of Federal Claims shall prescribe. If the name and address of any such person is known or can be ascertained by reasonable diligence, and if he resides within the jurisdiction of the United States, he shall be summoned to appear by personal service; but if any such person resides outside of the jurisdiction of the United States, or is unknown, or if for any other good and sufficient reason appearing to the court personal service cannot be had, he may be summoned by publication, under such rules as the court may adopt, together with a copy of the summons mailed by registered mail to such person's last known address. The United States Court of Federal Claims may, upon motion of the Attorney General, in any suit or proceeding where there may be any number of persons having possible interests therein, notify such persons to appear to assert and defend such interests. Upon failure so to appear, any and all claims or interests in claims of any such person against the United States, in respect of the subject matter of such suit or proceeding, shall forever be barred and the court shall have jurisdiction to enter judgment pro confesso upon any claim or contingent claim asserted on behalf of the United States against any person who, having been duly served with summons, fails to respond thereto, to the same extent and with like effect as if such person had appeared and had admitted the truth of all allegations made on behalf of the United States. Upon appearance by any person pursuant to any such summons or notice, the case as to such person shall, for all purposes, be treated as if an independent proceeding has been instituted by such person pursuant to sections 1491, 1496, 1501, 1503, and 2501 of title 28, and as if such independent proceeding had then been consolidated, for purposes of trial and determination, with the case in respect of which the summons or notice was issued, except that the United States shall not be heard upon any counterclaims, claims for damages or other demands whatsoever against such person, other than claims and contingent claims for the recovery of money hereafter paid by the United States in respect of the transaction or matter which constitutes the subject matter of such case, unless and until such person shall assert therein a claim, or an interest in a claim, against the United States, and the United States Court of Federal Claims shall have jurisdiction to adjudicate, as between any and all adverse claimants, their respective several interests in any matter in suit and to award several judgments in accordance therewith.

(c) Jurisdiction

The jurisdiction of the United States Court of Federal Claims shall not be affected by this chapter except to the extent necessary to give effect to this chapter, and no person shall recover judgment on any claim, or on any interest in any claim, in said court which such person would not have had a right to assert in said court if this section had not been enacted.

(July 1, 1944, ch. 358, §14, 58 Stat. 663; July 28, 1953, ch. 253, §5, 67 Stat. 226; Pub. L. 97–164, title I, §160(a)(14), Apr. 2, 1982, 96 Stat. 48; Pub. L. 102–572, title IX, §902(b)(1), Oct. 29, 1992, 106 Stat. 4516.)

CODIFICATION

In subsec. (b), ''sections 1491, 1496, 1501, 1503, and 2501 of title 28'' substituted for ''section 250 of title 28'' on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

AMENDMENTS

1992—Pub. L. 102–572 substituted ''United States Court of Federal Claims'' for ''United States Claims Court'' wherever appearing.

1982—Pub. L. 97–164 substituted ''United States Claims Court'' for ''Court of Claims'' wherever appearing.

1953—Subsec. (a). Act July 28, 1953, struck out provisions relating to the appointment of a maximum of twenty commissioners for the purpose of expediting the adjudication of termination claims.

EFFECTIVE DATE OF 1992 AMENDMENT

Amendment by Pub. L. 102–572 effective Oct. 29, 1992, see section 911 of Pub. L. 102–572, set out as a note under section 171 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97–164 effective Oct. 1, 1982, see section 402 of Pub. L. 97–164, set out as a note under section 171 of Title 28, Judiciary and Judicial Procedure.

COMMISSIONERS; TERMINATION OF APPOINTING AUTHORITY

Section 4(b) of act July 28, 1953, provided that the authority contained in subsec. (a) of this section respecting the appointment of commissioners ''is hereby terminated''.

SECTION UNAFFECTED BY REVISED TITLE 28

Act June 25, 1948, ch. 646, §2(d), 62 Stat. 985, provided that nothing in Title 28, Judiciary and Judicial Procedure, should be construed as repealing any of the provisions of this section.

§115. Personal financial liability of contracting officers

(a) Whenever any payment is made from Government funds to any war contractor or other

person as an advance, partial or final payment on any termination claim, or pursuant to any loan, guaranty, or agreement for the purchase of any loan, or any commitment in connection therewith, entered into by the Government, no officer or other Government agent authorizing or approving such payment or settlement, or certifying the voucher for such payment, or making the payment in accordance with a duly certified voucher, shall be personally liable for such payment, in the absence of fraud on his part. In settling the accounts of any disbursing officer the Government Accountability Office shall allow any such disbursements made by him notwithstanding any other provisions of law.

(b) For the purpose of making termination settlements or interim financing any Government agency is authorized to rely upon such certificates of war contractors as it deems proper and to permit war contractors and other persons to rely upon such certificates without financial liability in the absence of fraud on their part.

(July 1, 1944, ch. 358, § 15, 58 Stat. 664; Pub. L. 108–271, § 8(b), July 7, 2004, 118 Stat. 814.)

AMENDMENTS

2004—Subsec. (a). Pub. L. 108–271 substituted ''Government Accountability Office'' for ''General Accounting Office''.

§ 116. Repealed. Pub. L. 104–316, title I, § 121(a), Oct. 19, 1996, 110 Stat. 3836

Section, acts July 1, 1944, ch. 358, § 16, 58 Stat. 664; Ex. Ord. No. 9809, § 8, eff. Dec. 12, 1946, 11 F.R. 14281; 1947 Reorg. Plan No. 1, § 201, eff. July 1, 1947, 12 F.R. 4534, 61 Stat. 951; June 30, 1949, ch. 288, title I, § 102(b), 63 Stat. 380, related to functions and jurisdiction of General Accounting Office in reviewing final settlements made by contracting agency, in certifying settlements suspected of being fraudulent to Department of Justice, Administrator of General Services, and contracting agency, and in reporting on efficacy of settlement methods and procedures to Congress.

§ 117. Defective, informal, and quasi contracts

(a) Lack of formalized contract

Where any person has arranged to furnish or furnished to a contracting agency or to a war contractor any materials, services, or facilities related to the prosecution of the war, without a formal contract, relying in good faith upon the apparent authority of an officer or agent of a contracting agency, written or oral instructions, or any other request to proceed from a contracting agency, the contracting agency shall pay such person fair compensation therefor.

(b) Technical defects or omissions

Whenever any formal or technical defect or omission in any prime contract, or in any grant of authority to an officer or agent of a contracting agency who ordered any materials, services, and facilities might invalidate the contract or commitment, the contracting agency (1) shall not take advantage of such defect or omission; (2) shall amend, confirm, or ratify such contract or commitment without consideration in order to cure such defect or omission; and (3) shall make a fair settlement of any obligation thereby created or incurred by such agency, whether expressed or implied, in fact or in law, or in the nature of an implied or quasi contract.

(c) Failure to settle

Where a contracting agency fails to settle by agreement any claim asserted under this section, the dispute shall be subject to the provisions of section 113 of this title.

(d) Formalization of obligations; termination date for filing claims

The Administrator of General Services shall require each contracting agency to formalize all such obligations and commitments within such period as the Administrator of General Services deems appropriate. No person shall be entitled to recover compensation, to receive a settlement of any alleged obligation, or to obtain the benefit of any amendment, confirmation, ratification, or formalization of any alleged contract or commitment under the provisions of subsections (a), (b), (c), or (d) of this section, unless such person shall, on or before one hundred and eighty days after June 28, 1954, have filed a claim therefor with the contracting agency.

(July 1, 1944, ch. 358, § 17, 58 Stat. 665; Ex. Ord. No. 9809, § 8, eff. Dec. 12, 1946, 11 F.R. 14281; 1947 Reorg. Plan. No. 1, § 201, eff. July 1, 1947, 12 F.R. 4534, 61 Stat. 951; June 30, 1949, ch. 288, title I, § 102(b), 63 Stat. 380; June 28, 1954, ch. 403, § 1, 68 Stat. 300.)

AMENDMENTS

1954—Subsec. (d). Act June 28, 1954, inserted sentence providing a termination date for filing claims.

TRANSFER OF FUNCTIONS

Functions of Secretary of the Treasury transferred to Administrator of General Services by section 102(b) of act June 30, 1949, ch. 288, 63 Stat. 380, which was classified to section 752(b) of former Title 40, Public Buildings, Property, and Works, and was repealed by Pub. L. 107–217, § 6(b), Aug. 21, 2002, 116 Stat. 1304.

''Secretary'' substituted for ''Director'' by section 8 of Ex. Ord. No. 9809 and section 201 of Reorg. Plan No. 1 of 1947, set out in the Appendix to Title 5, Government Organization and Employees.

EFFECTIVE DATE OF TRANSFER OF FUNCTIONS

Transfer of functions by act June 30, 1949, 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.

NONACCRUAL OF LIABILITY

Section 2 of act June 28, 1954, provided that no liability should accrue by reason of the enactment of section 1 of that act [amending this section] which would not otherwise have accrued.

§ 118. Administration

(a) Records and forms

The Administrator of General Services shall establish policies for such supervision and review within the contracting agencies of termination settlements and interim financing as he deems necessary and appropriate to prevent and detect fraud and to assure uniformity in administration and to provide for expeditious settlements. For this purpose he shall prescribe such records to be prepared by the contracting agencies and by war contractors as he deems necessary in connection with such settlements and interim financing. He shall seek to reduce the amount of record keeping, reporting, and ac-

counting in connection with the settlement of termination claims and interim financing to the minimum compatible with the reasonable protection of the public interest. Each contracting agency shall prescribe forms for use by war contractors in connection with termination settlements and interim financing to the extent it deems necessary and feasible.

(b) Repealed. Oct. 31, 1951, ch. 654, § 1(111), 65 Stat. 705

(c) Advance notice on cut-backs

The Administrator of General Services, by regulation, shall provide for making available to any interested Government agency such advance notice and other information on cut-backs in war production resulting from terminations or failures to renew or extend war contracts, as he deems necessary and appropriate.

(d) Investigations

The Administrator of General Services shall make such investigations as he deems necessary or desirable in connection with termination settlements and interim financing. For this purpose he may utilize the facilities of any existing agencies and if he determines that the facilities of existing agencies are inadequate, he may establish a unit in the General Services Administration to supplement and facilitate the work of existing agencies. He shall report to the Department of Justice any information received by him indicating any fraudulent practices, for appropriate action.

(e) Certification of fraudulent settlements to Department of Justice

Whenever any contracting agency or the Administrator of General Services believes that any settlement was induced by fraud, the agency or Administrator of General Services shall report the facts to the Department of Justice. Thereupon, (1) the Department of Justice shall make an investigation to determine whether such settlement was induced by fraud, and (2) until the Department of Justice notifies the contracting agency that in its opinion the facts do not support the belief that the settlement was induced by fraud, the contracting agency, by set-off or otherwise, may withhold, from amounts owing to the war contractor by the United States under such settlement or otherwise, the amount of the settlement, or the portion thereof, which, in its opinion, was affected by the fraud. In any such case the Department of Justice shall take such action as it deems appropriate to recover payments made to such war contractor.

(July 1, 1944, ch. 358, § 18, 58 Stat. 666; Ex. Ord. No. 9809, § 8, eff. Dec. 12, 1946, 11 F.R. 14281; 1947 Reorg. Plan No. 1, § 201, eff. July 1, 1947, 12 F.R. 4534, 61 Stat. 951; June 30, 1949, ch. 288, title I, § 102(b), 63 Stat. 380; Oct. 31, 1951, ch. 654, § 1(111), 65 Stat. 705; Pub. L. 104–316, title I, § 121(b), Oct. 19, 1996, 110 Stat. 3836.)

AMENDMENTS

1996—Subsec. (a). Pub. L. 104–316, in second sentence, struck out ''(1)'' after ''he shall prescribe'' and struck out ''; and (2) the records in connection therewith to be transmitted to the General Accounting Office'' before period at end.

1951—Subsec. (b). Act Oct. 31, 1951, struck out provisions which related to preparation of information and reports regarding termination of war contracts, settlements of termination claims, interim financing, etc.

TRANSFER OF FUNCTIONS

Functions of Secretary of the Treasury transferred to Administrator of General Services by section 102(b) of act June 30, 1949, ch. 288, 63 Stat. 380, which was classified to section 752(b) of former Title 40, Public Buildings, Property, and Works, and was repealed by Pub. L. 107–217, § 6(b), Aug. 21, 2002, 116 Stat. 1304.

''Department of the Treasury'' substituted for ''Office of Contract Settlement'' in subsec. (d) and references to ''Director'' changed to ''Secretary'' throughout this section by section 8 of Ex. Ord. No. 9809 and section 201 of Reorg. Plan No. 1 of 1947, set out in the Appendix to Title 5, Government Organization and Employees.

EFFECTIVE DATE OF TRANSFER OF FUNCTIONS

Transfer of functions by act June 30, 1949, 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.

§ 119. Fraudulent claims, vouchers, statements, etc.; jurisdiction

Every person who makes or causes to be made, or presents or causes to be presented to any officer, agent, or employee of any Government agency any claim, bill, receipt, voucher, statement, account, certificate, affidavit, or deposition, knowing the same to be false, fraudulent, or fictitious or knowing the same to contain or to be based on any false, fraudulent, or fictitious statement or entry, or who shall cover up or conceal any material fact, or who shall use or engage in any other fraudulent trick, scheme, or device, for the purpose of securing or obtaining, or aiding to secure or obtain, for any person any benefit, payment, compensation, allowance, loan, advance, or emolument from the United States or any Government agency in connection with the termination, cancelation, settlement, payment, negotiation, renegotiation, performance, procurement, or award of a contract with the United States or with any other person, and every person who enters into an agreement, combination, or conspiracy so to do, (1) shall pay to the United States an amount equal to 25 per centum of any amount thereby sought to be wrongfully secured or obtained but not actually received, and (2) shall forfeit and refund any such benefit, payment, compensation, allowance, loan, advance, and emolument received as a result thereof and (3) shall in addition pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the costs of suit.

The several district courts of the United States, the several district courts of the Territories of the United States, within whose jurisdictional limits the person, or persons, doing or committing such act, or any one of them, resides or shall be found, shall, wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit, and such person or persons as are not inhabitants of or found within the district in which suit is brought may be brought in by order of the court to be served personally or by publication or in such other reasonable manner as the court may direct.

(July 1, 1944, ch. 358, § 19(a), (c)–(e), 58 Stat. 667; June 25, 1948, ch. 645, § 21, 62 Stat. 862.)

CODIFICATION

As originally enacted, the second undesignated paragraph of this section contained the words, ", the District of Columbia" after "The several district courts of the United States". The words "District of Columbia" have been deleted entirely as superfluous in view of section 132(a) of Title 28, Judiciary and Judicial Procedure, which states that "There shall be in each judicial district a district court which shall be a court of record known as the United States District Court for the district", and section 88 of Title 28 which states that "the District of Columbia constitutes one judicial district".

Section was comprised of subsecs. (a) and (c) to (e) of section 19 of act July 1, 1944. Subsec. (b) of section 19 was classified to section 590a of Title 18, Criminal Code and Criminal Procedure, prior to the general revision and enactment of Title 18, Crimes and Criminal Procedure, by act June 25, 1948, ch. 645, 62 Stat. 683. Subsecs. (a), (d), and (e) of section 19 were repealed by act June 25, 1948, leaving only subsec. (c) of section 19, which comprises this section. Subject matter of former subsecs. (a), (d), and (e) of section 19 is covered by sections 201, 287, 443, and 1001 of Title 18.

AMENDMENTS

1948—Act June 25, 1948, repealed first, second, fifth, and sixth undesignated pars. See Codification note above.

EFFECTIVE DATE OF 1948 REPEAL

Amendment by act June 25, 1948, effective Sept. 1, 1948, see section 20 of that act.

§ 120. Powers and duties of contracting agencies

(a) Limitation

Each contracting agency shall have authority, notwithstanding any provisions of law other than contained in this chapter, (1) to make any contract necessary and appropriate to carry out the provisions of this chapter; (2) to amend by agreement any existing contract, either before or after notice of its termination, on such terms and to such extent as it deems necessary and appropriate to carry out the provisions of this chapter; and (3) in settling any termination claim, to agree to assume, or indemnify the war contractor against, any claims by any person in connection with such termination claims or settlement. This subsection shall not limit or affect in any way any authority of any contracting agency under the First War Powers Act, 1941, or under any other statute.

(b) Evidence required; conclusiveness of determinations

Any contracting agency may prescribe the amount and kind of evidence required to identify any person as a war contractor, or any contract, agreement, or purchase order as a war contract for any of the purposes of this chapter. Any determination so made that any person is a war contractor, or that any contract, agreement, or purchase order is a war contract, shall be final and conclusive for any of the purposes of this chapter.

(c) Appropriations

There are authorized to be appropriated such sums as may be necessary for administering the provisions of this chapter.

(d) Validation of prior settlements

All policies and procedures relating to termination of war contracts, termination settlements, and interim financing, prescribed by the Secretary of the Treasury or any contracting agency, in effect on July 21, 1944, and not inconsistent with this chapter, shall remain in full force and effect unless and until superseded by the Administrator of General Services in accordance with this chapter, or by regulations of the contracting agency not inconsistent with this chapter or the policies prescribed by the Administrator of General Services.

(e) Impairment of contract

Nothing in this chapter shall be deemed to impair or modify any war contract or any term or provision of any war contract or any assignment of any claim under a war contract, without the consent of the parties thereto, if the war contract, or the term, provision, or assignment thereof, is otherwise valid.

(f) Aid to war contractors

Any contracting agency may authorize or direct its officers and employees, as a part of their official duties, to advise, aid, and assist war contractors in preparing and presenting termination claims, in obtaining interim financing, and in related matters, to such extent as it deems desirable. Such advice, aid, or assistance shall not constitute a violation of section 205 of title 18 or of any other law, provided the officer or employee does not receive therefor benefit or compensation of any kind, directly or indirectly, from any war contractor.

(July 1, 1944, ch. 358 § 20, 58 Stat. 668; Ex. Ord. No. 9809, § 8, eff. Dec. 12, 1946, 11 F.R. 14281; June 30, 1947, ch. 166, title II, § 207, 61 Stat. 209; 1947 Reorg. Plan No. 1, § 201, eff. July 1, 1947, 12 F.R. 4534, 61 Stat. 951; June 30, 1949, ch. 288, title I, § 102(b), 63 Stat. 380.)

REFERENCES IN TEXT

The First War Powers Act, 1941, referred to in subsec. (a), is act Dec. 18, 1941, ch. 593, 55 Stat. 838, which enacted sections 32 to 37 and 601 to 605, 611, and 616 to 622 of Title 50, Appendix, War and National Defense, and amended section 95a of Title 12, Banks and Banking, and section 5 of Title 50, Appendix. The First War Powers Act, 1941, was substantially repealed, with certain exceptions, by Pub. L. 89–554, § 8(a), Sept. 6, 1966, 80 Stat. 651. For complete classification of this Act to the Code, see Tables.

CODIFICATION

In subsec. (f), "section 205 of title 18" substituted for "section 109 of the Criminal Code (18 U.S.C. 198)" on authority of act June 25, 1948, ch. 645, 62 Stat. 683, the first section of which enacted Title 18, Crimes and Criminal Procedure, and on authority of Pub. L. 87–849, § 2, Oct. 23, 1962, 76 Stat. 1126.

Subsec. (g), relating to the duties of Smaller War Plants Corporation, omitted on authority of section 207 of act June 30, 1947, which provided: "The liquidation of the affairs of the Smaller War Plants Corporation administered by the Reconstruction Finance Corporation pursuant to Executive Order 9665 shall be carried out by the Reconstruction Finance Corporation, notwithstanding the provisions of the last paragraph of section 5 of the First War Powers Act, 1941 [section 605 of Title 50, Appendix, War and National Defense]. The Smaller War Plants Corporation is hereby abolished."

TRANSFER OF FUNCTIONS

Functions of Secretary of the Treasury transferred to Administrator of General Services by section 102(b) of

act June 30, 1949, ch. 288, 63 Stat. 380, which was classified to section 752(b) of former Title 40, Public Buildings, Property, and Works, and was repealed by Pub. L. 107–217, § 6(b), Aug. 21, 2002, 116 Stat. 1304.

''Secretary'' substituted for ''Director'' by section 8 of Ex. Ord. No. 9809 and section 201 of Reorg. Plan No. 1 of 1947, set out in the Appendix to Title 5, Government Organization and Employees.

EFFECTIVE DATE OF TRANSFER OF FUNCTIONS

Transfer of functions by act June 30, 1949, 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.

§ 121. Administrator of General Services; additional duties

In addition to his other functions under this chapter, the Administrator of General Services shall—

(a) promote the training of personnel for termination settlement and interim financing by contracting agencies, war contractors, and financing institutions;

(b) Omitted

(c) promote decentralization of the administration of termination settlements and interim financing by fostering delegation of authority within contracting agencies and to war contractors, to the extent he deems necessary and feasible; and

(d) consult with war contractors through advisory committees or such other methods as he deems appropriate.

(July 1, 1944, ch. 358, § 21, 58 Stat. 669; Ex. Ord. No. 9809, § 8, eff. Dec. 12, 1946, 11 F.R. 14281; June 30, 1947, ch. 166, title II, § 207, 61 Stat. 209; 1947 Reorg. Plan No. 1, § 201, eff. July 1, 1947, 12 F.R. 4534, 61 Stat. 951; June 30, 1949, ch. 288, title I, § 102(b), 63 Stat. 380.)

CODIFICATION

Subsec. (b), providing for Administrators' collaboration with Smaller War Plants Corporation in protecting interests of smaller war contractors, was omitted on authority of section 207 of act June 30, 1947, which provided: ''The liquidation of the affairs of the Smaller War Plants Corporation administered by the Reconstruction Finance Corporation pursuant to Executive Order 9665 shall be carried out by the Reconstruction Finance Corporation, notwithstanding the provisions of the last paragraph of section 5 of the First War Powers Act, 1941 [section 605 of Title 50, Appendix, War and National Defense]. The Smaller War Plants Corporation is hereby abolished.''

TRANSFER OF FUNCTIONS

Functions of Secretary of the Treasury transferred to Administrator of General Services by section 102(b) of act June 30, 1949, ch. 288, 63 Stat. 380, which was classified to section 752(b) of former Title 40, Public Buildings, Property, and Works, and was repealed by Pub. L. 107–217, § 6(b), Aug. 21, 2002, 116 Stat. 1304.

''Secretary'' substituted for ''Director'' by section 8 of Ex. Ord. No. 9809 and section 201 of Reorg. Plan No. 1 of 1947, set out in the Appendix to Title 5, Government Organization and Employees.

EFFECTIVE DATE OF TRANSFER OF FUNCTIONS

Transfer of functions by act June 30, 1949, 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.

TERMINATION OF ADVISORY COMMITTEES

Advisory committees in existence on Jan. 5, 1973, to terminate not later than the expiration of the 2-year period following Jan. 5, 1973, unless, in the case of a committee established by the President or an officer of the Federal Government, such committee is renewed by appropriate action prior to the expiration of such 2-year period, or in the case of a committee established by the Congress, its duration is otherwise provided by law. Advisory committees established after Jan. 5, 1973, to terminate not later than the expiration of the 2-year period beginning on the date of their establishment, unless, in the case of a committee established by the President or an officer of the Federal Government, such committee is renewed by appropriate action prior to the expiration of such 2-year period, or in the case of a committee established by the Congress, its duration is otherwise provided by law. See section 14 of Pub. L. 92–463, Oct. 6, 1972, 86 Stat. 776, set out in the Appendix to Title 5, Government Organization and Employees.

§ 122. Use of appropriated funds

Any contracting agency is authorized—

(a) to use for interim financing, the payment of claims, and for any other purposes authorized in this chapter any funds which have heretofore been appropriated or allocated or which may hereafter be appropriated or allocated to it, or which are or may become available to it, for such purposes or for the purposes of war production or war procurement;

(b) to use any such funds appropriated, allocated, or available to it for expenditures for or in behalf of any other contracting agency for the purposes authorized in this chapter; and

(c) to determine by agreement, joint estimate, or any other method authorized by the Administrator of General Services, the part of any expenditure made pursuant to subsection (b) of this section to be paid by each contracting agency concerned and to make transfers of funds between such contracting agencies accordingly. Transfers of funds between appropriations carried upon the books of the Treasury shall be made by the Administrator of General Services in accordance with joint requests of the contracting agencies involved.

(July 1, 1944, ch. 358, § 22, 58 Stat. 670; Ex. Ord. No. 9809, § 8, eff. Dec. 12, 1946, 11 F.R. 14281; 1947 Reorg. Plan No. 1, § 201, eff. July 1, 1949, 12 F.R. 4534, 61 Stat. 951; June 30, 1949, ch. 288, title I, § 102(b), 63 Stat. 380.)

TRANSFER OF FUNCTIONS

Functions of Secretary of the Treasury transferred to Administrator of General Services by section 102(b) of act June 30, 1949, ch. 288, 63 Stat. 380, which was classified to section 752(b) of former Title 40, Public Buildings, Property, and Works, and was repealed by Pub. L. 107–217, § 6(b), Aug. 21, 2002, 116 Stat. 1304.

''Secretary'' substituted for ''Director'' by section 8 of Ex. Ord. No. 9809 and section 201 of Reorg. Plan No. 1 of 1947, set out in the Appendix to Title 5, Government Organization and Employees.

EFFECTIVE DATE OF TRANSFER OF FUNCTIONS

Transfer of functions by act June 30, 1949, 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.

§ 123. Delegation of authority by Administrator of General Services

(a) Officers and agencies of General Service Administration and other governmental agencies

The Administrator of General Services may delegate any authority and discretion conferred

upon him by this chapter to such officers and agencies of the General Services Administration as he may designate, and may delegate such authority and discretion, upon such terms and conditions as he may prescribe, to the head of any Government agency to the extent necessary to the handling and solution of problems peculiar to that agency.

(b) Authority delegated to other governmental agencies

The head of any Government agency may delegate any authority and discretion conferred upon him or his agency by or pursuant to this chapter to any officer, agent, or employee of such agency or to any other Government agency, and may authorize successive redelegations of such authority and discretion.

(c) Joint exercise of delegated authority

Any two or more Government agencies may exercise jointly any authority and discretion conferred upon each of them individually by or pursuant to this chapter.

(d) Application to other laws

Nothing in this chapter shall prevent the Administrator of General Services from exercising any authority conferred upon him by any other statute.

(July 1, 1944, ch. 358, § 23, 58 Stat. 670; Ex. Ord. No. 9809, § 8, eff. Dec. 12, 1946, 11 F.R. 14281; 1947 Reorg. Plan No. 1, § 201, eff. July 1, 1947, 12 F.R. 4534, 61 Stat. 951; June 30, 1949, ch. 288, title I, § 102(b), 63 Stat. 380.)

CODIFICATION

In subsec. (a), the phrase ''such officers and agencies of the General Services Administration as he may designate'' substituted for ''any Deputy Director'' on authority of section 102(b) of act June 30, 1949, ch. 288, 63 Stat. 380, which was classified to section 752(b) of former Title 40, Public Buildings, Property, and Works, and was repealed by Pub. L. 107–217, § 6(b), Aug. 21, 2002, 116 Stat. 1304.

TRANSFER OF FUNCTIONS

Functions of Secretary of the Treasury transferred to Administrator of General Services by section 102(b) of act June 30, 1949, ch. 288, 63 Stat. 380, which was classified to section 752(b) of former Title 40, Public Buildings, Property, and Works, and was repealed by Pub. L. 107–217, § 6(b), Aug. 21, 2002, 116 Stat. 1304.

''Secretary'' substituted for ''Director'' by section 8 of Ex. Ord. No. 9809 and section 201 of Reorg. Plan No. 1 of 1947, set out in the Appendix to Title 5, Government Organization and Employees.

EFFECTIVE DATE OF TRANSFER OF FUNCTIONS

Transfer of functions by act June 30, 1949, 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.

§ 124. Effective date; applicability to lend lease contracts

(a) This chapter shall become effective twenty days after July 1, 1944. With the exception of the provisions of paragraphs (b), (c), (d), and (e) of section 112 of this title, and sections 106 to 110, and 113 of this title, this chapter shall be applicable in the case of any terminated war contract which has been finally settled at or before the effective date of this chapter.

(b) Nothing in this chapter shall limit or affect any authority conferred by sections 411 to 419 of title 22, or Acts supplemental thereto.

(July 1, 1944, ch. 358, § 24, 58 Stat. 670.)

REFERENCES IN TEXT

Sections 411 to 419 of title 22, referred to in subsec. (b), have been omitted from the Code.

§ 125. Exemption of certain contracts outside continental United States or in Alaska

Subject to policies prescribed by the Administrator of General Services, any contracting agency may exempt from some or all of the provisions of this chapter (a) any war contract made or to be performed outside the continental limits of the United States or in Alaska, or (b) any termination inventory situated outside of the continental limits of the United States or in Alaska, or (c) any modification of a war contract pursuant to its terms for the purpose of changing plans or specifications applicable to the work without substantially reducing its extent.

(July 1, 1944, ch. 358, § 25, 58 Stat. 670; Ex. Ord. No. 9809, § 8, eff. Dec. 12, 1946, 11 F.R. 14281; 1947 Reorg. Plan No. 1, § 201, eff. July 1, 1947, 12 F.R. 4534, 61 Stat. 951; June 30, 1949, ch. 288, title I, § 102(b), 63 Stat. 380.)

TRANSFER OF FUNCTIONS

Functions of Secretary of the Treasury transferred to Administrator of General Services by section 102(b) of act June 30, 1949, ch. 288, 63 Stat. 380, which was classified to section 752(b) of former Title 40, Public Buildings, Property, and Works, and was repealed by Pub. L. 107–217, § 6(b), Aug. 21, 2002, 116 Stat. 1304.

''Secretary'' substituted for ''Director'' by section 8 of Ex. Ord. No. 9809 and section 201 of Reorg. Plan No. 1 of 1947, set out in the Appendix to Title 5, Government Organization and Employees.

EFFECTIVE DATE OF TRANSFER OF FUNCTIONS

Transfer of functions by act June 30, 1949, 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.

CHAPTER 3—PROCUREMENT OF SUPPLIES AND SERVICES BY ARMED SERVICES

§§ 151 to 162. Repealed. Aug. 10, 1956, ch. 1041, § 53, 70A Stat. 641

Section 151, act Feb. 19, 1948, ch. 65, § 2, 62 Stat. 21, related to purchases and contracts for supplies and services for the Armed Services, stated the Congressional declaration of policy, provided for advertising requirements, excepted certain purchases and contracts, authorized reference to Attorney General where there is any evidence of violation of antitrust laws, excluded certain authorizations and contracts. See sections 2303 to 2305 of Title 10, Armed Forces.

Section 152, acts Feb. 19, 1948, ch. 65, § 3, 62 Stat. 22; Aug. 9, 1955, ch. 628, § 15, 69 Stat. 551, related to advertisements for bids, opening of bids and award or rejection of bids. See section 2305 of Title 10. Act Aug. 9, 1955, ch. 628, § 15, 69 Stat. 551, which amended section 152 of this title, was repealed by Pub. L. 85–861, § 36A, Sept. 2, 1958, 72 Stat. 1569.

Section 153, acts Feb. 19, 1948, ch. 65, § 4, 62 Stat. 23; Oct. 31, 1951, ch. 652, 65 Stat. 700, provided for types of contracts and examination of books, records, etc., of contractors. See sections 2306 and 2313 of Title 10.

Section 154, act Feb. 19, 1948, ch. 65, § 5, 62 Stat. 24, authorized advance payments under negotiated contracts. See section 2307 of Title 10.

Section 155, act Feb. 19, 1948, ch. 65, § 6, 62 Stat. 24, provided for remission of liquidated damages. See section 2312 of Title 10.

Section 156, act Feb. 19, 1948, ch. 65, § 7, 62 Stat. 24, provided for determinations and decisions, powers of agency head, finality of decisions, delegations of powers, non-delegable powers, written decisions, preservation of data. See sections 2304, 2310, and 2311 of Title 10.

Section 157, act Feb. 19, 1948, ch. 65, § 8, 62 Stat. 24, related to exemption of purchases or contracts from certain other provisions of law. See section 2304 of Title 10.

Section 158, act Feb. 19, 1948, ch. 65, § 9, 62 Stat. 24, defined ''agency head'' and ''supplies''. See sections 2302 and 2303 of Title 10.

Section 159, act Feb. 19, 1948, ch. 65, § 10, 62 Stat. 25, related to assignment and delegation of joint procurement responsibilities by agency head, and allocation of appropriations. See section 2309 of Title 10.

Section 160, act Feb. 19, 1948, ch. 65, § 11(b), 62 Stat. 25, provided that sections 5, 6, 6a, and 13 of this title should be inapplicable to procurement of supplies and services. See section 2314 of Title 10.

Section 161, act Feb. 19, 1948, ch. 65, § 12, 62 Stat. 26, related to concurrent authority of Secretaries of Army, Navy and Air Force. See section 2381 of Title 10.

Section 162, act July 10, 1952, ch. 630, title VI, § 638, 66 Stat. 537, related to obligation of funds by Department of Defense for procurement and distribution of supplies or equipment. See section 2202 of Title 10.

CHAPTER 4—PROCUREMENT PROCEDURES

SUBCHAPTER I—GENERAL PROVISIONS

Sec.
201 to 205. Transferred.

SUBCHAPTER II—GENERAL SERVICES ADMINISTRATION

211 to 219. Transferred.

SUBCHAPTER III—PROPERTY MANAGEMENT

231 to 240. Transferred.

SUBCHAPTER IV—PROCUREMENT PROVISIONS

251. Declaration of purpose of this subchapter.
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263. Performance based management: acquisition programs.
264. Relationship of commercial item provisions to other provisions of law.
264a. Definitions relating to procurement of commercial items.
264b. Preference for acquisition of commercial items.
265. Contractor employees: protection from reprisal for disclosure of certain information.
266. Merit-based award of grants for research and development.
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SUBCHAPTER V—FOREIGN EXCESS PROPERTY

271 to 274. Transferred.

SUBCHAPTER VI—FEDERAL RECORD MANAGEMENT

281 to 291. Transferred.

SUBCHAPTER I—GENERAL PROVISIONS

§§ 201 to 205. Transferred

CODIFICATION

Section 201, act June 30, 1949, ch. 288, § 2, 63 Stat. 378, which related to Congressional declaration of policy, was transferred to section 471 of former Title 40, Public Buildings, Property, and Works, and was repealed and reenacted as section 101 of Title 40, Public Buildings, Property, and Works, by Pub. L. 107–217, §§ 1, 6(b), Aug. 21, 2002, 116 Stat. 1062, 1304.

Section 202, acts June 30, 1949, ch. 288, § 3, 63 Stat. 378; Sept. 5, 1950, ch. 849, §§ 7(a), 8(a), 64 Stat. 590, 591, which related to definitions, was transferred to section 472 of former Title 40, and was repealed and reenacted as section 102 of Title 40, Public Buildings, Property, and Works, by Pub. L. 107–217, §§ 1, 6(b), Aug. 21, 2002, 116 Stat. 1062, 1304.

Section 203, act June 30, 1949, ch. 288, title VI, § 601, formerly title V, § 501, 63 Stat. 399; renumbered Sept. 5, 1950, ch. 849, § 6(a), (b), 64 Stat. 583, which related to applicability of existing provisions, was transferred to section 473 of former Title 40, and was repealed and reenacted as section 112 of Title 40, Public Buildings, Property, and Works, by Pub. L. 107–217, §§ 1, 6(b), Aug. 21, 2002, 116 Stat. 1062, 1304.

Section 204, act June 30, 1949, ch. 288, title VI, § 602(c)–(e), formerly title V, § 502(c), (d), 63 Stat. 401; renumbered and amended (including amendment to add subsec. (e)), Sept. 5, 1950, ch. 849, §§ 6(a), (b), 7(e), (f), 8(c), 64 Stat. 583, 590, which related to exemptions for Congress, departments, agencies, corporations, and persons, was transferred to section 474 of former Title 40, and was repealed and reenacted as section 113 of Title 40, Public Buildings, Property, and Works, by Pub. L. 107–217, §§ 1, 6(b), Aug. 21, 2002, 116 Stat. 1062, 1304.

Section 205, act June 30, 1949, ch. 288, title VI, § 603, formerly title V, § 503, 63 Stat. 403; renumbered and

amended Sept. 5, 1950, ch. 849, §§6(a), (b), 7(g), 64 Stat. 583, 590, which related to authorization of appropriations and fund transfer authority, was transferred to section 475 of former Title 40, and was repealed and reenacted as sections 124 and 125 of Title 40, Public Buildings, Property, and Works, by Pub. L. 107–217, §§1, 6(b), Aug. 21, 2002, 116 Stat. 1062, 1304.

SUBCHAPTER II—GENERAL SERVICES ADMINISTRATION

§§ 211 to 219. Transferred

CODIFICATION

Section 211, act June 30, 1949, ch. 288, title I, §101, 63 Stat. 379, which related to General Services Administration, was transferred to section 630 of former Title 5, Executive Departments and Government Officers and Employees, subsequently transferred to section 751 of former Title 40, Public Buildings, Property, and Works, and repealed and reenacted as sections 121(c)(1), 301, and 302 of Title 40, Public Buildings, Property, and Works, by Pub. L. 107–217, §§1, 6(b), Aug. 21, 2002, 116 Stat. 1062, 1304.

Section 212, act June 30, 1949, ch. 288, title I, §102, 63 Stat. 380, which related to transfer of functions, was transferred to section 630a of former Title 5, Executive Departments and Government Officers and Employees, subsequently transferred to section 752 of former Title 40, and repealed and reenacted as section 303(a) of Title 40, Public Buildings, Property, and Works, by Pub. L. 107–217, §§1, 6(b), Aug. 21, 2002, 116 Stat. 1062, 1304. Section 303(a) of Title 40 was amended generally by Pub. L. 109–313, §2(a)(1), Oct. 6, 2006, 120 Stat. 1734, and, as so amended, no longer relates to the Bureau of Federal Supply. See Historical and Revision Notes and 2006 Amendment note under section 303 of Title 40.

Section 213, act June 30, 1949, ch. 288, title I, §103, 63 Stat. 380, which related to transfer of affairs of Federal Works Agency, was transferred to section 630b of former Title 5, Executive Departments and Government Officers and Employees, subsequently transferred to section 753 of former Title 40, and repealed and reenacted as section 303(b) of Title 40, Public Buildings, Property, and Works, by Pub. L. 107–217, §§1, 6(b), Aug. 21, 2002, 116 Stat. 1062, 1304. Section 303(b) of Title 40 was amended generally by Pub. L. 109–313, §2(a)(1), Oct. 6, 2006, 120 Stat. 1734, and, as so amended, no longer relates to the Federal Works Agency and Commissioner of Public Buildings. See Historical and Revision Notes and 2006 Amendment note under section 303 of Title 40.

Section 214, act June 30, 1949, ch. 288, title I, §104, 63 Stat. 381, which related to records management, was transferred to section 391 of former Title 44, Public Printing and Documents. See sections 1506, 2102, 2301, 2501, and 2902 of Title 44, Public Printing and Documents.

Section 215, act June 30, 1949, ch. 288, title I, §105, 63 Stat. 381, which related to transfer and liquidation of War Assets Administration, was transferred to section 630c of former Title 5, Executive Departments and Government Officers and Employees, and was subsequently repealed by section 8(a) of Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 632.

Section 216, act June 30, 1949, ch. 288, title I, §106, 63 Stat. 381, which related to redistribution of Administrator's functions, was transferred to section 630d of former Title 5, Executive Departments and Government Officers and Employees, subsequently transferred to section 754 of former Title 40, Public Buildings, Property, and Works, and repealed and reenacted as section 121(e)(1)(C), (2)(A) of Title 40, Public Buildings, Property, and Works, by Pub. L. 107–217, §§1, 6(b), Aug. 21, 2002, 116 Stat. 1062, 1304.

Section 217, act June 30, 1949, ch. 288, title I, §107, 63 Stat. 382, which related to transfer of funds, was transferred to section 630e of former Title 5, Executive Departments and Government Officers and Employees, subsequently transferred to section 755 of former Title 40, and repealed by Pub. L. 107–217, §6(b), Aug. 21, 2002, 116 Stat. 1304.

Section 218, act June 30, 1949, ch. 288, title I, §108, 63 Stat. 382, which related to status of transferred employees, was transferred to section 630f of former Title 5, Executive Departments and Government Officers and Employees, and was subsequently repealed by section 8(a) of Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 632.

Section 219, acts June 30, 1949, ch. 288, title I, §109, 63 Stat 382; Sept. 5, 1950, ch. 849, §§1, 2(a), (b), 3, 64 Stat. 578, which related to the General Supply Fund, was transferred to section 630g of former Title 5, Executive Departments and Government Officers and Employees, subsequently transferred to section 756 of former Title 40, Public Buildings, Property, and Works, and repealed and reenacted as sections 313 and 321(a)–(d), (f)(1), (g) of Title 40, Public Buildings, Property, and Works, by Pub. L. 107–217, §§1, 6(b), Aug. 21, 2002, 116 Stat. 1062, 1304.

SUBCHAPTER III—PROPERTY MANAGEMENT

§§ 231 to 240. Transferred

CODIFICATION

Section 231, acts June 30, 1949, ch. 288, title II, §201, 63 Stat. 383; Aug. 10, 1949, ch. 412, §12(a), 63 Stat. 591; Sept. 5, 1950, ch. 849, §8(b), 64 Stat. 591, which related to procurement, warehousing, and related activities, was transferred to section 481 of former Title 40, Public Building, Property, and Works, and was repealed and reenacted as sections 501 to 505 of Title 40, Public Buildings, Property, and Works, by Pub. L. 107–217, §§1, 6(b), Aug. 21, 2002, 116 Stat. 1062, 1304.

Section 231a, act Oct. 26, 1949, ch. 737, 63 Stat. 920, which related to clarification of status of Architect of the Capitol under this chapter, was transferred to section 482 of former Title 40, and was repealed by Pub. L. 107–217, §6(b), Aug. 21, 2002, 116 Stat. 1304.

Section 232, acts June 30, 1949, ch. 288, title II, §202, 63 Stat. 384; Aug. 10, 1949, ch. 412, §12(a), 63 Stat. 591, which related to property utilization, was transferred to section 483 of former Title 40, and was repealed and reenacted as sections 521 to 527 and 529 of Title 40, Public Buildings, Property, and Works, by Pub. L. 107–217, §§1, 6(b), Aug. 21, 2002, 116 Stat. 1062, 1304.

Section 233, acts June 30, 1949, ch. 288, title II, §203, 63 Stat. 385; Aug. 10, 1949, ch. 412, §12(a), 63 Stat. 591; Sept. 5, 1950, ch. 849, §4, 64 Stat. 579, which related to disposal or surplus property, was transferred to section 484 of former Title 40, and was repealed and reenacted as sections 541 to 555 of Title 40, Public Buildings, Property, and Works, by Pub. L. 107–217, §§1, 6(b), Aug. 21, 2002, 116 Stat. 1062, 1304.

Section 234, act June 30, 1949, ch. 288, title I, §204, 63 Stat. 388, which related to proceeds from transfer, sale, etc., of property, was transferred to section 485 of former Title 40, and was repealed and reenacted as sections 571(a), 572 to 574 of Title 40, Public Buildings, Property, and Works, by Pub. L. 107–217, §§1, 6(b), Aug. 21, 2002, 116 Stat. 1062, 1304.

Section 235, acts June 30, 1949, ch. 288, title II, §205, 63 Stat. 389; Sept. 5, 1950, ch. 849, §9, 64 Stat. 591, which related to policies, regulations, and delegations, was transferred to section 486 of former Title 40, and was repealed and reenacted as section 121(a), (b), (c)(2), (d)(1), (2), (e)(1)(A), (B), (D)–(F), (2)(B), (f)–(h) of Title 40, Public Buildings, Property, and Works, by Pub. L. 107–217, §§1, 6(b), Aug. 21, 2002, 116 Stat. 1062, 1304.

Section 236, acts June 30, 1949, ch. 288, title II, §206, 63 Stat. 390; Aug. 10, 1949, ch. 412, §12(a), 63 Stat. 591, which related to surveys of government property and property management practices, was transferred to section 487 of former Title 40, and was repealed and reenacted as section 506 of Title 40, Public Buildings, Property, and Works, by Pub. L. 107–217, §§1, 6(b), Aug. 21, 2002, 116 Stat. 1062, 1304.

Section 237, act June 30, 1949, ch. 288, title II, §207, 63 Stat. 391, which related to applicability of antitrust

laws to property disposal, was transferred to section 488 of former Title 40, and was repealed and reenacted as section 559 of Title 40, Public Buildings, Property, and Works, by Pub. L. 107–217, §§1, 6(b), Aug. 21, 2002, 116 Stat. 1062, 1304.

Section 238, acts June 30, 1949, ch. 288, title II, §208, 63 Stat. 391; Sept. 5, 1950, ch. 849, §7(b), (c), 64 Stat. 590, which related to appointment and compensation of personnel, was transferred to section 630h of former Title 5, Executive Departments and Government Officers and Employees, subsequently transferred to section 758 of former Title 40, and repealed and reenacted as section 311(a)–(c) of Title 40, Public Buildings, Property, and Works, by Pub. L. 107–217, §§1, 6(b), Aug. 21, 2002, 116 Stat. 1062, 1304.

Section 239, act June 30, 1949, ch. 288, title II, §209, 63 Stat. 392, which related to civil remedies and penalties, was transferred to section 489 of former Title 40, and was repealed and reenacted as section 123 of Title 40, Public Buildings, Property, and Works, by Pub. L. 107–217, §§1, 6(b), Aug. 21, 2002, 116 Stat. 1062, 1304.

Section 239a, act June 30, 1949, ch. 288, title II, §210, as added Sept. 5, 1950, ch. 849, §5(c), 64 Stat. 580, which related to operation of buildings and related activities by the Administrator, was transferred to section 490 of former Title 40, and was repealed and reenacted as sections 581 to 585(a)(1), (2) (1st sentence, last sentence (words before ''and the obligation'')), (b), 586(a)–(c), 587(a)–(b)(4)(A), (c), 588, 589, 592(a)–(c)(1), (d), (e) of Title 40, Public Buildings, Property, and Works, by Pub. L. 107–217, §§1, 6(b), Aug. 21, 2002, 116 Stat. 1062, 1304.

Section 239b, act June 30, 1949, ch. 288, title II, §211, as added Sept. 5, 1950, ch. 849, §5(c), 64 Stat. 580, which related to motor vehicle identification, was transferred to section 491 of former Title 40, and was repealed and reenacted as sections 601 to 611 of Title 40, Public Buildings, Property, and Works, by Pub. L. 107–217, §§1, 6(b), Aug. 21, 2002, 116 Stat. 1062, 1304.

Section 240, act June 30, 1949, ch. 288, title II, §212, formerly §210, 63 Stat. 393; renumbered Sept. 5, 1950, ch. 849, §5(a), 64 Stat. 580, which related to reports to Congress, was transferred to section 492 of former Title 40, and was repealed and reenacted as section 126 of Title 40, Public Buildings, Property, and Works, by Pub. L. 107–217, §§1, 6(b), Aug. 21, 2002, 116 Stat. 1062, 1304.

SUBCHAPTER IV—PROCUREMENT PROVISIONS

§251. Declaration of purpose of this subchapter

The purpose of this subchapter is to facilitate the procurement of property and services.

(June 30, 1949, ch. 288, title III, §301, 63 Stat. 393; July 12, 1952, ch. 703, §1(m), 66 Stat. 594.)

AMENDMENTS

1952—Act July 12, 1952, substituted ''property'' for ''supplies''.

EFFECTIVE DATE OF 1996 AMENDMENT

Pub. L. 104–106, div. D, title XLIV, §4401, Feb. 10, 1996, 110 Stat. 678, provided that:

''(a) EFFECTIVE DATE.—Except as otherwise provided in this division [div. D (§§4001–4402) of Pub. L. 104–106, see Short Title of 1996 Amendment note below], this division and the amendments made by this division shall take effect on the date of the enactment of this Act [Feb. 10, 1996].

''(b) APPLICABILITY OF AMENDMENTS.—

''(1) SOLICITATIONS, UNSOLICITED PROPOSALS, AND RELATED CONTRACTS.—An amendment made by this division shall apply, in the manner prescribed in the final regulations promulgated pursuant to section 4402 [set out below] to implement such amendment, with respect to any solicitation that is issued, any unsolicited proposal that is received, and any contract entered into pursuant to such a solicitation or proposal, on or after the date described in paragraph (3).

''(2) OTHER MATTERS.—An amendment made by this division shall also apply, to the extent and in the manner prescribed in the final regulations promulgated pursuant to section 4402 to implement such amendment, with respect to any matter related to—

''(A) a contract that is in effect on the date described in paragraph (3);

''(B) an offer under consideration on the date described in paragraph (3); or

''(C) any other proceeding or action that is ongoing on the date described in paragraph (3).

''(3) DEMARCATION DATE.—The date referred to in paragraphs (1) and (2) is the date specified in such final regulations. The date so specified shall be January 1, 1997, or any earlier date that is not within 30 days after the date on which such final regulations are published.''

EFFECTIVE DATE OF 1994 AMENDMENT

Pub. L. 103–355, title X, §10001, Oct. 13, 1994, 108 Stat. 3404, provided that:

''(a) EFFECTIVE DATE.—Except as otherwise provided in this Act, this Act [see Short Title of 1994 Amendment note below] and the amendments made by this Act shall take effect on the date of the enactment of this Act [Oct. 13, 1994].

''(b) APPLICABILITY OF AMENDMENTS.—(1) An amendment made by this Act shall apply, in the manner prescribed in the final regulations promulgated pursuant to section 10002 to implement such amendment [set out below], with respect to any solicitation that is issued, any unsolicited proposal that is received, and any contract entered into pursuant to such a solicitation or proposal, on or after the date described in paragraph (3).

''(2) An amendment made by this Act shall also apply, to the extent and in the manner prescribed in the final regulations promulgated pursuant to section 10002 to implement such amendment, with respect to any matter related to—

''(A) a contract that is in effect on the date described in paragraph (3);

''(B) an offer under consideration on the date described in paragraph (3); or

''(C) any other proceeding or action that is ongoing on the date described in paragraph (3).

''(3) The date referred to in paragraphs (1) and (2) is the date specified in such final regulations [Oct. 1, 1995, see 60 F.R. 48231, Sept. 18, 1995]. The date so specified shall be October 1, 1995, or any earlier date that is not within 30 days after the date on which such final regulations are published.

''(c) IMMEDIATE APPLICABILITY OF CERTAIN AMENDMENTS.—Notwithstanding subsection (b), the amendments made by the following provisions of this Act apply on and after the date of the enactment of this Act [Oct. 13, 1994]: sections 1001, 1021, 1031, 1051, 1071, 1092, 1201, 1506(a), 1507, 1554, 2002(a), 2191, 3062(a), 3063, 3064, 3065(a)(1), 3065(b), 3066, 3067, 6001(a), 7101, 7103, 7205, and 7206, the provisions of subtitles A, B, and C of title III [§§3001–3025], and the provisions of title V [see Tables for classification].''

EFFECTIVE DATE OF 1984 AMENDMENT

Pub. L. 98–369, div. B, title VII, §2751, July 18, 1984, 98 Stat. 1203, provided that:

''(a) Except as provided in subsection (b), the amendments made by this title [see Short Title of 1984 Amendments note below] shall apply with respect to any solicitation for bids or proposals issued after March 31, 1985.

''(b) The amendments made by section 2713 [amending section 759 of former Title 40, Public Buildings, Property, and Works, and enacting provisions set out as a note under section 759 of former Title 40] and subtitle D [enacting sections 3551 to 3556 of Title 31, Money and Finance] shall apply with respect to any protest filed after January 14, 1985.''

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.

SHORT TITLE OF 2008 AMENDMENT

Pub. L. 110–417, [div. A], title VIII, § 861, Oct. 14, 2008, 122 Stat. 4546, provided that: ''This subtitle [subtitle G (§§ 861–874) of title VIII of Pub. L. 110–417, enacting sections 417b and 440 of this title, amending sections 253, 254d, and 417 of this title and sections 2304 and 2313 of Title 10, Armed Forces, enacting provisions set out as notes under this section, sections 253h, 254, 254b, 405, and 433a of this title, and sections 1535 and 6101 of Title 31, Money and Finance, and repealing provisions set out as a note under section 2304 of Title 10] may be cited as the 'Clean Contracting Act of 2008'.''

SHORT TITLE OF 1996 AMENDMENT

Pub. L. 104–106, div. D, § 4001, Feb. 10, 1996, 110 Stat. 642, as amended by Pub. L. 104–208, div. A, title I, § 101(f) [title VIII, § 808(a)], Sept. 30, 1996, 110 Stat. 3009–314, 3009–393, provided that: ''This division [div. D (§§ 4001–4402) of Pub. L. 104–106, see Tables for classification] and division E [§§ 5001–5703 of Pub. L. 104–106, repealed and reenacted, generally, as subtitle III (§ 11101 et seq.) of Title 40, Public Buildings, Property, and Works, by Pub. L. 107–217, §§ 1, 6(b), Aug. 21, 2002, 116 Stat. 1062, 1304, see Tables for complete classification] may be cited as the 'Clinger-Cohen Act of 1996'.''

SHORT TITLE OF 1994 AMENDMENT

Pub. L. 103–355, § 1, Oct. 13, 1994, 108 Stat. 3243, provided that: ''This Act [see Tables for classification] may be cited as the 'Federal Acquisition Streamlining Act of 1994'.''

SHORT TITLE OF 1984 AMENDMENTS

Pub. L. 98–577, § 1, Oct. 30, 1984, 98 Stat. 3066, provided that this Act [enacting sections 253c to 253h, 414a, 418a, and 418b of this title, repealing section 2303a of Title 10, Armed Forces, amending sections 253, 253b, 259, 403, and 416 of this title, sections 2302, 2304, 2311, and 2320 of Title 10, and sections 637 and 644 of Title 15, Commerce and Trade, and enacting provisions set out as notes under this section, section 416 of this title, and sections 637 and 644 of Title 15] may be cited as the ''Small Business and Federal Procurement Competition Enhancement Act of 1984''.

Pub. L. 98–369, div. B, title VII, § 2701, July 18, 1984, 98 Stat. 1175, provided that: ''This title [enacting sections 253a, 253b, 416 to 419 of this title and sections 3551 to 3556 of Title 31, Money and Finance, amending sections 252, 253, 254, 257, 258, 259, 260, 403, 405, and 414 of this title, sections 2301 to 2306, 2310, 2311, 2313, and 2356 of Title 10, Armed Forces, and section 759 of former Title 40, Public Buildings, Property, and Works, and enacting provisions set out as notes under this section, sections 253, 403, and 407 of this title, section 2304 of Title 10, and section 759 of former Title 40] may be cited as the 'Competition in Contracting Act of 1984'.''

SHORT TITLE

Act June 30, 1949, ch. 288, § 1(a), 63 Stat. 377, as amended by Pub. L. 103–355, title X, § 10005(a)(2), Oct. 13, 1994, 108 Stat. 3406; Pub. L. 107–217, § 6(b), Aug. 21, 2002, 116 Stat. 1304; Pub. L. 108–178, § 2(b)(1), Dec. 15, 2003, 117 Stat. 2640, provided that: ''This Act [see Tables for classification] may be cited as the 'Federal Property and Administrative Services Act of 1949'.''

[Pub. L. 107–217, § 6(b), which had repealed section 1(a) of act June 30, 1949, set out above, was itself repealed effective Aug. 21, 2002, by Pub. L. 108–178, § 2(b)(1), insofar as it related to section 1(a) of act June 30, 1949, and Pub. L. 108–178, § 2(b)(1), further provided that section 1(a) of act June 30, 1949, was revived to read as if Pub. L. 107–217, § 6(b), had not been enacted.]

REGULATIONS

Pub. L. 104–106, div. D, title XLIV, § 4402, Feb. 10, 1996, 110 Stat. 678, provided that:

''(a) PROPOSED REVISIONS.—Proposed revisions to the Federal Acquisition Regulation and such other proposed regulations (or revisions to existing regulations) as may be necessary to implement this Act [see Tables for classification] shall be published in the Federal Register not later than 210 days after the date of the enactment of this Act [Feb. 10, 1996].

''(b) PUBLIC COMMENT.—The proposed regulations described in subsection (a) shall be made available for public comment for a period of not less than 60 days.

''(c) FINAL REGULATIONS.—Final regulations shall be published in the Federal Register not later than 330 days after the date of enactment of this Act [Feb. 10, 1996].

''(d) MODIFICATIONS.—Final regulations promulgated pursuant to this section to implement an amendment made by this Act may provide for modification of an existing contract without consideration upon the request of the contractor.

''(e) SAVINGS PROVISIONS.—

''(1) VALIDITY OF PRIOR ACTIONS.—Nothing in this division [div. D (§§ 4001–4402) of Pub. L. 104–106, see Short Title of 1996 Amendment note above] shall be construed to affect the validity of any action taken or any contract entered into before the date specified in the regulations pursuant to section 4401(b)(3) [set out as an Effective Date of 1996 Amendment note above] except to the extent and in the manner prescribed in such regulations.

''(2) RENEGOTIATION AND MODIFICATION OF PREEXISTING CONTRACTS.—Except as specifically provided in this division, nothing in this division shall be construed to require the renegotiation or modification of contracts in existence on the date of the enactment of this Act [Feb. 10, 1996].

''(3) CONTINUED APPLICABILITY OF PREEXISTING LAW.—Except as otherwise provided in this division, a law amended by this division shall continue to be applied according to the provisions thereof as such law was in effect on the day before the date of the enactment of this Act until—

''(A) the date specified in final regulations implementing the amendment of that law (as promulgated pursuant to this section); or

''(B) if no such date is specified in regulations, January 1, 1997.''

Pub. L. 103–355, title X, § 10002, Oct. 13, 1994, 108 Stat. 3404, provided that:

''(a) PROPOSED REVISIONS.—Proposed revisions to the Federal Acquisition Regulation and such other proposed regulations (or revisions to existing regulations) as may be necessary to implement this Act [see Short Title of 1994 Amendment note above] shall be published in the Federal Register not later than 210 days after the date of the enactment of this Act [Oct. 13, 1994].

''(b) PUBLIC COMMENT.—The proposed regulations described in subsection (a) shall be made available for public comment for a period of not less than 60 days.

''(c) FINAL REGULATIONS.—Final regulations shall be published in the Federal Register not later than 330 days after the date of enactment of this Act.

''(d) MODIFICATIONS.—Final regulations promulgated pursuant to this section to implement an amendment made by this Act may provide for modification of an existing contract without consideration upon the request of the contractor.

''(e) REQUIREMENT FOR CLARITY.—Officers and employees of the Federal Government who prescribe regulations to implement this Act and the amendments made by this Act shall make every effort practicable to ensure that the regulations are concise and are easily understandable by potential offerors as well as by Government officials.

''(f) SAVINGS PROVISIONS.—(1) Nothing in this Act shall be construed to affect the validity of any action taken or any contract entered into before the date specified in the regulations pursuant to section 10001(b)(3) [see Effective Date of 1994 Amendment note above] except to the extent and in the manner prescribed in such regulations.

''(2) Except as specifically provided in this Act, nothing in this Act shall be construed to require the renegotiation or modification of contracts in existence on the date of the enactment of this Act [Oct. 13, 1994].

''(3) Except as otherwise provided in this Act, a law amended by this Act shall continue to be applied according to the provisions thereof as such law was in effect on the day before the date of the enactment of this Act until—

''(A) the date specified in final regulations implementing the amendment of that law (as promulgated pursuant to this section); or

''(B) if no such date is specified in regulations, October 1, 1995.''

SEPARABILITY

Section 604, formerly §504, of act June 30, 1949, renumbered by act Sept. 5, 1950, ch. 849, §6(a), (b), 64 Stat. 583, provided that: ''If any provision of this Act [see Tables for classification], or the application thereof to any person or circumstances, is held invalid, the remainder of this Act, and the application of such provision to other persons or circumstances, shall not be affected thereby.''

LINKING OF AWARD AND INCENTIVE FEES TO ACQUISITION OUTCOMES

Pub. L. 110–417, [div. A], title VIII, §867, Oct. 14, 2008, 122 Stat. 4551, provided that:

''(a) GUIDANCE FOR EXECUTIVE AGENCIES ON LINKING OF AWARD AND INCENTIVE FEES TO ACQUISITION OUTCOMES.—Not later than 1 year after the date of the enactment of this Act [Oct. 14, 2008], the Federal Acquisition Regulation shall be amended to provide executive agencies other than the Department of Defense with instructions, including definitions, on the appropriate use of award and incentive fees in Federal acquisition programs.

''(b) ELEMENTS.—The regulations under subsection (a) shall—

''(1) ensure that all new contracts using award fees link such fees to acquisition outcomes (which shall be defined in terms of program cost, schedule, and performance);

''(2) establish standards for identifying the appropriate level of officials authorized to approve the use of award and incentive fees in new contracts;

''(3) provide guidance on the circumstances in which contractor performance may be judged to be 'excellent' or 'superior' and the percentage of the available award fee which contractors should be paid for such performance;

''(4) establish standards for determining the percentage of the available award fee, if any, which contractors should be paid for performance that is judged to be 'acceptable', 'average', 'expected', 'good', or 'satisfactory';

''(5) ensure that no award fee may be paid for contractor performance that is judged to be below satisfactory performance or performance that does not meet the basic requirements of the contract;

''(6) provide specific direction on the circumstances, if any, in which it may be appropriate to roll over award fees that are not earned in one award fee period to a subsequent award fee period or periods;

''(7) ensure consistent use of guidelines and definitions relating to award and incentive fees across the Federal Government;

''(8) ensure that each executive agency—

''(A) collects relevant data on award and incentive fees paid to contractors; and

''(B) has mechanisms in place to evaluate such data on a regular basis;

''(9) include performance measures to evaluate the effectiveness of award and incentive fees as a tool for improving contractor performance and achieving desired program outcomes; and

''(10) provide mechanisms for sharing proven incentive strategies for the acquisition of different types of products and services among contracting and program management officials.

''(c) GUIDANCE FOR DEPARTMENT OF DEFENSE.—The Department of Defense shall continue to be subject to guidance on award and incentive fees issued by the Secretary of Defense pursuant to section 814 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Public Law 109–364; 120 Stat. 2321 [10 U.S.C. 2302 note]).

''(d) EXECUTIVE AGENCY DEFINED.—In this section, the term 'executive agency' has the meaning given such term in section 4(1) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(1)).''

CLOSE THE CONTRACTOR FRAUD LOOPHOLE

Pub. L. 110–252, title VI, ch. 1, June 30, 2008, 122 Stat. 2386, provided that:

''SHORT TITLE

''SEC. 6101. This chapter may be cited as the 'Close the Contractor Fraud Loophole Act'.

''REVISION OF THE FEDERAL ACQUISITION REGULATION

''SEC. 6102. The Federal Acquisition Regulation shall be amended within 180 days after the date of the enactment of this Act [June 30, 2008] pursuant to FAR Case 2007–006 (as published at 72 Fed Reg. 64019, November 14, 2007) or any follow-on FAR case to include provisions that require timely notification by Federal contractors of violations of Federal criminal law or overpayments in connection with the award or performance of covered contracts or subcontracts, including those performed outside the United States and those for commercial items.

''DEFINITION

''SEC. 6103. In this chapter, the term 'covered contract' means any contract in an amount greater than $5,000,000 and more than 120 days in duration.''

EVALUATION BY COMPTROLLER GENERAL

Pub. L. 103–355, title X, §10003, Oct. 13, 1994, 108 Stat. 3405, provided that not later than 180 days after the issuance in final form of revisions to the Federal Acquisition Regulation pursuant to section 10002 of Pub. L. 103–355, set out as a note above, the Comptroller General was to submit to Congress a report evaluating compliance with such section.

CONGRESSIONAL STATEMENT OF PURPOSE

Pub. L. 98–577, title I, §101, Oct. 30, 1984, 98 Stat. 3066, provided that: ''The purposes of this Act are to—

''(1) eliminate procurement procedures and practices that unnecessarily inhibit full and open competition for contracts;

''(2) promote the use of contracting opportunities as a means to expand the industrial base of the United States in order to ensure adequate responsive capability of the economy to the increased demands of the Government in times of national emergency; and

''(3) foster opportunities for the increased participation in the competitive procurement process of small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals.''

COMMISSION ON GOVERNMENT PROCUREMENT

Pub. L. 91–129, Nov. 26, 1969, 83 Stat. 269, as amended by Pub. L. 92–47, July 9, 1971, 85 Stat. 102, established the Commission on Government Procurement, which was to study and investigate statutes, rules, regulations, procedures, and practices affecting Government procurement and to submit a final report to Congress on or before Dec. 31, 1972, on the results of this study, including recommendations for changes designed to promote economy, efficiency, and effectiveness in the procurement of goods, services, and facilities by and for

the executive branch of the Government. The Commission terminated 120 days after submission of the final report.

EX. ORD. NO. 13005. EMPOWERMENT CONTRACTING

Ex. Ord. No. 13005, May 21, 1996, 61 F.R. 26069, provided:

In order to promote economy and efficiency in Federal procurement, it is necessary to secure broad-based competition for Federal contracts. This broad competition is best achieved where there is an expansive pool of potential contractors capable of producing quality goods and services at competitive prices. A great and largely untapped opportunity for expanding the pool of such contractors can be found in this Nation's economically distressed communities.

Fostering growth of Federal contractors in economically distressed communities and ensuring that those contractors become viable businesses for the long term will promote economy and efficiency in Federal procurement and help to empower those communities. Fostering growth of long-term viable contractors will be promoted by offering appropriate incentives to qualified businesses.

Accordingly, by the authority vested in me as President by the Constitution and the laws of the United States, including section 486(a) [now 121(a)] of title 40, United States Code, and section 301 of title 3, United States Code, it is hereby ordered as follows:

SECTION 1. *Policy*. The purpose of this order is to strengthen the economy and to improve the efficiency of the Federal procurement system by encouraging business development that expands the industrial base and increases competition.

SEC. 2. *Empowerment Contracting Program*. In consultation with the Secretaries of the Departments of Housing and Urban Development, Labor, and Defense; the Administrator of General Services; the Administrator of the National Aeronautics and Space Administration; the Administrator of the Small Business Administration; and the Administrator for Federal Procurement Policy, the Secretary of the Department of Commerce shall develop policies and procedures to ensure that agencies, to the extent permitted by law, grant qualified large businesses and qualified small businesses appropriate incentives to encourage business activity in areas of general economic distress, including a price or an evaluation credit, when assessing offers for government contracts in unrestricted competitions, where the incentives would promote the policy set forth in this order. In developing such policies and procedures, the Secretary shall consider the size of the qualified businesses.

SEC. 3. *Monitoring and Evaluation*. The Secretary shall:

(a) monitor the implementation and operation of the policies and procedures developed in accordance with this order;

(b) develop a process to ensure the proper administration of the program and to reduce the potential for fraud by the intended beneficiaries of the program;

(c) develop principles and a process to evaluate the effectiveness of the policies and procedures developed in accordance with this order; and

(d) by December 1 of each year, issue a report to the President on the status and effectiveness of the program.

SEC. 4. *Implementation Guidelines*. In implementing this order, the Secretary shall:

(a) issue rules, regulations, and guidelines necessary to implement this order, including a requirement for the periodic review of the eligibility of qualified businesses and distressed areas;

(b) draft all rules, regulations, and guidelines necessary to implement this order within 90 days of the date of this order; and

(c) ensure that all policies and procedures and all rules, regulations, and guidelines adopted and implemented in accordance with this order minimize the administrative burden on affected agencies and the procurement process.

SEC. 5. *Definitions*. For purposes of this Executive order:

(a) ''Agency'' means any authority of the United States that is an ''agency'' under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10).

(b) ''Area of general economic distress'' shall be defined, for all urban and rural communities, as any census tract that has a poverty rate of at least 20 percent or any designated Federal Empowerment Zone, Supplemental Empowerment Zone, Enhanced Enterprise Community, or Enterprise Community. In addition, the Secretary may designate as an area of general economic distress any additional rural or Indian reservation area after considering the following factors:

(1) Unemployment rate;

(2) Degree of poverty;

(3) Extent of outmigration; and

(4) Rate of business formation and rate of business growth.

(c) ''Qualified large business'' means a large for-profit or not-for-profit trade or business that (1) employs a significant number of residents from the area of general economic distress; and (2) either has a significant physical presence in the area of general economic distress or has a direct impact on generating significant economic activity in the area of general economic distress.

(d) ''Qualified small business'' means a small for-profit or not-for-profit trade or business that (1) employs a significant number of residents from the area of general economic distress; (2) has a significant physical presence in the area of general economic distress; or (3) has a direct impact on generating significant economic activity in the area of general economic distress.

(e) ''Secretary'' means the Secretary of Commerce.

SEC. 6. *Agency Authority*. Nothing in this Executive order shall be construed as displacing the agencies' authority or responsibilities, as authorized by law, including specifically other programs designed to promote the development of small or disadvantaged businesses.

SEC. 7. *Judicial Review*. This Executive order does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

WILLIAM J. CLINTON.

EXECUTIVE ORDER NO. 13202

Ex. Ord. No. 13202, Feb. 17, 2001, 66 F.R. 11225, as amended by Ex. Ord. No. 13208, Apr. 6, 2001, 66 F.R. 18717, which promoted preservation of open competition and Government neutrality towards Government contractors' labor relations on Federal and Federally funded construction projects, was revoked by Ex. Ord. No. 13502, § 8, Feb. 6, 2009, 74 F.R. 6986, set out below.

EX. ORD. NO. 13502. USE OF PROJECT LABOR AGREEMENTS FOR FEDERAL CONSTRUCTION PROJECTS

Ex. Ord. No. 13502, Feb. 6, 2009, 74 F.R. 6985, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 101 *et seq.*, and in order to promote the efficient administration and completion of Federal construction projects, it is hereby ordered that:

SECTION 1. *Policy*. (a) Large-scale construction projects pose special challenges to efficient and timely procurement by the Federal Government. Construction employers typically do not have a permanent workforce, which makes it difficult for them to predict labor costs when bidding on contracts and to ensure a steady supply of labor on contracts being performed. Challenges also arise due to the fact that construction projects typically involve multiple employers at a single location. A labor dispute involving one employer can delay the entire project. A lack of coordination

among various employers, or uncertainty about the terms and conditions of employment of various groups of workers, can create frictions and disputes in the absence of an agreed-upon resolution mechanism. These problems threaten the efficient and timely completion of construction projects undertaken by Federal contractors. On larger projects, which are generally more complex and of longer duration, these problems tend to be more pronounced.

(b) The use of a project labor agreement may prevent these problems from developing by providing structure and stability to large-scale construction projects, thereby promoting the efficient and expeditious completion of Federal construction contracts. Accordingly, it is the policy of the Federal Government to encourage executive agencies to consider requiring the use of project labor agreements in connection with large-scale construction projects in order to promote economy and efficiency in Federal procurement.

SEC. 2. *Definitions*.

(a) The term ''labor organization'' as used in this order means a labor organization as defined in 29 U.S.C. 152(5).

(b) The term ''construction'' as used in this order means construction, rehabilitation, alteration, conversion, extension, repair, or improvement of buildings, highways, or other real property.

(c) The term ''large-scale construction project'' as used in this order means a construction project where the total cost to the Federal Government is $25 million or more.

(d) The term ''executive agency'' as used in this order has the same meaning as in 5 U.S.C. 105, but excludes the Government Accountability Office.

(e) The term ''project labor agreement'' as used in this order means a pre-hire collective bargaining agreement with one or more labor organizations that establishes the terms and conditions of employment for a specific construction project and is an agreement described in 29 U.S.C. 158(f).

SEC. 3. (a) In awarding any contract in connection with a large-scale construction project, or obligating funds pursuant to such a contract, executive agencies may, on a project-by-project basis, require the use of a project labor agreement by a contractor where use of such an agreement will (i) advance the Federal Government's interest in achieving economy and efficiency in Federal procurement, producing labor-management stability, and ensuring compliance with laws and regulations governing safety and health, equal employment opportunity, labor and employment standards, and other matters, and (ii) be consistent with law.

(b) If an executive agency determines under subsection (a) that the use of a project labor agreement will satisfy the criteria in clauses (i) and (ii) of that subsection, the agency may, if appropriate, require that every contractor or subcontractor on the project agree, for that project, to negotiate or become a party to a project labor agreement with one or more appropriate labor organizations.

SEC. 4. Any project labor agreement reached pursuant to this order shall:

(a) bind all contractors and subcontractors on the Construction project through the inclusion of appropriate specifications in all relevant solicitation provisions and contract documents;

(b) allow all contractors and subcontractors to compete for contracts and subcontracts without regard to whether they are otherwise parties to collective bargaining agreements;

(c) contain guarantees against strikes, lockouts, and similar job disruptions;

(d) set forth effective, prompt, and mutually binding procedures for resolving labor disputes arising during the project labor agreement;

(e) provide other mechanisms for labor-management cooperation on matters of mutual interest and concern, including productivity, quality of work, safety, and health; and

(f) fully conform to all statutes, regulations, and Executive Orders.

SEC. 5. This order does not require an executive agency to use a project labor agreement on any construction project, nor does it preclude the use of a project labor agreement in circumstances not covered by this order, including leasehold arrangements and projects receiving Federal financial assistance. This order also does not require contractors or subcontractors to enter into a project labor agreement with any particular labor organization.

SEC. 6. Within 120 days of the date of this order, the Federal Acquisition Regulatory Council (FAR Council), to the extent permitted by law, shall take whatever action is required to amend the Federal Acquisition Regulation to implement the provisions of this order.

SEC. 7. The Director of OMB, in consultation with the Secretary of Labor and with other officials as appropriate, shall provide the President within 180 days of this order, recommendations about whether broader use of project labor agreements, with respect to both construction projects undertaken under Federal contracts and construction projects receiving Federal financial assistance, would help to promote the economical, efficient, and timely completion of such projects.

SEC. 8. *Revocation of Prior Orders, Rules, and Regulations*. Executive Order 13202 of February 17, 2001, and Executive Order 13208 of April 6, 2001, are revoked. The heads of executive agencies shall, to the extent permitted by law, revoke expeditiously any orders, rules, or regulations implementing Executive Orders 13202 and 13208.

SEC. 9. *Severability*. If any provision of this order, or the application of such provision to any person or circumstance, is held to be invalid, the remainder of this order and the application of the provisions of such to any person or circumstance shall not be affected thereby.

SEC. 10. *General*. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) authority granted by law to an executive department, agency, or the head thereof; or

(ii) functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order 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.

SEC. 11. *Effective Date*. This order shall be effective immediately and shall apply to all solicitations for contracts issued on or after the effective date of the action taken by the FAR Council under section 6 of this order.

BARACK OBAMA.

GOVERNMENT CONTRACTING

Memorandum of President of the United States, Mar. 4, 2009, 74 F.R. 9755, provided:

Memorandum for the Heads of Executive Departments and Agencies

The Federal Government has an overriding obligation to American taxpayers. It should perform its functions efficiently and effectively while ensuring that its actions result in the best value for the taxpayers.

Since 2001, spending on Government contracts has more than doubled, reaching over $500 billion in 2008. During this same period, there has been a significant increase in the dollars awarded without full and open competition and an increase in the dollars obligated through cost-reimbursement contracts. Between fiscal years 2000 and 2008, for example, dollars obligated under cost-reimbursement contracts nearly doubled, from $71 billion in 2000 to $135 billion in 2008. Reversing these trends away from full and open competition and toward cost-reimbursement contracts could result in savings of billions of dollars each year for the American taxpayer.

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 property 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.

best suited under the circumstances of the procurement.

(2) In determining the competitive procedures appropriate under the circumstance, an executive agency—

(A) shall solicit sealed bids if—

(i) time permits the solicitation, submission, and evaluation of sealed bids;

(ii) the award will be made on the basis of price and other price-related factors;

(iii) it is not necessary to conduct discussions with the responding sources about their bids; and

(iv) there is a reasonable expectation of receiving more than one sealed bid; and

(B) shall request competitive proposals if sealed bids are not appropriate under clause (A).

(b) Exclusion of particular source; restriction of solicitation to small business concerns

(1) An executive agency may provide for the procurement of property or services covered by this section using competitive procedures but excluding a particular source in order to establish or maintain any alternative source or sources of supply for that property or service if the agency head determines that to do so—

(A) would increase or maintain competition and would likely result in reduced overall costs for such procurement, or for any anticipated procurement, of such property or services;

(B) would be in the interest of national defense in having a facility (or a producer, manufacturer, or other supplier) available for furnishing the property or service in case of a national emergency or industrial mobilization;

(C) would be in the interest of national defense in establishing or maintaining an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center;

(D) would ensure the continuous availability of a reliable source of supply of such property or service;

(E) would satisfy projected needs for such property or service determined on the basis of a history of high demand for the property or service; or

(F) in the case of medical supplies, safety supplies, or emergency supplies, would satisfy a critical need for such supplies.

(2) An executive agency may provide for the procurement of property or services covered by this section using competitive procedures, but excluding other than small business concerns in furtherance of sections 638 and 644 of title 15.

(3) A contract awarded pursuant to the competitive procedures referred to in paragraphs (1) and (2) shall not be subject to the justification and approval required by subsection (f)(1) of this section.

(4) A determination under paragraph (1) may not be made for a class of purchases or contracts.

(c) Use of noncompetitive procedures

An executive agency may use procedures other than competitive procedures only when—

(1) the property or services needed by the executive agency are available from only one responsible source and no other type of property or services will satisfy the needs of the executive agency;

(2) the executive agency's need for the property or services is of such an unusual and compelling urgency that the Government would be seriously injured unless the executive agency is permitted to limit the number of sources from which it solicits bids or proposals;

(3) it is necessary to award the contract to a particular source or sources in order (A) to maintain a facility, producer, manufacturer, or other supplier available for furnishing property or services in case of a national emergency or to achieve industrial mobilization, (B) to establish or maintain an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center, or (C) to procure the services of an expert for use, in any litigation or dispute (including any reasonably foreseeable litigation or dispute) involving the Federal Government, in any trial, hearing, or proceeding before any court, administrative tribunal, or agency, or to procure the services of an expert or neutral for use in any part of an alternative dispute resolution or negotiated rulemaking process, whether or not the expert is expected to testify;

(4) the terms of an international agreement or treaty between the United States Government and a foreign government or international organization, or the written directions of a foreign government reimbursing the executive agency for the cost of the procurement of the property or services for such government, have the effect of requiring the use of procedures other than competitive procedures;

(5) subject to subsection (h)[1] of this section, a statute expressly authorizes or requires that the procurement be made through another executive agency or from a specified source, or the agency's need is for a brand-name commercial item for authorized resale;

(6) the disclosure of the executive agency's needs would compromise the national security unless the agency is permitted to limit the number of sources from which it solicits bids or proposals; or

(7) the head of the executive agency—

(A) determines that it is necessary in the public interest to use procedures other than competitive procedures in the particular procurement concerned, and

(B) notifies the Congress in writing of such determination not less than 30 days before the award of the contract.

(d) Property or services deemed available from only one source; nondelegable authority

(1) For the purposes of applying subsection (c)(1) of this section—

(A) in the case of a contract for property or services to be awarded on the basis of acceptance of an unsolicited research proposal, the

[1] See References in Text note below.

property or services shall be considered to be available from only one source if the source has submitted an unsolicited research proposal that demonstrates a unique and innovative concept the substance of which is not otherwise available to the United States and does not resemble the substance of a pending competitive procurement; and

(B) in the case of a follow-on contract for the continued development or production of a major system or highly specialized equipment when it is likely that award to a source other than the original source would result in (i) substantial duplication of cost to the Government which is not expected to be recovered through competition, or (ii) unacceptable delays in fulfilling the executive agency's needs, such property may be deemed to be available only from the original source and may be procured through procedures other than competitive procedures.

(2) The authority of the head of an executive agency under subsection (c)(7) of this section may not be delegated.

(3)(A) The contract period of a contract described in subparagraph (B) that is entered into by an executive agency pursuant to the authority provided under subsection (c)(2)—

(i) may not exceed the time necessary—

(I) to meet the unusual and compelling requirements of the work to be performed under the contract; and

(II) for the executive agency to enter into another contract for the required goods or services through the use of competitive procedures; and

(ii) may not exceed one year unless the head of the executive agency entering into such contract determines that exceptional circumstances apply.

(B) This paragraph applies to any contract in an amount greater than the simplified acquisition threshold.

(e) Offer requests to potential sources

An executive agency using procedures other than competitive procedures to procure property or services by reason of the application of subsection (c)(2) or (c)(6) of this section shall request offers from as many potential sources as is practicable under the circumstances.

(f) Justification for use of noncompetitive procedures

(1) Except as provided in paragraph (2), an executive agency may not award a contract using procedures other than competitive procedures unless—

(A) the contracting officer for the contract justifies the use of such procedures in writing and certifies the accuracy and completeness of the justification;

(B) the justification is approved—

(i) in the case of a contract for an amount exceeding $500,000 (but equal to or less than $10,000,000), by the competition advocate for the procuring activity (without further delegation) or by an official referred to in clause (ii) or (iii); and

(ii) in the case of a contract for an amount exceeding $10,000,000 (but equal to or less than $50,000,000), by the head of the procuring activity or a delegate who, if a member of the armed forces, is a general or flag officer or, if a civilian, is serving in a position in grade GS–16 or above under the General Schedule (or in a comparable or higher position under another schedule); or

(iii) in the case of a contract for an amount exceeding $50,000,000, by the senior procurement executive of the agency designated pursuant to section 414(3)[1] of this title (without further delegation); and

(C) any required notice has been published with respect to such contract pursuant to section 416 of this title and all bids or proposals received in response to such notice have been considered by such executive agency.

(2) In the case of a procurement permitted by subsection (c)(2), the justification and approval required by paragraph (1) may be made after the contract is awarded. The justification and approval required by paragraph (1) is not required—

(A) when a statute expressly requires that the procurement be made from a specified source;

(B) when the agency's need is for a brand-name commercial item for authorized resale;

(C) in the case of a procurement permitted by subsection (c)(7) of this section; or

(D) in the case of a procurement conducted under (i) the Javits-Wagner-O'Day Act (41 U.S.C. 46 et seq.), or (ii) section 637(a) of title 15.

(3) The justification required by paragraph (1)(A) shall include—

(A) a description of the agency's needs;

(B) an identification of the statutory exception from the requirement to use competitive procedures and a demonstration, based on the proposed contractor's qualifications or the nature of the procurement, of the reasons for using that exception;

(C) a determination that the anticipated cost will be fair and reasonable;

(D) a description of the market survey conducted or a statement of the reasons a market survey was not conducted;

(E) a listing of the sources, if any, that expressed in writing an interest in the procurement; and

(F) a statement of the actions, if any, the agency may take to remove or overcome a barrier to competition before a subsequent procurement for such needs.

(4) In no case may an executive agency—

(A) enter into a contract for property or services using procedures other than competitive procedures on the basis of the lack of advance planning or concerns related to the amount of funds available to the agency for procurement functions; or

(B) procure property or services from another executive agency unless such other executive agency complies fully with the requirements of this subchapter in its procurement of such property or services.

The restriction set out in clause (B) is in addition to, and not in lieu of, any other restriction provided by law.

(g) Simplified procedures for small purchases

(1) In order to promote efficiency and economy in contracting and to avoid unnecessary burdens for agencies and contractors, the Federal Acquisition Regulation shall provide for—

(A) special simplified procedures for purchases of property and services for amounts not greater than the simplified acquisition threshold; and

(B) special simplified procedures for purchases of property and services for amounts greater than the simplified acquisition threshold but not greater than $5,000,000 with respect to which the contracting officer reasonably expects, based on the nature of the property or services sought and on market research, that offers will include only commercial items.

(2)(A) The Administrator of General Services shall prescribe regulations that provide special simplified procedures for acquisitions of leasehold interests in real property at rental rates that do not exceed the simplified acquisition threshold.

(B) For purposes of subparagraph (A), the rental rate or rates under a multiyear lease do not exceed the simplified acquisition threshold if the average annual amount of the rent payable for the period of the lease does not exceed the simplified acquisition threshold.

(3) A proposed purchase or contract for an amount above the simplified acquisition threshold may not be divided into several purchases or contracts for lesser amounts in order to use the simplified procedures required by paragraph (1).

(4) In using the simplified procedures, an executive agency shall promote competition to the maximum extent practicable.

(5) An executive agency shall comply with the Federal Acquisition Regulation provisions referred to in section 427(f) of this title.

(h) Efficient implementation of requirement

The Federal Acquisition Regulation shall ensure that the requirement to obtain full and open competition is implemented in a manner that is consistent with the need to efficiently fulfill the Government's requirements.

(i) Merit-based award of contracts

(1) It is the policy of Congress that an executive agency should not be required by legislation to award a new contract to a specific non-Federal Government entity. It is further the policy of Congress that any program, project, or technology identified in legislation be procured through merit-based selection procedures.

(2) A provision of law may not be construed as requiring a new contract to be awarded to a specified non-Federal Government entity unless that provision of law—

(A) specifically refers to this subsection;

(B) specifically identifies the particular non-Federal Government entity involved; and

(C) specifically states that the award to that entity is required by such provision of law in contravention of the policy set forth in paragraph (1).

(3) For purposes of this subsection, a contract is a new contract unless the work provided for in the contract is a continuation of the work performed by the specified entity under a preceding contract.

(4) This subsection shall not apply with respect to any contract that calls upon the National Academy of Sciences to investigate, examine, or experiment upon any subject of science or art of significance to an executive agency and to report on such matters to the Congress or any agency of the Federal Government.

(j)(1)(A) Except as provided in subparagraph (B), in the case of a procurement permitted by subsection (c), the head of an executive agency shall make publicly available, within 14 days after the award of the contract, the documents containing the justification and approval required by subsection (f)(1) with respect to the procurement.

(B) In the case of a procurement permitted by subsection (c)(2), subparagraph (A) shall be applied by substituting ''30 days'' for ''14 days''.

(2) The documents shall be made available on the website of the agency and through a government-wide website selected by the Administrator for Federal Procurement Policy.

(3) This subsection does not require the public availability of information that is exempt from public disclosure under section 552(b) of title 5.

(June 30, 1949, ch. 288, title III, § 303, 63 Stat. 395; July 12, 1952, ch. 703, § 1(m), 66 Stat. 594; Pub. L. 90–268, § 2, Mar. 16, 1968, 82 Stat. 49; Pub. L. 98–369, div. B, title VII, § 2711(a)(1), July 18, 1984, 98 Stat. 1175; Pub. L. 98–577, title V, § 504(a)(1), (2), Oct. 30, 1984, 98 Stat. 3086; Pub. L. 99–145, title IX, § 961(a)(2), title XIII, § 1304(c)(2), (3), Nov. 8, 1985, 99 Stat. 703, 742; Pub. L. 101–510, div. A, title VIII, § 806(c), Nov. 5, 1990, 104 Stat. 1592; Pub. L. 103–355, title I, §§ 1051–1053, 1055(a), title IV, § 4402(a), title VII, § 7203(b)(1), Oct. 13, 1994, 108 Stat. 3260, 3261, 3265, 3348, 3380; Pub. L. 104–106, div. D, title XLI, §§ 4101(b), 4102(b), title XLII, § 4202(b)(1), title XLIII, § 4321(e)(2), Feb. 10, 1996, 110 Stat. 642, 643, 653, 674; Pub. L. 104–320, §§ 7(a)(2), 11(c)(2), Oct. 19, 1996, 110 Stat. 3871, 3873; Pub. L. 105–85, div. A, title VIII, § 850(f)(4)(B), Nov. 18, 1997, 111 Stat. 1850; Pub. L. 110–181, div. A, title VIII, § 844(a), Jan. 28, 2008, 122 Stat. 239; Pub. L. 110–417, [div. A], title VIII, § 862(a), Oct. 14, 2008, 122 Stat. 4546.)

REFERENCES IN TEXT

Subsection (h) of this section, referred to in subsec. (c)(5), was redesignated subsec. (i) and a new subsec. (h) was added by Pub. L. 104–106, div. D, title XLI, § 4101(b), Feb. 10, 1996, 110 Stat. 642.

Section 414 of this title, referred to in subsec. (f)(1)(B)(iii), 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.

The Javits-Wagner-O'Day Act, referred to in subsec. (f)(2)(D), is act June 25, 1938, ch. 697, 52 Stat. 1196, as amended, which is classified to sections 46 to 48c of this title. For complete classification of this Act to the Code, see Tables.

AMENDMENTS

2008—Subsec. (d)(3). Pub. L. 110–417 added par. (3).

Subsec. (f)(4), (5). Pub. L. 110–181, § 844(a)(2), redesignated par. (5) as (4) and struck out former par. (4) which read as follows: ''The justification required by paragraph (1)(A) and any related information shall be made available for inspection by the public consistent with the provisions of section 552 of title 5.''

Subsec. (j). Pub. L. 110–181, §844(a)(1), added subsec. (j).

1997—Subsec. (g)(5). Pub. L. 105–85 substituted ''section 427(f)'' for ''section 427(g)''.

1996—Subsec. (c)(3)(C). Pub. L. 104–320 substituted ''agency, or to procure the services of an expert or neutral for use'' for ''agency, or'' and inserted ''or negotiated rulemaking'' after ''alternative dispute resolution''.

Subsec. (f)(1)(B)(i). Pub. L. 104–106, §4102(b)(1), substituted ''$500,000 (but equal to or less than $10,000,000)'' for ''$100,000 (but equal to or less than $1,000,000)'' and ''(ii) or (iii); and'' for ''(ii), (iii), or (iv);''.

Subsec. (f)(1)(B)(ii). Pub. L. 104–106, §4102(b)(2), substituted ''$10,000,000 (but equal to or less than $50,000,000)'' for ''$1,000,000 (but equal to or less than $10,000,000)'' and ''civilian,'' for ''civilian;''.

Subsec. (f)(1)(B)(iii). Pub. L. 104–106, §4102(b)(3), substituted ''$50,000,000'' for ''$10,000,000''.

Subsec. (f)(2)(D). Pub. L. 104–106, §4321(e)(2), substituted ''the Javits-Wagner-O'Day Act (41 U.S.C. 46 et seq.),'' for ''the Act of June 25, 1938 (41 U.S.C. 46 et seq.), popularly referred to as the Wagner-O'Day Act,''.

Subsec. (g)(1). Pub. L. 104–106, §4202(b)(1)(A), substituted ''shall provided for—'' for ''shall provide for special simplified procedures for purchases of property and services for amounts not greater than the simplified acquisition threshold.'' and added subpars. (A) and (B).

Subsec. (g)(5). Pub. L. 104–106, §4202(b)(1)(B), added par. (5).

Subsecs. (h), (i). Pub. L. 104–106, §4101(b), added subsec. (h) and redesignated former subsec. (h) as (i).

1994—Subsec. (a)(1)(A). Pub. L. 103–355, §1051(1), substituted ''Federal Acquisition Regulation'' for ''modifications to regulations promulgated pursuant to section 2752 of the Competition in Contracting Act of 1984''.

Subsec. (b)(1)(D) to (F). Pub. L. 103–355, §1052(a), added subpars. (D) to (F).

Subsec. (b)(4). Pub. L. 103–355, §1052(b), added par. (4).

Subsec. (c)(3). Pub. L. 103–355, §1055(a), struck out ''or'' before ''(B)'' and inserted '', or'' and cl. (C) before period at end.

Subsec. (c)(5). Pub. L. 103–355, §7203(b)(1)(A), inserted ''subject to subsection (h) of this section,'' before ''a statute''.

Subsec. (f)(1)(B)(i). Pub. L. 103–355, §1053, inserted before semicolon at end ''or by an official referred to in clause (ii), (iii), or (iv)''.

Subsec. (g)(1). Pub. L. 103–355, §4402(a)(1)(A), substituted ''purchases of property and services for amounts not greater than the simplified acquisition threshold'' for ''small purchases of property and services''.

Pub. L. 103–355, §§1051(2), 4402(a)(1)(B), amended par. (1) identically, substituting ''Federal Acquisition Regulation'' for ''regulations modified, in accordance with section 2752 of the Competition in Contracting Act of 1984,''.

Subsec. (g)(2). Pub. L. 103–355, §4402(a)(2), added par. (2) and struck out former par. (2) which read as follows: ''For the purposes of this subchapter, a small purchase is a purchase or contract for an amount which does not exceed the small purchase threshold.''

Subsec. (g)(3). Pub. L. 103–355, §4402(a)(3), substituted ''simplified acquisition threshold'' for ''small purchase threshold'' and ''simplified procedures'' for ''small purchase procedures''.

Subsec. (g)(4). Pub. L. 103–355, §4402(a)(4), substituted ''the simplified procedures'' for ''small purchase procedures''.

Subsec. (g)(5). Pub. L. 103–355, §4402(a)(5), struck out par. (5) which read as follows: ''In this subsection, the term 'small purchase threshold' has the meaning given such term in section 403(11) of this title.''

Subsec. (h). Pub. L. 103–355, §7203(b)(1)(B), added subsec. (h).

1990—Subsec. (g)(2), (3). Pub. L. 101–510, §806(c)(1), (2), substituted ''the small purchase threshold'' for ''$25,000''.

Subsec. (g)(5). Pub. L. 101–510, §806(c)(3), added par. (5).

1985—Subsec. (f)(1)(C). Pub. L. 99–145, §1304(c)(2), substituted ''any'' for ''Any''.

Subsec. (f)(2). Pub. L. 99–145, §961(a)(2), added subpars. (A) and (B), designated existing provision as subpar. (C), and redesignated as subpar. (D), cls. (i) and (ii) provisions previously designated subpars. (A) and (B), substituting in cl. (ii) ''section 637(a) of title 15'' for ''the authority of section 637(a) of title 15''.

Subsec.(g)(1). Pub. L. 99–145, §1304(c)(3), inserted a comma after ''1984''.

1984—Subsec. (a). Pub. L. 98–369 substituted provisions requiring procurement through full and open competition for provisions requiring advertisement for bids to be made a sufficient time prior to the purchase or contract and to permit full and free competition, and struck out provision that no advertisement or bid invitation for carriage of Government property in other than Government-owned cargo containers could specify carriage in cargo containers of any stated length, height, or width.

Subsec. (b). Pub. L. 98–369 substituted provisions regarding the exclusion of a particular source of property or services from competitive procedures for provisions regarding the opening of bids and procedures for awards, and inserted provision that in fulfilling the statutory requirements relating to small business concerns and socially and economically disadvantaged small business concerns, an executive agency shall use competitive procedures but may restrict a solicitation to allow only such business concerns to compete.

Subsec. (b)(2). Pub. L. 98–577, §504(a)(1), substituted provisions to the effect that executive agencies may provide for procurement of property or services covered by this section using competitive procedures but excluding other than small business concerns for former provisions which provided that executive agencies shall use competitive procedures but may restrict a solicitation to allow only such small business concerns to compete.

Subsec. (b)(3). Pub. L. 98–577, §504(a)(1), added par. (3).

Subsecs. (c) to (g). Pub. L. 98–369 added subsecs. (c) to (g).

Subsec. (f)(2). Pub. L. 98–577, §504(a)(2), designated the final sentence as subpar. (A) and added subpar. (B).

1968—Subsec. (a). Pub. L. 90–268 inserted provision that no advertisement or invitation to bid for carriage of Government property in other than Government-owned cargo containers shall specify carriage of such property in cargo containers of any stated length, height, or width.

1952—Subsec. (a). Act July 12, 1952, substituted ''property'' for ''supplies''.

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 OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104–106, see section 4401 of Pub. L. 104–106, set out as a note under section 251 of this title.

EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103–355, see section 10001 of Pub. L. 103–355, set out as a note under section 251 of this title.

EFFECTIVE DATE OF 1985 AMENDMENT

Amendment by section 961(a)(2) of Pub. L. 99–145 effective as if included in enactment of Competition in Contracting Act of 1984, Pub. L. 98–369, div. B, title VII, see section 961(e) of Pub. L. 99–145, set out as a note under section 2304 of Title 10, Armed Forces.

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.

TERMINATION OF AUTHORITY TO ISSUE SOLICITATIONS FOR PURCHASES OF COMMERCIAL ITEMS IN EXCESS OF SIMPLIFIED ACQUISITION THRESHOLD

Authority to issue solicitations for purchases of commercial items in excess of simplified acquisition threshold pursuant to special simplified procedures authorized by subsec. (g)(1) of this section to expire three years after date certain amendments by section 4202 of Pub. L. 104–106 take effect pursuant to section 4401(b) of Pub. L. 104–106, set out as a note under section 251 of this title, see section 4202(e) of Pub. L. 104–106, set out as a note under section 2304 of Title 10, Armed Forces.

REFERENCES IN OTHER LAWS TO GS–16, 17, OR 18 PAY RATES

References in laws to the rates of pay for GS–16, 17, or 18, or to maximum rates of pay under the General Schedule, to be considered references to rates payable under specified sections of Title 5, Government Organization and Employees, see section 529 [title I, § 101(c)(1)] of Pub. L. 101–509, set out in a note under section 5376 of Title 5.

PUBLIC DISCLOSURE OF NONCOMPETITIVE CONTRACTING FOR THE RECONSTRUCTION OF INFRASTRUCTURE IN IRAQ

Pub. L. 108–136, div. A, title XIV, § 1442, Nov. 24, 2003, 117 Stat. 1674, provided that:

''(a) DISCLOSURE REQUIRED.—

''(1) PUBLICATION AND PUBLIC AVAILABILITY.—The head of an executive agency of the United States that enters into a contract for the repair, maintenance, or construction of infrastructure in Iraq without full and open competition shall publish in the Federal Register or Commerce Business Daily and otherwise make available to the public, not later than 30 days after the date on which the contract is entered into, the following information:

''(A) The amount of the contract.

''(B) A brief description of the scope of the contract.

''(C) A discussion of how the executive agency identified, and solicited offers from, potential contractors to perform the contract, together with a list of the potential contractors that were issued solicitations for the offers.

''(D) The justification and approval documents on which was based the determination to use procedures other than procedures that provide for full and open competition.

''(2) INAPPLICABILITY TO CONTRACTS AFTER FISCAL YEAR 2005.—Paragraph (1) does not apply to a contract entered into after September 30, 2005.

''(b) CLASSIFIED INFORMATION.—

''(1) AUTHORITY TO WITHHOLD.—The head of an executive agency may—

''(A) withhold from publication and disclosure under subsection (a) any document that is classified for restricted access in accordance with an Executive order in the interest of national defense or foreign policy; and

''(B) redact any part so classified that is in a document not so classified before publication and disclosure of the document under subsection (a).

''(2) AVAILABILITY TO CONGRESS.—In any case in which the head of an executive agency withholds information under paragraph (1), the head of such executive agency shall make available an unredacted version of the document containing that information to the chairman and ranking member of each of the following committees of Congress:

''(A) The Committee on Governmental Affairs of the Senate and the Committee on Government Reform [now Committee on Oversight and Government Reform] of the House of Representatives.

''(B) The Committees on Appropriations of the Senate and House of Representatives.

''(C) Each committee that the head of the executive agency determines has legislative jurisdiction for the operations of such department or agency to which the information relates.

''(c) FISCAL YEAR 2003 CONTRACTS.—This section shall apply to contracts entered into on or after October 1, 2002, except that, in the case of a contract entered into before the date of the enactment of this Act [Nov. 24, 2003], subsection (a) shall be applied as if the contract had been entered into on the date of the enactment of this Act.

''(d) RELATIONSHIP TO OTHER DISCLOSURE LAWS.—Nothing in this section shall be construed as affecting obligations to disclose United States Government information under any other provision of law.

''(e) DEFINITIONS.—In this section, the terms 'executive agency' and 'full and open competition' have the meanings given such terms in section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. 403).''

SMALL BUSINESS ACT

Section 2711(c) of Pub. L. 98–369 provided that: ''The amendments made by this section [amending this section and section 259 of this title and enacting sections 253a and 253b of this title] do not supersede or affect the provisions of section 8(a) of the Small Business Act (15 U.S.C. 637(a)).''

DEFINITIONS

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

§ 253a. Planning and solicitation requirements

(a) Preparation; planning; specifications in solicitation

(1) In preparing for the procurement of property or services, an executive agency shall—

(A) specify its needs and solicit bids or proposals in a manner designed to achieve full and open competition for the procurement;

(B) use advance procurement planning and market research; and

(C) develop specifications in such manner as is necessary to obtain full and open competition with due regard to the nature of the property or services to be acquired.

(2) Each solicitation under this subchapter shall include specifications which—

(A) consistent with the provisions of this subchapter, permit full and open competition;

(B) include restrictive provisions or conditions only to the extent necessary to satisfy the needs of the executive agency or as authorized by law.

(3) For the purposes of paragraphs (1) and (2), the type of specification included in a solicitation shall depend on the nature of the needs of the executive agency and the market available to satisfy such needs. Subject to such needs, specifications may be stated in terms of—

(A) function, so that a variety of products or services may qualify;

(B) performance, including specifications of the range of acceptable characteristics or of the minimum acceptable standards; or

(C) design requirements.

(b) Contents of solicitation

In addition to the specifications described in subsection (a) of this section, each solicitation for sealed bids or competitive proposals (other than for a procurement for commercial items using special simplified procedures or a purchase for an amount not greater than the simplified acquisition threshold) shall at a minimum include—

(1) a statement of—

(A) all significant factors and significant subfactors which the executive agency reasonably expects to consider in evaluating sealed bids (including price) or competitive proposals (including cost or price, cost-related or price-related factors and subfactors, and noncost-related or nonprice-related factors and subfactors); and

(B) the relative importance assigned to each of those factors and subfactors; and

(2)(A) in the case of sealed bids—

(i) a statement that sealed bids will be evaluated without discussions with the bidders; and

(ii) the time and place for the opening of the sealed bids; or

(B) in the case of competitive proposals—

(i) either a statement that the proposals are intended to be evaluated with, and award made after, discussions with the offerors, or a statement that the proposals are intended to be evaluated, and award made, without discussions with the offerors (other than discussions conducted for the purpose of minor clarification) unless discussions are determined to be necessary; and

(ii) the time and place for submission of proposals.

(c) Evaluation factors

(1) In prescribing the evaluation factors to be included in each solicitation for competitive proposals, an executive agency—

(A) shall clearly establish the relative importance assigned to the evaluation factors and subfactors, including the quality of the product or services to be provided (including technical capability, management capability, prior experience, and past performance of the offeror);

(B) shall include cost or price to the Federal Government as an evaluation factor that must be considered in the evaluation of proposals; and

(C) shall disclose to offerors whether all evaluation factors other than cost or price, when combined, are—

(i) significantly more important than cost or price;

(ii) approximately equal in importance to cost or price; or

(iii) significantly less important than cost or price.

(2) The regulations implementing subparagraph (C) of paragraph (1) may not define the terms ''significantly more important'' and ''significantly less important'' as specific numeric weights that would be applied uniformly to all solicitations or a class of solicitations.

(d) Additional information in solicitation

Nothing in this section prohibits an executive agency from—

(1) providing additional information in a solicitation, including numeric weights for all evaluation factors and subfactors on a case-by-case basis; or

(2) stating in a solicitation that award will be made to the offeror that meets the solicitation's mandatory requirements at the lowest cost or price.

(e) Evaluation of purchase options

An executive agency, in issuing a solicitation for a contract to be awarded using sealed bid procedures, may not include in such solicitation a clause providing for the evaluation of prices for options to purchase additional property or services under the contract unless the executive agency has determined that there is a reasonable likelihood that the options will be exercised.

(June 30, 1949, ch. 288, title III, § 303A, as added Pub. L. 98–369, div. B, title VII, § 2711(a)(2), July 18, 1984, 98 Stat. 1178; amended Pub. L. 103–355, title I, §§ 1061(a), (b), 1062, title IV, § 4402(b), Oct. 13, 1994, 108 Stat. 3266, 3267, 3348; Pub. L. 104–106, div. D, title XLII, § 4202(b)(2), Feb. 10, 1996, 110 Stat. 653.)

AMENDMENTS

1996—Subsec. (b). Pub. L. 104–106 inserted ''a procurement for commercial items using special simplified procedures or'' after ''(other than for'' in introductory provisions.

1994—Subsec. (b). Pub. L. 103–355, § 4402(b), substituted ''a purchase for an amount not greater than the simplified acquisition threshold)'' for ''small purchases)'' in introductory provisions.

Subsec. (b)(1)(A). Pub. L. 103–355, § 1061(a)(1)(A), amended subpar. (A) generally. Prior to amendment, subpar. (A) read as follows: ''all significant factors (including price) which the executive agency reasonably expects to consider in evaluating sealed bids or competitive proposals; and''.

Subsec. (b)(1)(B). Pub. L. 103–355, § 1061(a)(1)(B), substituted ''factors and subfactors'' for ''factors''.

Subsec. (b)(2)(B)(i). Pub. L. 103–355, § 1061(a)(2), amended cl. (i) generally. Prior to amendment, cl. (i) read as follows: ''a statement that the proposals are intended to be evaluated with, and awards made after, discussions with the offerors, but might be evaluated and awarded without discussions with the offerors; and''.

Subsecs. (c), (d). Pub. L. 103–355, § 1061(b), added subsecs. (c) and (d).

Subsec. (e). Pub. L. 103–355, § 1062, added subsec. (e).

EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104–106, see section 4401 of Pub. L. 104–106, set out as a note under section 251 of this title.

EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103–355, see section 10001 of Pub. L. 103–355, set out as a note under section 251 of this title.

EFFECTIVE DATE

Section 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 an Effective Date of 1984 Amendment note under section 251 of this title.

AUTHORIZATION OF TELECOMMUTING FOR FEDERAL CONTRACTORS

Pub. L. 108–136, div. A, title XIV, § 1428, Nov. 24, 2003, 117 Stat. 1670, provided that:

''(a) AMENDMENT TO THE FEDERAL ACQUISITION REGULATION.—Not later than 180 days after the date of the enactment of this Act [Nov. 24, 2003], the Federal Acquisition Regulatory Council shall amend the Federal Acquisition Regulation issued in accordance with sections 6 and 25 of the Office of Federal Procurement Policy Act (41 U.S.C. 405 and 421) to permit telecommuting by employees of Federal Government contractors in the performance of contracts entered into with executive agencies.

''(b) CONTENT OF AMENDMENT.—The regulation issued pursuant to subsection (a) shall, at a minimum, provide that solicitations for the acquisition of property or services may not set forth any requirement or evaluation criteria that would—

''(1) render an offeror ineligible to enter into a contract on the basis of the inclusion of a plan of the offeror to permit the offeror's employees to telecommute, unless the contracting officer concerned first determines that the requirements of the agency, including security requirements, cannot be met if the telecommuting is permitted and documents in writing the basis for that determination; or

''(2) reduce the scoring of an offer on the basis of the inclusion in the offer of a plan of the offeror to permit the offeror's employees to telecommute, unless the contracting officer concerned first determines that the requirements of the agency, including security requirements, would be adversely impacted if telecommuting is permitted and documents in writing the basis for that determination.

''(c) DEFINITION.—In this section, the term 'executive agency' has the meaning given that term in section 4(1) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(1)).''

SMALL BUSINESS ACT

Section not to affect or supersede the provisions of section 637(a) of Title 15, Commerce and Trade, see section 2711(c) of Pub. L. 98–369, set out as a note under section 253 of this title.

DEFINITIONS

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

§ 253b. Evaluation and award

(a) Basis

An executive agency shall evaluate sealed bids and competitive proposals, and award a contract, based solely on the factors specified in the solicitation.

(b) Rejection of bids or proposals

All sealed bids or competitive proposals received in response to a solicitation may be rejected if the agency head determines that such action is in the public interest.

(c) Opening of bids; promptness of award; written notice

Sealed bids shall be opened publicly at the time and place stated in the solicitation. The executive agency shall evaluate the bids in accordance with subsection (a) of this section without discussions with the bidders and, except as provided in subsection (b) of this section, shall award a contract with reasonable promptness to the responsible source whose bid conforms to the solicitation and is most advantageous to the United States, considering only price and the other price-related factors included in the solicitation. The award of a contract shall be made by transmitting, in writing or by electronic means, notice of the award to the successful bidder. Within 3 days after the date of contract award, the executive agency shall notify, in writing or by electronic means, each bidder not awarded the contract that the contract has been awarded.

(d) Discussions with offerors; written notification

(1) An executive agency shall evaluate competitive proposals in accordance with subsection (a) of this section and may award a contract—

(A) after discussions with the offerors, provided that written or oral discussions have been conducted with all responsible offerors who submit proposals within the competitive range; or

(B) based on the proposals received and without discussions with the offerors (other than discussions conducted for the purpose of minor clarification), if, as required by section 253a(b)(2)(B)(i) of this title, the solicitation included a statement that proposals are intended to be evaluated, and award made, without discussions, unless discussions are determined to be necessary.

(2) If the contracting officer determines that the number of offerors that would otherwise be included in the competitive range under paragraph (1)(A) exceeds the number at which an efficient competition can be conducted, the contracting officer may limit the number of proposals in the competitive range, in accordance with the criteria specified in the solicitation, to the greatest number that will permit an efficient competition among the offerors rated most highly in accordance with such criteria.

(3) Except as otherwise provided in subsection (b) of this section, the executive agency shall award a contract with reasonable promptness to the responsible source whose proposal is most advantageous to the United States, considering only cost or price and the other factors included in the solicitation. The executive agency shall award the contract by transmitting, in writing or by electronic means, notice of the award to such source and, within 3 days after the date of contract award, shall notify, in writing or by electronic means, all other offerors of the rejection of their proposals.

(e) Post-award debriefings

(1) When a contract is awarded by the head of an executive agency on the basis of competitive proposals, an unsuccessful offeror, upon written request received by the agency within 3 days after the date on which the unsuccessful offeror receives the notification of the contract award, shall be debriefed and furnished the basis for the selection decision and contract award. The executive agency shall debrief the offeror within, to the maximum extent practicable, 5 days after receipt of the request by the executive agency.

(2) The debriefing shall include, at a minimum—

(A) the executive agency's evaluation of the significant weak or deficient factors in the offeror's offer;

(B) the overall evaluated cost and technical rating of the offer of the contractor awarded the contract and the overall evaluated cost and technical rating of the offer of the debriefed offeror;

(C) the overall ranking of all offers;

(D) a summary of the rationale for the award;

(E) in the case of a proposal that includes a commercial item that is an end item under the contract, the make and model of the item being provided in accordance with the offer of the contractor awarded the contract; and

(F) reasonable responses to relevant questions posed by the debriefed offeror as to whether source selection procedures set forth in the solicitation, applicable regulations, and other applicable authorities were followed by the executive agency.

(3) The debriefing may not include point-by-point comparisons of the debriefed offeror's offer with other offers and may not disclose any information that is exempt from disclosure under section 552(b) of title 5.

(4) Each solicitation for competitive proposals shall include a statement that information described in paragraph (2) may be disclosed in post-award debriefings.

(5) If, within one year after the date of the contract award and as a result of a successful procurement protest, the executive agency seeks to fulfill the requirement under the protested contract either on the basis of a new solicitation of offers or on the basis of new best and final offers requested for that contract, the head of such executive agency shall make available to all offerors—

(A) the information provided in debriefings under this subsection regarding the offer of the contractor awarded the contract; and

(B) the same information that would have been provided to the original offerors.

(f) Preaward debriefings

(1) When the contracting officer excludes an offeror submitting a competitive proposal from the competitive range (or otherwise excludes such an offeror from further consideration prior to the final source selection decision), the excluded offeror may request in writing, within 3 days after the date on which the excluded offeror receives notice of its exclusion, a debriefing prior to award. The contracting officer shall make every effort to debrief the unsuccessful offeror as soon as practicable but may refuse the request for a debriefing if it is not in the best interests of the Government to conduct a debriefing at that time.

(2) The contracting officer is required to debrief an excluded offeror in accordance with subsection (e) of this section only if that offeror requested and was refused a preaward debriefing under paragraph (1) of this subsection.

(3) The debriefing conducted under this subsection shall include—

(A) the executive agency's evaluation of the significant elements in the offeror's offer;

(B) a summary of the rationale for the offeror's exclusion; and

(C) reasonable responses to relevant questions posed by the debriefed offeror as to whether source selection procedures set forth in the solicitation, applicable regulations, and other applicable authorities were followed by the executive agency.

(4) The debriefing conducted pursuant to this subsection may not disclose the number or identity of other offerors and shall not disclose information about the content, ranking, or evaluation of other offerors' proposals.

(g) Summary of debriefing

The contracting officer shall include a summary of any debriefing conducted under subsection (e) or (f) of this section in the contract file.

(h) Alternative dispute resolution

The Federal Acquisition Regulation shall include a provision encouraging the use of alternative dispute resolution techniques to provide informal, expeditious, and inexpensive procedures for an offeror to consider using before filing a protest, prior to the award of a contract, of the exclusion of the offeror from the competitive range (or otherwise from further consideration) for that contract.

(i) Antitrust violations

If the agency head considers that a bid or proposal evidences a violation of the antitrust laws, such agency head shall refer the bid or proposal to the Attorney General for appropriate action.

(j) Planning for future competition

(1)(A) In preparing a solicitation for the award of a development contract for a major system, the head of an agency shall consider requiring in the solicitation that an offeror include in its offer proposals described in subparagraph (B). In determining whether to require such proposals, the head of the agency shall give due consideration to the purposes for which the system is being procured and the technology necessary to meet the system's required capabilities. If such proposals are required, the head of the agency shall consider them in evaluating the offeror's price.

(B) The proposals that the head of an agency is to consider requiring in a solicitation for the award of a development contract are the following:

(i) Proposals to incorporate in the design of the major system items which are currently available within the supply system of the Federal agency responsible for the major system, available elsewhere in the national supply system, or commercially available from more than one source.

(ii) With respect to items that are likely to be required in substantial quantities during the system's service life, proposals to incorporate in the design of the major system items which the United States will be able to acquire competitively in the future.

(2)(A) In preparing a solicitation for the award of a production contract for a major system, the head of an agency shall consider requiring in the solicitation that an offeror include in its offer proposals described in subparagraph (B). In determining whether to require such proposals, the head of the agency shall give due consideration to the purposes for which the system is being procured and the technology necessary to meet the system's required capabilities. If such proposals are required, the head of the agency shall consider them in evaluating the offeror's price.

(B) The proposals that the head of an agency is to consider requiring in a solicitation for the

award of a production contract are proposals identifying opportunities to ensure that the United States will be able to obtain on a competitive basis items procured in connection with the system that are likely to be reprocured in substantial quantities during the service life of the system. Proposals submitted in response to such requirement may include the following:

(i) Proposals to provide to the United States the right to use technical data to be provided under the contract for competitive reprocurement of the item, together with the cost to the United States, if any, of acquiring such technical data and the right to use such data.

(ii) Proposals for the qualification or development of multiple sources of supply for the item.

(3) If the head of an agency is making a noncompetitive award of a development contract or a production contract for a major system, the factors specified in paragraphs (1) and (2) to be considered in evaluating an offer for a contract may be considered as objectives in negotiating the contract to be awarded.

(k) Protest file

(1) If, in the case of a solicitation for a contract issued by, or an award or proposed award of a contract by, the head of an executive agency, a protest is filed pursuant to the procedures in subchapter V of chapter 35 of title 31, and an actual or prospective offeror so requests, a file of the protest shall be established by the procuring activity and reasonable access shall be provided to actual or prospective offerors.

(2) Information exempt from disclosure under section 552 of title 5 may be redacted in a file established pursuant to paragraph (1) unless an applicable protective order provides otherwise.

(*l*) Agency actions on protests

If, in connection with a protest, the head of an executive agency determines that a solicitation, proposed award, or award does not comply with the requirements of law or regulation, the head of such executive agency—

(1) may take any action set out in subparagraphs (A) through (F) of subsection (b)(1) of section 3554 of title 31; and

(2) may pay costs described in paragraph (1) of section 3554(c) of such title within the limits referred to in paragraph (2) of such section.

(m) Prohibition on release of contractor proposals

(1) Except as provided in paragraph (2), a proposal in the possession or control of an executive agency may not be made available to any person under section 552 of title 5.

(2) Paragraph (1) does not apply to any proposal that is set forth or incorporated by reference in a contract entered into between the agency and the contractor that submitted the proposal.

(3) In this subsection, the term ''proposal'' means any proposal, including a technical, management, or cost proposal, submitted by a contractor in response to the requirements of a solicitation for a competitive proposal.

(June 30, 1949, ch. 288, title III, § 303B, as added Pub. L. 98–369, div. B, title VII, § 2711(a)(2), July 18, 1984, 98 Stat. 1179; amended Pub. L. 98–577, title II, § 201(a), Oct. 30, 1984, 98 Stat. 3068; Pub. L. 103–355, title I, §§ 1061(c), 1063–1066, Oct. 13, 1994, 108 Stat. 3267–3269; Pub. L. 104–106, div. D, title XLI, §§ 4103(b), 4104(b), div. E, title LVI, § 5607(c), Feb. 10, 1996, 110 Stat. 644, 645, 701; Pub. L. 104–201, div. A, title VIII, § 821(b), title X, § 1074(b)(7), Sept. 23, 1996, 110 Stat. 2609, 2660.)

AMENDMENTS

1996—Subsec. (d)(2), (3). Pub. L. 104–106, § 4103(b), added par. (2) and redesignated former par. (2) as (3).

Subsec. (e)(6). Pub. L. 104–106, § 4104(b)(1), struck out par. (6) which read as follows: ''The contracting officer shall include a summary of the debriefing in the contract file.''

Subsecs. (f) to (h). Pub. L. 104–106, § 4104(b)(3), added subsecs. (f) to (h). Former subsecs. (f) to (h) redesignated (i) to (k), respectively.

Subsecs. (i), (j). Pub. L. 104–106, § 4104(b)(2), redesignated subsecs. (f) and (g) as (i) and (j), respectively. Former subsec. (i) redesignated (*l*).

Subsec. (k). Pub. L. 104–106, § 5607(c), as amended by Pub. L. 104–201, § 1074(b)(7), struck out par. (3) which read as follows: ''Regulations implementing this subsection shall be consistent with the regulations regarding the preparation and submission of an agency's protest file (the so-called 'rule 4 file') for protests to the General Services Board of Contract Appeals under section 759 of title 40.''

Pub. L. 104–106, § 4104(b)(2), redesignated subsec. (h) as (k).

Subsec. (*l*). Pub. L. 104–106, § 4104(b)(2), redesignated subsec. (i) as (*l*).

Subsec. (m). Pub. L. 104–201, § 821(b), added subsec. (m).

1994—Subsec. (a). Pub. L. 103–355, § 1061(c)(1), inserted '', and award a contract,'' after ''competitive proposals''.

Subsec. (c). Pub. L. 103–355, §§ 1061(c)(2), 1063(a), inserted ''in accordance with subsection (a) of this section'' after ''shall evaluate the bids'' in second sentence, substituted ''transmitting, in writing or by electronic means, notice'' for ''transmitting written notice'' in third sentence, and inserted at end ''Within 3 days after the date of contract award, the executive agency shall notify, in writing or by electronic means, each bidder not awarded the contract that the contract has been awarded.''

Subsec. (d)(1). Pub. L. 103–355, § 1061(c)(3)(A), added par. (1) and struck out former par. (1) which read as follows: ''The executive agency shall evaluate competitive proposals and may award a contract—

''(A) after discussions conducted with the offerors at any time after receipt of the proposals and before the award of the contract; or

''(B) without discussions with the offerors (other than discussions conducted for the purpose of minor clarification) when it can be clearly demonstrated from the existence of full and open competition or accurate prior cost experience with the product or service that acceptance of an initial proposal without discussions would result in the lowest overall cost to the Government.''

Subsec. (d)(2). Pub. L. 103–355, §§ 1061(c)(3)(C), 1063(b), inserted ''cost or'' before ''price'' in first sentence, and, in second sentence, substituted ''transmitting, in writing or by electronic means, notice'' for ''transmitting written notice'' and '', within 3 days after the date of contract award, shall notify, in writing or by electronic means,'' for ''shall promptly notify''.

Pub. L. 103–355, § 1061(c)(3)(B), redesignated par. (4) as (2) and struck out former par. (2) which read as follows: ''In the case of award of a contract under paragraph (1)(A), the executive agency shall conduct, before such award, written or oral discussions with all responsible sources who submit proposals within the competitive range, considering only price and the other factors included in the solicitation.''

Subsec. (d)(3). Pub. L. 103–355, §1061(c)(3)(B), struck out par. (3) which read as follows: ''In the case of award of a contract under paragraph (1)(B), the executive agency shall award the contract based on the proposals as received (and as clarified, if necessary, in discussions conducted for the purpose of minor clarification).''

Subsec. (d)(4). Pub. L. 103–355, §1061(c)(3)(B), redesignated par. (4) as (2).

Subsecs. (e) to (g). Pub. L. 103–355, §1064, added subsec. (e) and redesignated former subsecs. (e) and (f) as (f) and (g), respectively.

Subsec. (h). Pub. L. 103–355, §1065, added subsec. (h).

Subsec. (i). Pub. L. 103–355, §1066, added subsec. (i).

1984—Subsec. (f). Pub. L. 98–577 added subsec. (f).

EFFECTIVE DATE OF 1996 AMENDMENTS

Section 1074(b)(7) of Pub. L. 104–201 provided that the amendment made by that section is effective Feb. 10, 1996.

For effective date and applicability of amendment by sections 4103(b) and 4104(b) of Pub. L. 104–106, see section 4401 of Pub. L. 104–106, set out as a note under section 251 of this title.

Amendment by section 5607(c) of Pub. L. 104–106 effective 180 days after Feb. 10, 1996, see section 5701 of Pub. L. 104–106, Feb. 10, 1996, 110 Stat. 702.

EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103–355, see section 10001 of Pub. L. 103–355, set out as a note under section 251 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Section 201(b) of Pub. L. 98–577 provided that: ''The amendment made by subsection (a) [amending this section] shall apply with respect to any solicitation issued more than 180 days after the date of enactment of this Act [Oct. 30, 1984].''

EFFECTIVE DATE

Section 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 an Effective Date of 1984 Amendment note under section 251 of this title.

SMALL BUSINESS ACT

Section not to affect or supersede the provisions of section 637(a) of Title 15, Commerce and Trade, see section 2711(c) of Pub. L. 98–369, set out as a note under section 253 of this title.

EX. ORD. NO. 12979. AGENCY PROCUREMENT PROTESTS

Ex. Ord. No. 12979, Oct. 25, 1995, 60 F.R. 55171, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to ensure effective and efficient expenditure of public funds and fair and expeditious resolution of protests to the award of Federal procurement contracts, it is hereby ordered as follows:

SECTION 1. Heads of executive departments and agencies (''agencies'') engaged in the procurement of supplies and services shall prescribe administrative procedures for the resolution of protests to the award of their procurement contracts as an alternative to protests in fora outside the procuring agencies. Procedures prescribed pursuant to this order shall:

(a) emphasize that whenever conduct of a procurement is contested, all parties should use their best efforts to resolve the matter with agency contracting officers;

(b) to the maximum extent practicable, provide for inexpensive, informal, procedurally simple, and expeditious resolution of protests, including, where appropriate and as permitted by law, the use of alternative dispute resolution techniques, third party neutrals, and another agency's personnel;

(c) allow actual or prospective bidders or offerors whose direct economic interests would be affected by the award or failure to award the contract to request a review, at a level above the contracting officer, of any decision by a contracting officer that is alleged to have violated a statute or regulation and, thereby, caused prejudice to the protester; and

(d) except where immediate contract award or performance is justified for urgent and compelling reasons or is determined to be in the best interest of the United States, prohibit award or performance of the contract while a timely filed protest is pending before the agency. To allow for the withholding of a contract award or performance, the agency must have received notice of the protest within either 10 calendar days after the contract award or 5 calendar days after the bidder or offeror who is protesting the contract award was given the opportunity to be debriefed by the agency, whichever date is later.

SEC. 2. The Administrator for Federal Procurement Policy shall: (a) work with the heads of executive agencies to provide policy guidance and leadership necessary to implement provisions of this order; and

(b) review and evaluate agency experience and performance under this order, and report on any findings to the President within 2 years from the date of this order.

SEC. 3. The Administrator of General Services, the Secretary of Defense, and the Administrator of the National Aeronautics and Space Administration, in coordination with the Office of Federal Procurement Policy, shall amend the Federal Acquisition Regulation, 48 C.F.R. 1, within 180 days of the date of this order to further the purposes of this order.

WILLIAM J. CLINTON.

DEFINITIONS

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

§ 253c. Encouragement of new competition

(a) "Qualification requirement" defined

In this section, ''qualification requirement'' means a requirement for testing or other quality assurance demonstration that must be completed by an offeror before award of a contract.

(b) Agency head; functions; prior to enforcement of qualification requirement

Except as provided in subsection (c) of this section, the head of the agency shall, before enforcing any qualification requirement—

(1) prepare a written justification stating the necessity for establishing the qualification requirement and specify why the qualification requirement must be demonstrated before contract award;

(2) specify in writing and make available to a potential offeror upon request all requirements which a prospective offeror, or its product, must satisfy in order to become qualified, such requirements to be limited to those least restrictive to meet the purposes necessitating the establishment of the qualification requirement;

(3) specify an estimate of the costs of testing and evaluation likely to be incurred by a potential offeror in order to become qualified;

(4) ensure that a potential offeror is provided, upon request, a prompt opportunity to demonstrate at its own expense (except as provided in subsection (d) of this section) its ability to meet the standards specified for qualification using qualified personnel and facilities of the agency concerned or of another

agency obtained through interagency agreement, or under contract, or other methods approved by the agency (including use of approved testing and evaluation services not provided under contract to the agency);

(5) if testing and evaluation services are provided under contract to the agency for the purposes of clause (4), provide to the extent possible that such services be provided by a contractor who is not expected to benefit from an absence of additional qualified sources and who shall be required in such contract to adhere to any restriction on technical data asserted by the potential offeror seeking qualification; and

(6) ensure that a potential offeror seeking qualification is promptly informed as to whether qualification is attained and, in the event qualification is not attained, is promptly furnished specific information why qualification was not attained.

(c) Applicability; waiver authority; referral of offers

(1) Subsection (b) of this section does not apply with respect to a qualification requirement established by statute prior to October 30, 1984.

(2) Except as provided in paragraph (3), if it is unreasonable to specify the standards for qualification which a prospective offeror or its product must satisfy, a determination to that effect shall be submitted to the advocate for competition of the procuring activity responsible for the purchase of the item subject to the qualification requirement. After considering any comments of the advocate for competition reviewing such determination, the head of the procuring activity may waive the requirements of paragraphs (2) through (5) of subsection (b) of this section for up to two years with respect to the item subject to the qualification requirement.

(3) The waiver authority contained in paragraph (2) shall not apply with respect to any qualified products list.

(4) A potential offeror may not be denied the opportunity to submit and have considered an offer for a contract solely because the potential offeror has not been identified as meeting a qualification requirement, if the potential offeror can demonstrate to the satisfaction of the contracting officer that the potential offeror or its product meets the standards established for qualification or can meet such standards before the date specified for award of the contract.

(5) Nothing contained in this subsection requires the referral of an offer to the Small Business Administration pursuant to section 637(b)(7) of title 15 if the basis for the referral is a challenge by the offeror to either the validity of the qualification requirement or the offeror's compliance with such requirement.

(6) The head of an agency need not delay a proposed procurement in order to comply with subsection (b) of this section or in order to provide a potential offeror with an opportunity to demonstrate its ability to meet the standards specified for qualification.

(d) Number; qualified sources or products; fewer than two actual manufacturers; functions of agency head

(1) If the number of qualified sources or qualified products available to compete actively for an anticipated future requirement is fewer than two actual manufacturers or the products of two actual manufacturers, respectively, the head of the agency concerned shall—

(A) periodically publish notice in the Commerce Business Daily soliciting additional sources or products to seek qualification, unless the contracting officer determines that such publication would compromise national security; and

(B) bear the cost of conducting the specified testing and evaluation (excluding the costs associated with producing the item or establishing the production, quality control, or other system to be tested and evaluated) for a small business concern or a product manufactured by a small business concern which has met the standards specified for qualification and which could reasonably be expected to compete for a contract for that requirement, but such costs may be borne only if the head of the agency determines that such additional qualified sources or products are likely to result in cost savings from increased competition for future requirements sufficient to offset (within a reasonable period of time considering the duration and dollar value of anticipated future requirements) the costs incurred by the agency.

(2) The head of an agency shall require a prospective contractor requesting the United States to bear testing and evaluation costs under paragraph (1)(B) to certify as to its status as a small business concern under section 632 of title 15.

(e) Examination; need for qualification requirement

Within seven years after the establishment of a qualification requirement, the need for such qualification requirement shall be examined and the standards of such requirement revalidated in accordance with the requirements of subsection (b) of this section. The preceding sentence does not apply in the case of a qualification requirement for which a waiver is in effect under subsection (c)(2) of this section.

(f) Enforcement determination by agency head

Except in an emergency as determined by the head of the agency, whenever the head of the agency determines not to enforce a qualification requirement for a solicitation, the agency may not thereafter enforce that qualification requirement unless the agency complies with the requirements of subsection (b) of this section.

(June 30, 1949, ch. 288, title III, § 303C, formerly § 303D, as added Pub. L. 98–577, title II, § 202(a), Oct. 30, 1984, 98 Stat. 3069; renumbered § 303C, Pub. L. 99–145, title XIII, § 1304(c)(4)(A), Nov. 8, 1985, 99 Stat. 742.)

EFFECTIVE DATE

Section 202(b) of Pub. L. 98–577 provided that: ''The amendment made by subsection (a) [enacting this section] shall apply with respect to solicitations issued more than 180 days after the date of enactment of this Act [Oct. 30, 1984].''

DEFINITIONS

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

§ 253d. Validation of proprietary data restrictions

(a) Contracts; delivery of technical services; contents

A contract for property or services entered into by an executive agency which provides for the delivery of technical data, shall provide that—

(1) a contractor or subcontractor at any tier shall be prepared to furnish to the contracting officer a written justification for any restriction asserted by the contractor or subcontractor on the right of the United States to use such technical data; and

(2) the contracting officer may review the validity of any restriction asserted by the contractor or by a subcontractor under the contract on the right of the United States to use technical data furnished to the United States under the contract if the contracting officer determines that reasonable grounds exist to question the current validity of the asserted restriction and that the continued adherence to the asserted restriction by the United States would make it impracticable to procure the item competitively at a later time.

(b) Review; challenge; notice

If after such review the contracting officer determines that a challenge to the asserted restriction is warranted, the contracting officer shall provide written notice to the contractor or subcontractor asserting the restriction. Such notice shall state—

(1) the grounds for challenging the asserted restriction; and

(2) the requirement for a response within 60 days justifying the current validity of the asserted restriction.

(c) Written request; additional time; schedule of responses

If a contractor or subcontractor asserting a restriction subject to this section submits to the contracting officer a written request, showing the need for additional time to comply with the requirement to justify the current validity of the asserted restriction, additional time to adequately permit the submission of such justification shall be provided by the contracting officer as appropriate. If a party asserting a restriction receives notices of challenges to restrictions on technical data from more than one contracting officer, and notifies each contracting officer of the existence of more than one challenge, the contracting officer initiating the first in time challenge, after consultation with the party asserting the restriction and the other contracting officers, shall formulate a schedule of responses to each of the challenges that will afford the party asserting the restriction with an equitable opportunity to respond to each such challenge.

(d) Decision; validity of asserted restriction; failure to submit response

(1) Upon a failure by the contractor or subcontractor to submit any response under subsection (b) of this section, the contracting officer shall issue a decision pertaining to the validity of the asserted restriction.

(2) If a justification is submitted in response to the notice provided pursuant to subsection (b) of this section, a contracting officer shall within 60 days of receipt of any justification submitted, issue a decision or notify the party asserting the restriction of the time within which a decision will be issued.

(e) Claim; considered claim within Contract Disputes Act of 1978

If a claim pertaining to the validity of the asserted restriction is submitted in writing to a contracting officer by a contractor or subcontractor at any tier, such claim shall be considered a claim within the meaning of the Contract Disputes Act of 1978 (41 U.S.C. 601 et seq.).

(f) Challenge; use of technical data; sustained; liability of United States for costs and fees

(1) If, upon final disposition, the contracting officer's challenge to the restriction on the right of the United States to use such technical data is sustained—

(A) the restriction on the right of the United States to use the technical data shall be cancelled; and

(B) if the asserted restriction is found not to be substantially justified, the contractor or subcontractor, as appropriate, shall be liable to the United States for payment of the cost to the United States of reviewing the asserted restriction and the fees and other expenses (as defined in section 2412(d)(2)(A) of title 28) incurred by the United States in challenging the asserted restriction, unless special circumstances would make such payment unjust.

(2) If, upon final disposition, the contracting officer's challenge to the restriction on the right of the United States to use such technical data is not sustained—

(A) the United States shall continue to be bound by the restriction; and

(B) the United States shall be liable for payment to the party asserting the restriction for fees and other expenses (as defined in section 2412(d)(2)(A) of title 28) incurred by the party asserting the restriction in defending the asserted restriction if the challenge by the United States is found not to be made in good faith.

(June 30, 1949, ch. 288, title III, § 303D, formerly § 303E, as added Pub. L. 98–577, title II, § 203(a), Oct. 30, 1984, 98 Stat. 3071; renumbered § 303D, Pub. L. 99–145, title XIII, § 1304(c)(4)(A), Nov. 8, 1985, 99 Stat. 742.)

REFERENCES IN TEXT

The Contract Disputes Act of 1978, referred to in subsec. (e), is Pub. L. 95–563, Nov. 1, 1978, 92 Stat. 2383, as amended, which is classified principally to chapter 9 (§ 601 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 601 of this title and Tables.

EFFECTIVE DATE

Section 203(b) of Pub. L. 98–577 provided that: ''The amendment made by subsection (a) [enacting this section] shall apply with respect to solicitations issued more than 60 days after the date of the enactment of this Act [Oct. 30, 1984].''

DEFINITIONS

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

§ 253e. Repealed. Pub. L. 103–355, title I, § 1252, Oct. 13, 1994, 108 Stat. 3284

Section, act June 30, 1949, ch. 288, title III, § 303E, formerly § 303F, as added Oct. 30, 1984, Pub. L. 98–577, title II, § 204(a), 98 Stat. 3072; renumbered § 303E, Nov. 8, 1985, Pub. L. 99–145, title XIII, § 1304(c)(4)(A), 99 Stat. 742, related to commercial pricing for supplies.

EFFECTIVE DATE OF REPEAL

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

§ 253f. Economic order quantities

(a) Procurement of supplies; costs advantageous to United States

Each executive agency shall procure supplies in such quantity as (A) will result in the total cost and unit cost most advantageous to the United States, where practicable, and (B) does not exceed the quantity reasonably expected to be required by the agency.

(b) Opinions; economic advantage to United States

Each solicitation for a contract for supplies shall, if practicable, include a provision inviting each offeror responding to the solicitation to state an opinion on whether the quantity of the supplies proposed to be procured is economically advantageous to the United States and, if applicable, to recommend a quantity or quantities which would be more economically advantageous to the United States. Each such recommendation shall include a quotation of the total price and the unit price for supplies procured in each recommended quantity.

(June 30, 1949, ch. 288, title III, § 303F, formerly § 303G, as added Pub. L. 98–577, title II, § 205(a), Oct. 30, 1984, 98 Stat. 3073; renumbered § 303F, Pub. L. 99–145, title XIII, § 1304(c)(4)(A), Nov. 8, 1985, 99 Stat. 742.)

EFFECTIVE DATE

Section 205(b) of Pub. L. 98–577 provided that: ''The amendment made by subsection (a) [enacting this section] shall take effect at the end of the 180-day period beginning on the date of the enactment of this Act [Oct. 30, 1984].''

DEFINITIONS

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

§ 253g. Prohibition of contractors limiting subcontractor sales directly to United States

(a) Contract restrictions

Each contract for the purchase of property or services made by an executive agency shall provide that the contractor will not—

(1) enter into any agreement with a subcontractor under the contract that has the effect of unreasonably restricting sales by the subcontractor directly to the United States of any item or process (including computer software) made or furnished by the subcontractor under the contract (or any follow-on production contract); or

(2) otherwise act to restrict unreasonably the ability of a subcontractor to make sales to the United States described in clause (1).

(b) Rights under law

This section does not prohibit a contractor from asserting rights it otherwise has under law.

(c) Inapplicability to certain contracts

This section does not apply to a contract for an amount that is not greater than the simplified acquisition threshold.

(d) Inapplicability when Government treated similarly to other purchasers

An agreement between the contractor in a contract for the acquisition of commercial items and a subcontractor under such contract that restricts sales by such subcontractor directly to persons other than the contractor may not be considered to unreasonably restrict sales by that subcontractor to the United States in violation of the provision included in such contract pursuant to subsection (a) of this section if the agreement does not result in the Federal Government being treated differently with regard to the restriction than any other prospective purchaser of such commercial items from that subcontractor.

(June 30, 1949, ch. 288, title III, § 303G, formerly § 303H, as added Pub. L. 98–577, title II, § 206(a), Oct. 30, 1984, 98 Stat. 3073; renumbered § 303G, Pub. L. 99–145, title XIII, § 1304(c)(4)(A), Nov. 8, 1985, 99 Stat. 742; amended Pub. L. 103–355, title IV, § 4103(b), title VIII, § 8204(a), Oct. 13, 1994, 108 Stat. 3341, 3396.)

AMENDMENTS

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

Subsec. (d). Pub. L. 103–355, § 8204(a), added subsec. (d).

EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103–355, see section 10001 of Pub. L. 103–355, set out as a note under section 251 of this title.

EFFECTIVE DATE

Section 206(b) of Pub. L. 98–577 provided that: ''The amendment made by subsection (a) [enacting this section] shall apply with respect to solicitations made more than 180 days after the date of enactment of this Act [Oct. 30, 1984].''

DEFINITIONS

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

§ 253h. Task and delivery order contracts: general authority

(a) Authority to award

Subject to the requirements of this section, section 253j of this title, and other applicable law, the head of an executive agency may enter into a task or delivery order contract (as defined in section 253k of this title) for procurement of services or property.

(b) Solicitation

The solicitation for a task or delivery order contract shall include the following:

(1) The period of the contract, including the number of options to extend the contract and the period for which the contract may be extended under each option, if any.

(2) The maximum quantity or dollar value of the services or property to be procured under the contract.

(3) A statement of work, specifications, or other description that reasonably describes the general scope, nature, complexity, and purposes of the services or property to be procured under the contract.

(c) Applicability of restriction on use of noncompetitive procedures

The head of an executive agency may use procedures other than competitive procedures to enter into a task or delivery order contract under this section only if an exception in subsection (c) of section 253 of this title applies to the contract and the use of such procedures is approved in accordance with subsection (f) of such section.

(d) Single and multiple contract awards

(1) The head of an executive agency may exercise the authority provided in this section—

(A) to award a single task or delivery order contract; or

(B) if the solicitation states that the head of the executive agency has the option to do so, to award separate task or delivery order contracts for the same or similar services or property to two or more sources.

(2) No determination under section 253(b) of this title is required for an award of multiple task or delivery order contracts under paragraph (1)(B).

(3)(A) No task or delivery order contract in an amount estimated to exceed $100,000,000 (including all options) may be awarded to a single source unless the head of the executive agency determines in writing that—

(i) the task or delivery orders expected under the contract are so integrally related that only a single source can reasonably perform the work;

(ii) the contract provides only for firm, fixed price task orders or delivery orders for—

(I) products for which unit prices are established in the contract; or

(II) services for which prices are established in the contract for the specific tasks to be performed;

(iii) only one source is qualified and capable of performing the work at a reasonable price to the government; or

(iv) because of exceptional circumstances, it is necessary in the public interest to award the contract to a single source.

(B) The head of the executive agency shall notify Congress within 30 days after any determination under subparagraph (A)(iv).

(4) The regulations implementing this subsection shall—

(A) establish a preference for awarding, to the maximum extent practicable, multiple task or delivery order contracts for the same or similar services or property under the authority of paragraph (1)(B); and

(B) establish criteria for determining when award of multiple task or delivery order contracts would not be in the best interest of the Federal Government.

(e) Contract modifications

A task or delivery order may not increase the scope, period, or maximum value of the task or delivery order contract under which the order is issued. The scope, period, or maximum value of the contract may be increased only by modification of the contract.

(f) Inapplicability to contracts for advisory and assistance services

Except as otherwise specifically provided in section 253i of this title, this section does not apply to a task or delivery order contract for the acquisition of advisory and assistance services (as defined in section 1105(g) of title 31).

(g) Relationship to other contracting authority

Nothing in this section may be construed to limit or expand any authority of the head of an executive agency or the Administrator of General Services to enter into schedule, multiple award, or task or delivery order contracts under any other provision of law.

(June 30, 1949, ch. 288, title III, § 303H, as added Pub. L. 103–355, title I, § 1054(a), Oct. 13, 1994, 108 Stat. 3261; amended Pub. L. 110–181, div. A, title VIII, § 843(b)(1), Jan. 28, 2008, 122 Stat. 238.)

AMENDMENTS

2008—Subsec. (d)(3), (4). Pub. L. 110–181 added par. (3) and redesignated former par. (3) as (4).

EFFECTIVE DATE OF 2008 AMENDMENT

Pub. L. 110–181, div. A, title VIII, § 843(b)(3)(A), Jan. 28, 2008, 122 Stat. 239, provided that: ''The amendments made by paragraph (1) [amending this section] shall take effect on the date that is 120 days after the date of the enactment of this Act [Jan. 28, 2008], and shall apply with respect to any contract awarded on or after such date.''

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.

CONSTRUCTION

Section 1054(b) of Pub. L. 103–355 provided that: ''Nothing in section 303H, 303I, 303J, or 303K of the Federal Property and Administrative Services Act of 1949 [41 U.S.C. 253h, 253i, 253j, 253k], as added by subsection (a), shall be construed as modifying or superseding, or as intended to impair or restrict, authorities or responsibilities under—

''(1) the Brooks Automatic Data Processing Act (section 111 of the Federal Property and Administrative Services Act of 1949 ([former] 40 U.S.C. 759)); and

''(2) the Brooks Architect-Engineers Act (title IX of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 541 et seq.) [now 40 U.S.C. 1101–1104]).''

REQUIREMENTS FOR PURCHASE OF PROPERTY AND SERVICES PURSUANT TO MULTIPLE AWARD CONTRACTS

Pub. L. 110–417, [div. A], title VIII, § 863(a)–(e), Oct. 14, 2008, 122 Stat. 4547, 4548, provided that:

''(a) REGULATIONS REQUIRED.—Not later than one year after the date of the enactment of this Act [Oct. 14, 2008], the Federal Acquisition Regulation shall be amended to require enhanced competition in the purchase of property and services by all executive agencies pursuant to multiple award contracts.

''(b) CONTENT OF REGULATIONS.—

''(1) IN GENERAL.—The regulations required by subsection (a) shall provide, at a minimum, that each individual purchase of property or services in excess of the simplified acquisition threshold that is made under a multiple award contract shall be made on a competitive basis unless a contracting officer—

''(A) waives the requirement on the basis of a determination that—

''(i) one of the circumstances described in paragraphs (1) through (4) of section 303J(b) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253j(b)) or section 2304c(b) of title 10, United States Code, applies to such individual purchase; or

''(ii) a law expressly authorizes or requires that the purchase be made from a specified source; and

''(B) justifies the determination in writing.

''(2) COMPETITIVE BASIS PROCEDURES.—For purposes of this subsection, an individual purchase of property or services is made on a competitive basis only if it is made pursuant to procedures that—

''(A) except as provided in paragraph (3), require fair notice of the intent to make that purchase (including a description of the work to be performed and the basis on which the selection will be made) to be provided to all contractors offering such property or services under the multiple award contract; and

''(B) afford all contractors responding to the notice a fair opportunity to make an offer and have that offer fairly considered by the official making the purchase.

''(3) EXCEPTION TO NOTICE REQUIREMENT.—

''(A) IN GENERAL.—Notwithstanding paragraph (2), and subject to subparagraph (B), notice may be provided to fewer than all contractors offering such property or services under a multiple award contract as described in subsection (d)(2)(A) [sic] if notice is provided to as many contractors as practicable.

''(B) LIMITATION ON EXCEPTION.—A purchase may not be made pursuant to a notice that is provided to fewer than all contractors under subparagraph (A) unless—

''(i) offers were received from at least 3 qualified contractors; or

''(ii) a contracting officer of the executive agency determines in writing that no additional qualified contractors were able to be identified despite reasonable efforts to do so.

''(c) PUBLIC NOTICE REQUIREMENTS RELATED TO SOLE SOURCE TASK OR DELIVERY ORDERS.—

''(1) PUBLIC NOTICE REQUIRED.—Not later than one year after the date of the enactment of this Act [Oct. 14, 2008], the Federal Acquisition Regulation shall be amended to require the head of each executive agency to—

''(A) publish on FedBizOpps notice of all sole source task or delivery orders in excess of the simplified acquisition threshold that are placed against multiple award contracts not later than 14 days after such orders are placed, except in the event of extraordinary circumstances or classified orders; and

''(B) disclose the determination required by subsection (b)(1) related to sole source task or delivery orders in excess of the simplified acquisition threshold placed against multiple award contracts through the same mechanism and to the same extent as the disclosure of documents containing a justification and approval required by section 2304(f)(1) of title 10, United States Code, and section 303(f)(1) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253(f)(1)), except in the event of extraordinary circumstances or classified orders.

''(2) EXEMPTION.—This subsection does not require the public availability of information that is exempt from public disclosure under section 552(b) of title 5, United States Code.

''(d) DEFINITIONS.—In this section:

''(1) The term 'executive agency' has the meaning given such term in section 4(1) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(1)).

''(2) The term 'individual purchase' means a task order, delivery order, or other purchase.

''(3) The term 'multiple award contract' means—

''(A) a contract that is entered into by the Administrator of General Services under the multiple award schedule program referred to in section 2302(2)(C) of title 10, United States Code;

''(B) a multiple award task order contract that is entered into under the authority of sections 2304a through 2304d of title 10, United States Code, or sections 303H through 303K of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253h through 253k); and

''(C) any other indefinite delivery, indefinite quantity contract that is entered into by the head of an executive agency with 2 or more sources pursuant to the same solicitation.

''(4) The term 'sole source task or delivery order' means any order that does not follow the competitive procedures in subsection (b)(2) or (b)(3).

''(e) APPLICABILITY.—The regulations required by subsection (a) shall apply to all individual purchases of property or services that are made under multiple award contracts on or after the effective date of such regulations, without regard to whether the multiple award contracts were entered into before, on, or after such effective date.''

GUIDANCE ON USE OF TASK ORDER AND DELIVERY ORDER CONTRACTS

Pub. L. 106–65, div. A, title VIII, § 804, Oct. 5, 1999, 113 Stat. 704, provided that:

''(a) GUIDANCE IN THE FEDERAL ACQUISITION REGULATION.—Not later than 180 days after the date of the enactment of this Act [Oct. 5, 1999], the Federal Acquisition Regulation issued in accordance with sections 6 and 25 of the Office of Federal Procurement Policy Act (41 U.S.C. 405 and 421) shall be revised to provide guidance to agencies on the appropriate use of task order and delivery order contracts in accordance with sections 2304a through 2304d of title 10, United States Code, and sections 303H through 303K of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253h through 253k).

''(b) CONTENT OF GUIDANCE.—The regulations issued pursuant to subsection (a) shall, at a minimum, provide the following:

''(1) Specific guidance on the appropriate use of governmentwide and other multiagency contracts entered into in accordance with the provisions of law referred to in that subsection.

''(2) Specific guidance on steps that agencies should take in entering into and administering multiple award task order and delivery order contracts to ensure compliance with—

''(A) the requirement in section 5122 of the Clinger-Cohen Act (40 U.S.C. 1422) [now 40 U.S.C. 11312] for capital planning and investment control in purchases of information technology products and services;

''(B) the requirement in section 2304c(b) of title 10, United States Code, and section 303J(b) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253j(b)) to ensure that all contractors are afforded a fair opportunity to be considered for the award of task orders and delivery orders; and

''(C) the requirement in section 2304c(c) of title 10, United States Code, and section 303J(c) of the Fed-

eral Property and Administrative Services Act of 1949 (41 U.S.C. 253j(c)) for a statement of work in each task order or delivery order issued that clearly specifies all tasks to be performed or property to be delivered under the order.

''(c) GSA FEDERAL SUPPLY SCHEDULES PROGRAM.—The Administrator for Federal Procurement Policy shall consult with the Administrator of General Services to assess the effectiveness of the multiple awards schedule program of the General Services Administration referred to in section 309(b)(3) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 259(b)(3)) that is administered as the Federal Supply Schedules program. The assessment shall include examination of the following:

''(1) The administration of the program by the Administrator of General Services.

''(2) The ordering and program practices followed by Federal customer agencies in using schedules established under the program.

''(d) GAO REPORT.—Not later than one year after the date on which the regulations required by subsection (a) are published in the Federal Register, the Comptroller General shall submit to Congress an evaluation of—

''(1) executive agency compliance with the regulations; and

''(2) conformance of the regulations with existing law, together with any recommendations that the Comptroller General considers appropriate.''

§ 253i. Task order contracts: advisory and assistance services

(a) Authority to award

(1) Subject to the requirements of this section, section 253j of this title, and other applicable law, the head of an executive agency may enter into a task order contract (as defined in section 253k of this title) for procurement of advisory and assistance services.

(2) The head of an executive agency may enter into a task order contract for advisory and assistance services only under the authority of this section.

(b) Limitation on contract period

The period of a task order contract entered into under this section, including all periods of extensions of the contract under options, modifications, or otherwise, may not exceed five years unless a longer period is specifically authorized in a law that is applicable to such contract.

(c) Content of notice

The notice required by section 416 of this title and section 637(e) of title 15 shall reasonably and fairly describe the general scope, magnitude, and duration of the proposed task order contract in a manner that would reasonably enable a potential offeror to decide whether to request the solicitation and consider submitting an offer.

(d) Required content of solicitation and contract

(1) The solicitation shall include the information (regarding services) described in section 253h(b) of this title.

(2) A task order contract entered into under this section shall contain the same information that is required by paragraph (1) to be included in the solicitation of offers for that contract.

(e) Multiple awards

(1) The head of an executive agency may, on the basis of one solicitation, award separate task order contracts under this section for the same or similar services to two or more sources if the solicitation states that the head of the executive agency has the option to do so.

(2) If, in the case of a task order contract for advisory and assistance services to be entered into under the authority of this section, the contract period is to exceed three years and the contract amount is estimated to exceed $10,000,000 (including all options), the solicitation shall—

(A) provide for a multiple award authorized under paragraph (1); and

(B) include a statement that the head of the executive agency may also elect to award only one task order contract if the head of the executive agency determines in writing that only one of the offerers is capable of providing the services required at the level of quality required.

(3) Paragraph (2) does not apply in the case of a solicitation for which the head of the executive agency concerned determines in writing that, because the services required under the contract are unique or highly specialized, it is not practicable to award more than one contract.

(f) Contract modifications

(1) A task order may not increase the scope, period, or maximum value of the task order contract under which the order is issued. The scope, period, or maximum value of the contract may be increased only by modification of the contract.

(2) Unless use of procedures other than competitive procedures is authorized by an exception in subsection (c) of section 253 of this title and approved in accordance with subsection (f) of such section, competitive procedures shall be used for making such a modification.

(3) Notice regarding the modification shall be provided in accordance with section 416 of this title and section 637(e) of title 15.

(g) Contract extensions

(1) Notwithstanding the limitation on the contract period set forth in subsection (b) of this section or in a solicitation or contract pursuant to subsection (e) of this section, a contract entered into by the head of an executive agency under this section may be extended on a sole-source basis for a period not exceeding six months if the head of such executive agency determines that—

(A) the award of a follow-on contract has been delayed by circumstances that were not reasonably foreseeable at the time the initial contract was entered into; and

(B) the extension is necessary in order to ensure continuity of the receipt of services pending the award of, and commencement of performance under, the follow-on contract.

(2) A task order contract may be extended under the authority of paragraph (1) only once and only in accordance with the limitations and requirements of this subsection.

(h) Inapplicability to certain contracts

This section does not apply to a contract for the acquisition of property or services that includes acquisition of advisory and assistance

services if the head of the executive agency entering into such contract determines that, under the contract, advisory and assistance services are necessarily incident to, and not a significant component of, the contract.

(i) "Advisory and assistance services" defined

In this section, the term ''advisory and assistance services'' has the meaning given such term in section 1105(g) of title 31.

(June 30, 1949, ch. 288, title III, § 303I, as added Pub. L. 103–355, title I, § 1054(a), Oct. 13, 1994, 108 Stat. 3262.)

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.

CONSTRUCTION

Section not to be construed as modifying or superseding, or as intended to impair or restrict, authorities or responsibilities under former 40 U.S.C. 759 or subchapter VI (§ 541 et seq.) of chapter 10 of former title 40 [now 40 U.S.C. 1101–1104], see section 1054(b) of Pub. L. 103–355, set out as a note under section 253h of this title.

WAIVERS TO EXTEND TASK ORDER CONTRACTS FOR ADVISORY AND ASSISTANCE SERVICES

Pub. L. 109–364, div. A, title VIII, § 834, Oct. 17, 2006, 120 Stat. 2332, provided that:

''(a) DEFENSE CONTRACTS.—

''(1) WAIVER AUTHORITY.—The head of an agency may issue a waiver to extend a task order contract entered into under section 2304b of title 10, United States Code, for a period not exceeding 10 years, through five one-year options, if the head of the agency determines in writing—

''(A) that the contract provides engineering or technical services of such a unique and substantial technical nature that award of a new contract would be harmful to the continuity of the program for which the services are performed;

''(B) that award of a new contract would create a large disruption in services provided to the Department of Defense; and

''(C) that the Department of Defense would, through award of a new contract, endure program risk during critical program stages due to loss of program corporate knowledge of ongoing program activities.

''(2) DELEGATION.—The authority of the head of an agency under paragraph (1) may be delegated only to the senior procurement executive of the agency.

''(3) REPORT.—Not later than April 1, 2007, the Secretary of Defense shall submit to the Committees on Armed Services of the Senate and the House of Representatives a report on advisory and assistance services. The report shall include the following information:

''(A) The methods used by the Department of Defense to identify a contract as an advisory and assistance services contract, as defined in section 2304b of title 10, United States Code.

''(B) The number of such contracts awarded by the Department during the five-year period preceding the date of the enactment of this Act [Oct. 17, 2006].

''(C) The average annual expenditures by the Department for such contracts.

''(D) The average length of such contracts.

''(E) The number of such contracts recompeted and awarded to the previous award winner.

''(4) PROHIBITION ON USE OF AUTHORITY BY DEPARTMENT OF DEFENSE IF REPORT NOT SUBMITTED.—The head of an agency may not issue a waiver under paragraph (1) if the report required by paragraph (3) is not submitted by the date set forth in that paragraph.

''(b) CIVILIAN AGENCY CONTRACTS.—

''(1) WAIVER AUTHORITY.—The head of an executive agency may issue a waiver to extend a task order contract entered into under section 303I of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253i) for a period not exceeding 10 years, through five one-year options, if the head of the agency determines in writing—

''(A) that the contract provides engineering or technical services of such a unique and substantial technical nature that award of a new contract would be harmful to the continuity of the program for which the services are performed;

''(B) that award of a new contract would create a large disruption in services provided to the executive agency; and

''(C) that the executive agency would, through award of a new contract, endure program risk during critical program stages due to loss of program corporate knowledge of ongoing program activities.

''(2) DELEGATION.—The authority of the head of an executive agency under paragraph (1) may be delegated only to the Chief Acquisition Officer of the agency (or the senior procurement executive in the case of an agency for which a Chief Acquisition Officer has not been appointed or designated under section 16(a) of the Office of Federal Procurement Policy Act (41 U.S.C. 414(a))).

''(3) REPORT.—Not later than April 1, 2007, the Administrator for Federal Procurement Policy shall submit to the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Government Reform of the House of Representatives a report on advisory and assistance services. The report shall include the following information:

''(A) The methods used by executive agencies to identify a contract as an advisory and assistance services contract, as defined in section 303I(i) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253i(i)).

''(B) The number of such contracts awarded by each executive agency during the five-year period preceding the date of the enactment of this Act [Oct. 17, 2006].

''(C) The average annual expenditures by each executive agency for such contracts.

''(D) The average length of such contracts.

''(E) The number of such contracts recompeted and awarded to the previous award winner.

''(4) PROHIBITION ON USE OF AUTHORITY BY EXECUTIVE AGENCIES IF REPORT NOT SUBMITTED.—The head of an executive agency may not issue a waiver under paragraph (1) if the report required by paragraph (3) is not submitted by the date set forth in that paragraph.

''(c) TERMINATION OF AUTHORITY.—A waiver may not be issued under this section after December 31, 2011.

''(d) COMPTROLLER GENERAL REVIEW.—

''(1) REPORT REQUIREMENT.—Not later than one year after the date of the enactment of this Act [Oct. 17, 2006], the Comptroller General shall submit to the committees described in paragraph (3) a report on the use of advisory and assistance services contracts by the Federal Government.

''(2) DEFENSE AND CIVILIAN AGENCY CONTRACTS COVERED.—The report shall cover both of the following:

''(A) Advisory and assistance services contracts as defined in section 2304b of title 10, United States Code.

''(B) Advisory and assistance services contracts as defined in section 303I(i) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253i(i)).

''(3) MATTERS COVERED.—The report shall address the following issues:

''(A) The extent to which executive agencies and elements of the Department of Defense require ad-

visory and assistance services for periods of greater than five years.

''(B) The extent to which such advisory and assistance services are provided by the same contractors under recurring contracts.

''(C) The rationale for contracting for advisory and assistance services that will be needed on a continuing basis, rather than performing the services inside the Federal Government.

''(D) The contract types and oversight mechanisms used by the Federal Government in contracts for advisory and assistance services and the extent to which such contract types and oversight mechanisms are adequate to protect the interests of the Government and taxpayers.

''(E) The actions taken by the Federal Government to prevent organizational conflicts of interest and improper personal services contracts in its contracts for advisory and assistance services.

''(4) COMMITTEES.—The committees described in this paragraph are the following:

''(A) The Committees on Armed Services and on Homeland Security and Governmental Affairs of the Senate.

''(B) The Committees on Armed Services and on Government Reform [now Oversight and Government Reform] of the House of Representatives.''

§ 253j. Task and delivery order contracts: orders

(a) Issuance of orders

The following actions are not required for issuance of a task or delivery order under a task or delivery order contract:

(1) A separate notice for such order under section 416 of this title or section 637(e) of title 15.

(2) Except as provided in subsection (b) of this section, a competition (or a waiver of competition approved in accordance with section 253(f) of this title) that is separate from that used for entering into the contract.

(b) Multiple award contracts

When multiple contracts are awarded under section 253h(d)(1)(B) or 253i(e) of this title, all contractors awarded such contracts shall be provided a fair opportunity to be considered, pursuant to procedures set forth in the contracts, for each task or delivery order in excess of $2,500 that is to be issued under any of the contracts unless—

(1) the executive agency's need for the services or property ordered is of such unusual urgency that providing such opportunity to all such contractors would result in unacceptable delays in fulfilling that need;

(2) only one such contractor is capable of providing the services or property required at the level of quality required because the services or property ordered are unique or highly specialized;

(3) the task or delivery order should be issued on a sole-source basis in the interest of economy and efficiency because it is a logical follow-on to a task or delivery order already issued on a competitive basis; or

(4) it is necessary to place the order with a particular contractor in order to satisfy a minimum guarantee.

(c) Statement of work

A task or delivery order shall include a statement of work that clearly specifies all tasks to be performed or property to be delivered under the order.

(d) Enhanced competition for orders in excess of $5,000,000

In the case of a task or delivery order in excess of $5,000,000, the requirement to provide all contractors a fair opportunity to be considered under subsection (b) is not met unless all such contractors are provided, at a minimum—

(1) a notice of the task or delivery order that includes a clear statement of the executive agency's requirements;

(2) a reasonable period of time to provide a proposal in response to the notice;

(3) disclosure of the significant factors and subfactors, including cost or price, that the executive agency expects to consider in evaluating such proposals, and their relative importance;

(4) in the case of an award that is to be made on a best value basis, a written statement documenting the basis for the award and the relative importance of quality and price or cost factors; and

(5) an opportunity for a post-award debriefing consistent with the requirements of section 253b(e) of this title.

(e) Protests

(1) A protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order except for—

(A) a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued; or

(B) a protest of an order valued in excess of $10,000,000.

(2) Notwithstanding section 3556 of title 31, the Comptroller General of the United States shall have exclusive jurisdiction of a protest authorized under paragraph (1)(B).

(3) This subsection shall be in effect for three years, beginning on the date that is 120 days after January 28, 2008.

(f) Task and delivery order ombudsman

The head of each executive agency who awards multiple task or delivery order contracts pursuant to section 253h(d)(1)(B) or 253i(e) of this title shall appoint or designate a task and delivery order ombudsman who shall be responsible for reviewing complaints from the contractors on such contracts and ensuring that all of the contractors are afforded a fair opportunity to be considered for task or delivery orders when required under subsection (b) of this section. The task and delivery order ombudsman shall be a senior agency official who is independent of the contracting officer for the contracts and may be the executive agency's competition advocate.

(g) Applicability

This section applies to task and delivery order contracts entered into under sections 253h and 253i of this title.

(June 30, 1949, ch. 288, title III, § 303J, as added Pub. L. 103–355, title I, § 1054(a), Oct. 13, 1994, 108 Stat. 3264; amended Pub. L. 110–181, div. A, title VIII, § 843(b)(2), Jan. 28, 2008, 122 Stat. 238.)

AMENDMENTS

2008—Subsec. (d). Pub. L. 110–181, § 843(b)(2)(B), added subsec. (d). Former subsec. (d) redesignated (e).

Subsec. (e). Pub. L. 110–181, § 843(b)(2)(C), added subsec. (e) and struck out former subsec. (e). Prior to amendment, text read as follows: ''A protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order except for a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued.''

Pub. L. 110–181, § 843(b)(2)(A), redesignated subsec. (d) as (e). Former subsec. (e) redesignated (f).

Subsecs. (f), (g). Pub. L. 110–181, § 843(b)(2)(A), redesignated subsecs. (e) and (f) as (f) and (g), respectively.

EFFECTIVE DATE OF 2008 AMENDMENT

Pub. L. 110–181, div. A, title VIII, § 843(b)(3)(B), Jan. 28, 2008, 122 Stat. 239, provided that: ''The amendments made by paragraph (2) [amending this section] shall take effect on the date that is 120 days after the date of the enactment of this Act [Jan. 28, 2008], and shall apply with respect to any task or delivery order awarded on or after such date.''

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.

CONSTRUCTION

Section not to be construed as modifying or superseding, or as intended to impair or restrict, authorities or responsibilities under former 40 U.S.C. 759 or subchapter VI (§ 541 et seq.) of chapter 10 of former title 40 [now 40 U.S.C. 1101–1104], see section 1054(b) of Pub. L. 103–355, set out as a note under section 253h of this title.

§ 253k. Task and delivery order contracts: definitions

In sections 253h, 253i, and 253j of this title:

(1) The term ''task order contract'' means a contract for services that does not procure or specify a firm quantity of services (other than a minimum or maximum quantity) and that provides for the issuance of orders for the performance of tasks during the period of the contract.

(2) The term ''delivery order contract'' means a contract for property that does not procure or specify a firm quantity of property (other than a minimum or maximum quantity) and that provides for the issuance of orders for the delivery of property during the period of the contract.

(June 30, 1949, ch. 288, title III, § 303K, as added Pub. L. 103–355, title I, § 1054(a), Oct. 13, 1994, 108 Stat. 3265.)

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.

CONSTRUCTION

Section not to be construed as modifying or superseding, or as intended to impair or restrict, authorities or responsibilities under former 40 U.S.C. 759 or subchapter VI (§ 541 et seq.) of chapter 10 of former title 40 [now 40 U.S.C. 1101–1104], see section 1054(b) of Pub. L. 103–355, set out as a note under section 253h of this title.

§ 253*l*. Severable services contracts for periods crossing fiscal years

(a) Authority

The head of an executive agency may enter into a contract for procurement of severable services for a period that begins in one fiscal year and ends in the next fiscal year if (without regard to any option to extend the period of the contract) the contract period does not exceed one year.

(b) Obligation of funds

Funds made available for a fiscal year may be obligated for the total amount of a contract entered into under the authority of subsection (a) of this section.

(June 30, 1949, ch. 288, title III, § 303L, as added Pub. L. 103–355, title I, § 1073, Oct. 13, 1994, 108 Stat. 3271; amended Pub. L. 104–106, div. D, title XLIII, § 4321(a)(1), Feb. 10, 1996, 110 Stat. 671.)

AMENDMENTS

1996—Pub. L. 104–106 made technical correction to directory language of Pub. L. 103–355, § 1073, which enacted this section.

EFFECTIVE DATE OF 1996 AMENDMENT

Section 4321(a) of Pub. L. 104–106 provided that the amendment made by that section is effective as of Oct. 13, 1994, and as if included in Pub. L. 103–355.

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*l*–1. Contract authority of Comptroller General

The Comptroller General may use available funds, now and hereafter, to enter into contracts for the acquisition of severable services for a period that begins in one fiscal year and ends in the next fiscal year and to enter in multiyear contracts for the acquisition of property and nonaudit-related services, to the same extent as executive agencies under the authority of sections 253*l* and 254c, respectively, of this title.

(Pub. L. 105–18, title II, § 7004, June 12, 1997, 111 Stat. 192.)

CODIFICATION

Section was not enacted as part of title III of act June 30, 1949, ch. 288, 63 Stat. 393, which comprises this subchapter.

§ 253*l*–2. Contract authority of Library of Congress

The Library of Congress may use available funds, now and hereafter, to enter into contracts for the lease or acquisition of severable services for a period that begins in one fiscal year and ends in the next fiscal year and to enter into multi-year contracts for the acquisition of property and services pursuant to sections 253*l* and 254c of this title, respectively.

(Pub. L. 106–57, title II, § 207, Sept. 29, 1999, 113 Stat. 423.)

CODIFICATION

Section was not enacted as part of title III of act June 30, 1949, ch. 288, 63 Stat. 393, which comprises this subchapter.

§ 253*l*–3. Contract authority of Chief Administrative Officer of the House of Representatives

During fiscal year 2001 and any succeeding fiscal year, the Chief Administrative Officer of the House of Representatives may—

(1) enter into contracts for the acquisition of severable services for a period that begins in 1 fiscal year and ends in the next fiscal year to the same extent as the head of an executive agency under the authority of section 253*l* of this title; and

(2) enter into multiyear contracts for the acquisitions of property and nonaudit-related services to the same extent as executive agencies under the authority of section 254c of this title.

(Pub. L. 106–554, § 1(a)(2) [title I, § 101], Dec. 21, 2000, 114 Stat. 2763, 2763A–100.)

CODIFICATION

Section was not enacted as part of title III of act June 30, 1949, ch. 288, 63 Stat. 393, which comprises this subchapter.

§ 253*l*–4. Contract authority of Congressional Budget Office

Beginning on December 21, 2000, and hereafter, the Congressional Budget Office may use available funds to enter into contracts for the procurement of severable services for a period that begins in one fiscal year and ends in the next fiscal year and may enter into multi-year contracts for the acquisition of property and services, to the same extent as executive agencies under the authority of section[1] 253*l* and 254c, respectively, of this title.

(Pub. L. 106–554, § 1(a)(2) [title I, § 110], Dec. 21, 2000, 114 Stat. 2763, 2763A–108.)

CODIFICATION

Section was not enacted as part of title III of act June 30, 1949, ch. 288, 63 Stat. 393, which comprises this subchapter.

§ 253*l*–5. Contract authority of Secretary and Sergeant at Arms and Doorkeeper of the Senate

(a) Subject to regulations prescribed by the Committee on Rules and Administration of the Senate, the Secretary and the Sergeant at Arms and Doorkeeper of the Senate may—

(1) enter into contracts for the acquisition of severable services for a period that begins in one fiscal year and ends in the next fiscal year to the same extent and under the same conditions as the head of an executive agency under the authority of section 253*l* of this title; and

(2) enter into multiyear contracts for the acquisition of property and services to the same extent and under the same conditions as the head of an executive agency under the authority of section 254c of this title.

(b) This section shall take effect on October 1, 2002, and shall apply in fiscal year 2003 and successive fiscal years.

(Pub. L. 108–7, div. H, title I, § 5, Feb. 20, 2003, 117 Stat. 350.)

[1] So in original. Probably should be ''sections''.

CODIFICATION

Section was not enacted as part of title III of act June 30, 1949, ch. 288, 63 Stat. 393, which comprises this subchapter.

§ 253*l*–6. Contract authority of Capitol Police

(a) In general

The United States Capitol Police may—

(1) enter into contracts for the acquisition of severable services for a period that begins in 1 fiscal year and ends in the next fiscal year to the same extent as the head of an executive agency under the authority of section 253*l* of this title; and

(2) enter into multiyear contracts for the acquisitions of property and nonaudit-related services to the same extent as executive agencies under the authority of section 254c of this title.

(b) Effective date

This section shall apply to fiscal year 2003 and each fiscal year thereafter.

(Pub. L. 108–7, div. H, title I, § 1002, Feb. 20, 2003, 117 Stat. 357.)

CODIFICATION

Section was not enacted as part of title III of act June 30, 1949, ch. 288, 63 Stat. 393, which comprises this subchapter.

§ 253*l*–7. Contract authority of Architect of the Capitol

(a) In general

The Architect of the Capitol may—

(1) enter into contracts for the acquisition of severable services for a period that begins in 1 fiscal year and ends in the next fiscal year to the same extent as the head of an executive agency under the authority of section 253*l* of this title; and

(2) enter into multiyear contracts for the acquisitions of property and nonaudit-related services to the same extent as executive agencies under the authority of section 254c of this title.

(b) Effective date

This section shall apply to fiscal year 2003 and each fiscal year thereafter.

(Pub. L. 108–7, div. H, title I, § 1202, Feb. 20, 2003, 117 Stat. 373.)

CODIFICATION

Section was not enacted as part of title III of act June 30, 1949, ch. 288, 63 Stat. 393, which comprises this subchapter.

§ 253*l*–8. Contract authority of Secretary of Smithsonian Institution

(a) In general

The Secretary of the Smithsonian Institution may—

(1) enter into multi-year contracts for the acquisition of property and services under the authority of section 254c of this title; and

(2) enter into contracts for the acquisition of severable services for a period that begins in one fiscal year and ends in the next fiscal year

under the authority of section 253*l* of this title.

(b) Effective date

This section shall apply to contracts entered into on or after August 15, 2003.

(Pub. L. 108–72, § 4, Aug. 15, 2003, 117 Stat. 889.)

CODIFICATION

Section was not enacted as part of title III of act June 30, 1949, ch. 288, 63 Stat. 393, which comprises this subchapter.

§ 253m. Design-build selection procedures

(a) Authorization

Unless the traditional acquisition approach of design-bid-build established under sections 1101 to 1104 of title 40 is used or another acquisition procedure authorized by law is used, the head of an executive agency shall use the two-phase selection procedures authorized in this section for entering into a contract for the design and construction of a public building, facility, or work when a determination is made under subsection (b) of this section that the procedures are appropriate for use.

(b) Criteria for use

A contracting officer shall make a determination whether two-phase selection procedures are appropriate for use for entering into a contract for the design and construction of a public building, facility, or work when the contracting officer anticipates that three or more offers will be received for such contract, design work must be performed before an offeror can develop a price or cost proposal for such contract, the offeror will incur a substantial amount of expense in preparing the offer, and the contracting officer has considered information such as the following:

(1) The extent to which the project requirements have been adequately defined.

(2) The time constraints for delivery of the project.

(3) The capability and experience of potential contractors.

(4) The suitability of the project for use of the two-phase selection procedures.

(5) The capability of the agency to manage the two-phase selection process.

(6) Other criteria established by the agency.

(c) Procedures described

Two-phase selection procedures consist of the following:

(1) The agency develops, either in-house or by contract, a scope of work statement for inclusion in the solicitation that defines the project and provides prospective offerors with sufficient information regarding the Government's requirements (which may include criteria and preliminary design, budget parameters, and schedule or delivery requirements) to enable the offerors to submit proposals which meet the Government's needs. If the agency contracts for development of the scope of work statement, the agency shall contract for architectural and engineering services as defined by and in accordance with sections 1101 to 1104 of title 40.

(2) The contracting officer solicits phase-one proposals that—

(A) include information on the offeror's—

(i) technical approach; and

(ii) technical qualifications; and

(B) do not include—

(i) detailed design information; or

(ii) cost or price information.

(3) The evaluation factors to be used in evaluating phase-one proposals are stated in the solicitation and include specialized experience and technical competence, capability to perform, past performance of the offeror's team (including the architect-engineer and construction members of the team) and other appropriate factors, except that cost-related or price-related evaluation factors are not permitted. Each solicitation establishes the relative importance assigned to the evaluation factors and subfactors that must be considered in the evaluation of phase-one proposals. The agency evaluates phase-one proposals on the basis of the phase-one evaluation factors set forth in the solicitation.

(4) The contracting officer selects as the most highly qualified the number of offerors specified in the solicitation to provide the property or services under the contract and requests the selected offerors to submit phase-two competitive proposals that include technical proposals and cost or price information. Each solicitation establishes with respect to phase two—

(A) the technical submission for the proposal, including design concepts or proposed solutions to requirements addressed within the scope of work (or both), and

(B) the evaluation factors and subfactors, including cost or price, that must be considered in the evaluations of proposals in accordance with subsections (b), (c), and (d) of section 253a of this title.

The contracting officer separately evaluates the submissions described in subparagraphs (A) and (B).

(5) The agency awards the contract in accordance with section 253b of this title.

(d) Solicitation to state number of offerors to be selected for phase-two requests for competitive proposals

A solicitation issued pursuant to the procedures described in subsection (c) of this section shall state the maximum number of offerors that are to be selected to submit competitive proposals pursuant to subsection (c)(4) of this section. The maximum number specified in the solicitation shall not exceed 5 unless the agency determines with respect to an individual solicitation that a specified number greater than 5 is in the Government's interest and is consistent with the purposes and objectives of the two-phase selection process.

(e) Requirement for guidance and regulations

The Federal Acquisition Regulation shall include guidance—

(1) regarding the factors that may be considered in determining whether the two-phase contracting procedures authorized by sub-

section (a) of this section are appropriate for use in individual contracting situations;

(2) regarding the factors that may be used in selecting contractors; and

(3) providing for a uniform approach to be used Government-wide.

(June 30, 1949, ch. 288, title III, §303M, as added Pub. L. 104–106, div. D, title XLI, §4105(b)(1), Feb. 10, 1996, 110 Stat. 647.)

CODIFICATION

''Sections 1101 to 1104 of title 40'' substituted in subsec. (a) for ''the Brooks Architect-Engineers Act (title IX of this Act)'' and in subsec. (c)(1) for ''the Brooks Architect-Engineers Act (40 U.S.C. 541 et seq.)'' 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.

EFFECTIVE DATE

For effective date and applicability of section, see section 4401 of Pub. L. 104–106, set out as an Effective Date of 1996 Amendment note under section 251 of this title.

§254. Contract requirements

(a) Contracts awarded using procedures other than sealed-bid procedures

Except as provided in subsection (b) of this section, contracts awarded after using procedures other than sealed-bid procedures may be of any type which in the opinion of the agency head will promote the best interests of the Government. Every contract awarded after using procedures other than sealed-bid procedures shall contain a suitable warranty, as determined by the agency head, by the contractor that no person or selling agency has been employed or retained to solicit or secure such contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business, for the breach or violation of which warranty the Government shall have the right to annul such contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee. The preceding sentence does not apply to a contract for an amount that is not greater than the simplified acquisition threshold or to a contract for the acquisition of commercial items.

(b) Barred contracts; fee limitation; determination of use; advance notification

The cost-plus-a-percentage-of-cost system of contracting shall not be used, and in the case of a cost-plus-a-fixed-fee contract the fee shall not exceed 10 percent of the estimated cost of the contract, exclusive of the fee, as determined by the agency head at the time of entering into such contract (except that a fee not in excess of 15 percent of such estimated cost is authorized in any such contract for experimental, developmental, or research work and that a fee inclusive of the contractor's costs and not in excess of 6 percent of the estimated cost, exclusive of fees, as determined by the agency head at the time of entering into the contract, of the project to which such fee is applicable is authorized in contracts for architectural or engineering services relating to any public works or utility project). All cost and cost-plus-a-fixed-fee contracts shall provide for advance notification by the contractor to the procuring agency of any subcontract thereunder on a cost-plus-a-fixed-fee basis and of any fixed-price subcontract or purchase order which exceeds in dollar amount either the simplified acquisition threshold or 5 percent of the total estimated cost of the prime contract; and a procuring agency, through any authorized representative thereof, shall have the right to inspect the plans and to audit the books and records of any prime contractor or subcontractor engaged in the performance of a cost or cost-plus-a-fixed-fee contract.

(June 30, 1949, ch. 288, title III, §304, 63 Stat. 395; Oct. 31, 1951, ch. 652, 65 Stat. 700; July 12, 1952, ch. 703, §1(m), 66 Stat. 594; Pub. L. 89–607, §2, Sept. 27, 1966, 80 Stat. 850; Pub. L. 98–369, div. B, title VII, §§2712, 2714(a)(2), (3), July 18, 1984, 98 Stat. 1181, 1184; Pub. L. 103–355, title I, §§1071, 1251(a)(1), title II, §2251(b), title IV, §§4103(c), 4402(c), title VIII, §8204(b), title X, §10005(e), Oct. 13, 1994, 108 Stat. 3270, 3278, 3320, 3341, 3349, 3396, 3408.)

AMENDMENTS

1994—Subsec. (a). Pub. L. 103–355, §§4103(c), 8204(b), inserted at end ''The preceding sentence does not apply to a contract for an amount that is not greater than the simplified acquisition threshold or to a contract for the acquisition of commercial items.''

Subsec. (b). Pub. L. 103–355, §§4402(c), 10005(e), substituted ''percent'' for ''per centum'' wherever appearing and ''either the simplified acquisition threshold'' for ''either $25,000'' in last sentence.

Pub. L. 103–355, §1071, struck out after first sentence ''Neither a cost nor a cost-plus-a-fixed-fee contract nor an incentive-type contract shall be used unless the agency head determines that such method of contracting is likely to be less costly than other methods or that it is impractical to secure property or services of the kind or quality required without the use of a cost or cost-plus-a-fixed-fee contract or an incentive-type contract.''

Subsec. (c). Pub. L. 103–355, §2251(b), struck out subsec. (c) which related to examination of books, records, etc. of contractors, time limitations, exemptions, exceptional conditions, and reports to Congress. See section 254d of this title.

Subsec. (d). Pub. L. 103–355, §1251(a)(1), struck out subsec. (d) which related to submission of cost or pricing data by contractors and subcontractors, certificate requirements, adjustment of price, inspection of books, records, etc., necessity of data, and exceptions. See section 254b of this title.

1984—Pub. L. 98–369, §2714(a)(2), amended section catchline generally.

Subsec. (a). Pub. L. 98–369, §2714(a)(3)(A), (B), substituted ''awarded after using procedures other than sealed-bid procedures'' for ''negotiated pursuant to section 252(c) of this title'' in first and second sentences.

Subsec. (c). Pub. L. 98–369, §2714(a)(3)(C), substituted ''awarded after using procedures other than sealed-bid procedures'' for ''negotiated without advertising pursuant to authority contained in this Act'' in first sentence.

Subsec. (d). Pub. L. 98–369, §2712, added subsec. (d).

1966—Subsec. (c). Pub. L. 89–607 provided for exemption of certain contracts with foreign contractors from the requirement for an examination-of-records clause, such determination to be reported to Congress.

1952—Subsec. (b). Act July 12, 1952, substituted ''property'' for ''supplies''.

1951—Subsec. (c). Act Oct. 31, 1951, added subsec. (c).

EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103–355, see section 10001 of Pub. L. 103–355, set out as a note under section 251 of this title.

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.

REGULATIONS ON THE USE OF COST-REIMBURSEMENT CONTRACTS

Pub. L. 110–417, [div. A], title VIII, § 864, Oct. 14, 2008, 122 Stat. 4549, provided that:

''(a) IN GENERAL.—Not later than 270 days after the date of the enactment of this Act [Oct. 14, 2008], the Federal Acquisition Regulation shall be revised to address the use of cost-reimbursement contracts.

''(b) CONTENT.—The regulations promulgated under subsection (a) shall include, at a minimum, guidance regarding—

''(1) when and under what circumstances cost-reimbursement contracts are appropriate;

''(2) the acquisition plan findings necessary to support a decision to use cost-reimbursement contracts; and

''(3) the acquisition workforce resources necessary to award and manage cost-reimbursement contracts.

''(c) INSPECTOR GENERAL REVIEW.—Not later than one year after the regulations required by subsection (a) are promulgated, the Inspector General for each executive agency shall review the use of cost-reimbursement contracts by such agency for compliance with such regulations and shall include the results of the review in the Inspector General's next semiannual report.

''(d) REPORT.—Subject to subsection (f), the Director of the Office of Management and Budget shall submit an annual report to Congressional committees identified in subsection (e) on the use of cost-reimbursement contracts and task or delivery orders by all executive agencies. The report shall be submitted no later than March 1 and shall cover the fiscal year ending September 30 of the prior year. The report shall include—

''(1) the total number and value of contracts awarded and orders issued during the covered fiscal year;

''(2) the total number and value of cost-reimbursement contracts awarded and orders issued during the covered fiscal year; and

''(3) an assessment of the effectiveness of the regulations promulgated pursuant to subsection (a) in ensuring the appropriate use of cost-reimbursement contracts.

''(e) CONGRESSIONAL COMMITTEES DEFINED.—The report required by subsection (d) shall be submitted to the Committee on Oversight and Government Reform of the House of Representatives; the Committee on Homeland Security and Governmental Affairs of the Senate; the Committees on Appropriations of the House of Representatives and the Senate; and, in the case of the Department of Defense and the Department of Energy, the Committees on Armed Services of the Senate and the House of Representatives.

''(f) REQUIREMENTS LIMITED TO CERTAIN AGENCIES AND YEARS.—

''(1) AGENCIES.—The requirement in subsection (c) shall apply only to those executive agencies that awarded contracts or issued orders (under contracts previously awarded) in a total amount of at least $1,000,000,000 in the fiscal year proceeding the fiscal year in which the assessments and reports are submitted.

''(2) YEARS.—The report required by subsection (d) shall be submitted from March 1, 2009, until March 1, 2014.

''(g) EXECUTIVE AGENCY DEFINED.—In this section, the term 'executive agency' has the meaning given such term in section 4(1) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(1)).''

EXEMPTION OF FUNCTIONS

Functions authorized by Foreign Assistance Act of 1961, as amended, as exempt, see Ex. Ord. No. 11223, eff. May 12, 1965, 30 F.R. 6635, set out as a note under section 2393 of Title 22, Foreign Relations and Intercourse.

FOREIGN CONTRACTORS

Secretaries of Defense, Army, Navy, or Air Force, or their designees, to determine, prior to exercising the authority provided in the amendment of this section by Pub. L. 89–607 to exempt certain contracts with foreign contractors from the requirement of an examination-of-records clause, that all reasonable efforts have been made to include such examination-of-records clause, as required by par. (11) of Part I of Ex. Ord. No. 10789, and that alternate sources of supply are not reasonably available, see par. (11) of Part I of Ex. Ord. No. 10789, eff. Nov. 14, 1958, 23 F.R. 8897, as amended, set out as a note under section 1431 of Title 50, War and National Defense.

EXECUTIVE ORDER NO. 12800

Ex. Ord. No. 12800, Apr. 13, 1992, 57 F.R. 12985, 13413, which required Federal contractors to post a notice that employees could not be required to be members of a union in order to retain their jobs, was revoked by Ex. Ord. No. 12836, § 1, Feb. 1, 1993, 58 F.R. 7045, which was itself revoked as it relates to notification of employee rights concerning payment of union dues or fees by Ex. Ord. No. 13201, § 11, Feb. 17, 2001, 66 F.R. 11221, which was itself revoked by Ex. Ord. No. 13496, § 13, Jan. 30, 2009, 74 F.R. 6110, set out below, and as it relates to project agreements by Ex. Ord. No. 13202, § 8, Feb. 17, 2001, 66 F.R. 11226, which was itself revoked by Ex. Ord. No. 13502, § 8, Feb. 6, 2009, 74 F.R. 6986, set out as a note under section 251 of this title.

EXECUTIVE ORDER NO. 13201

Ex. Ord. No. 13201, Feb. 17, 2001, 66 F.R. 11221, which related to notification of employee rights concerning payment of union dues or fees, was revoked by Ex. Ord. No. 13496, § 13, Jan. 30, 2009, 74 F.R. 6110, set out below.

EX. ORD. NO. 13496. NOTIFICATION OF EMPLOYEE RIGHTS UNDER FEDERAL LABOR LAWS

Ex. Ord. No. 13496, Jan. 30, 2009, 74 F.R. 6107, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 101 *et seq.*, and in order to ensure the economical and efficient administration and completion of Government contracts, it is hereby ordered that:

SECTION 1. *Policy*. This order is designed to promote economy and efficiency in Government procurement. When the Federal Government contracts for goods or services, it has a proprietary interest in ensuring that those contracts will be performed by contractors whose work will not be interrupted by labor unrest. The attainment of industrial peace is most easily achieved and workers' productivity is enhanced when workers are well informed of their rights under Federal labor laws, including the National Labor Relations Act (Act), 29 U.S.C. 151 *et seq*. As the Act recognizes, ''encouraging the practice and procedure of collective bargaining and . . . protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection'' will ''eliminate the causes of certain substantial obstruc-

tions to the free flow of commerce'' and ''mitigate and eliminate these obstructions when they have occurred.'' 29 U.S.C. 151. Relying on contractors whose employees are informed of such rights under Federal labor laws facilitates the efficient and economical completion of the Federal Government's contracts.

SEC. 2. *Contract Clause*. Except in contracts exempted in accordance with section 3 of this order, all Government contracting departments and agencies shall, to the extent consistent with law, include the following provisions in every Government contract, other than collective bargaining agreements as defined in 5 U.S.C. 7103(a)(8) and purchases under the simplified acquisition threshold as defined in the Office of Federal Procurement Policy Act, 41 U.S.C. 403.

''1. During the term of this contract, the contractor agrees to post a notice, of such size and in such form, and containing such content as the Secretary of Labor shall prescribe, in conspicuous places in and about its plants and offices where employees covered by the National Labor Relations Act engage in activities relating to the performance of the contract, including all places where notices to employees are customarily posted both physically and electronically. The notice shall include the information contained in the notice published by the Secretary of Labor in the Federal Register (Secretary's Notice).

''2. The contractor will comply with all provisions of the Secretary's Notice, and related rules, regulations, and orders of the Secretary of Labor.

''3. In the event that the contractor does not comply with any of the requirements set forth in paragraphs (1) or (2) above, this contract may be cancelled, terminated, or suspended in whole or in part, and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in or adopted pursuant to Executive Order [number as provided by the Federal Register [13496]] of [insert new date [Jan. 30, 2009]]. Such other sanctions or remedies may be imposed as are provided in Executive Order [number as provided by the Federal Register [13496]] of [insert new date [Jan. 30, 2009]], or by rule, regulation, or order of the Secretary of Labor, or as are otherwise provided by law.

''4. The contractor will include the provisions of paragraphs (1) through (3) above in every subcontract entered into in connection with this contract (unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 3 of Executive Order [number as provided by the Federal Register [13496]] of [insert new date [Jan. 30, 2009]]) so that such provisions will be binding upon each subcontractor. The contractor will take such action with respect to any such subcontract as may be directed by the Secretary of Labor as a means of enforcing such provisions, including the imposition of sanctions for noncompliance: Provided, however, that if the contractor becomes involved in litigation with a subcontractor, or is threatened with such involvement, as a result of such direction, the contractor may request the United States to enter into such litigation to protect the interests of the United States.''

SEC. 3. *Administration*.

(a) The Secretary of Labor (Secretary) shall be responsible for the administration and enforcement of this order. The Secretary shall adopt such rules and regulations and issue such orders as are necessary and appropriate to achieve the purposes of this order.

(b) Within 120 days of the effective date of this order, the Secretary shall initiate a rulemaking to prescribe the size, form, and content of the notice to be posted by a contractor under paragraph 1 of the contract clause described in section 2 of this order. Such notice shall describe the rights of employees under Federal labor laws, consistent with the policy set forth in section 1 of this order.

(c) Whenever the Secretary finds that an act of Congress, clarification of existing law by the courts or the National Labor Relations Board, or other circumstances make modification of the contractual provisions set out in subsection (a) of this section necessary to achieve the purposes of this order, the Secretary promptly shall issue such rules, regulations, or orders as are needed to cause the substitution or addition of appropriate contractual provisions in Government contracts thereafter entered into.

SEC. 4. *Exemptions*. (a) If the Secretary finds that the application of any of the requirements of this order would not serve the purposes of this order or would impair the ability of the Government to procure goods or services on an economical and efficient basis, the Secretary may exempt a contracting department or agency or group of departments or agencies from the requirements of any or all of the provisions of this order with respect to a particular contract or subcontract or any class of contracts or subcontracts.

(b) The Secretary may, if the Secretary finds that special circumstances require an exemption in order to serve the national interest, exempt a contracting department or agency from the requirements of any or all of the provisions of section 2 of this order with respect to a particular contract or subcontract or class of contracts or subcontracts.

SEC. 5. *Investigation*.

(a) The Secretary may investigate any Government contractor, subcontractor, or vendor to determine whether the contractual provisions required by section 2 of this order have been violated.

Such investigations shall be conducted in accordance with procedures established by the Secretary.

(b) The Secretary shall receive and investigate complaints by employees of a Government contractor or subcontractor, where such complaints allege a failure to perform or a violation of the contractual provisions required by section 2 of this order.

SEC. 6. *Compliance*.

(a) The Secretary, or any agency or officer in the executive branch lawfully designated by rule, regulation, or order of the Secretary, may hold such hearings, public or private, regarding compliance with this order as the Secretary may deem advisable.

(b) The Secretary may hold hearings, or cause hearings to be held, in accordance with subsection (a) of this section, prior to imposing, ordering, or recommending the imposition of sanctions under this order. Neither an order for cancellation, termination, or suspension of any contract or debarment of any contractor from further Government contracts under section 7(b) of this order nor the inclusion of a contractor on a published list of noncomplying contractors under section 7(c) of this order shall be carried out without affording the contractor an opportunity for a hearing.

SEC. 7. *Remedies*. In accordance with such rules, regulations, or orders as the Secretary may issue or adopt, the Secretary may:

(a) after consulting with the contracting department or agency, direct that department or agency to cancel, terminate, suspend, or cause to be cancelled, terminated, or suspended, any contract, or any portion or portions thereof, for failure of the contractor to comply with the contractual provisions required by section 2 of this order; contracts may be cancelled, terminated, or suspended absolutely, or continuance of contracts may be conditioned upon future compliance: Provided, that before issuing a directive under this subsection, the Secretary shall provide the head of the contracting department or agency an opportunity to offer written objections to the issuance of such a directive, which objections shall include a complete statement of reasons for the objections, among which reasons shall be a finding that completion of the contract is essential to the agency's mission: And provided further, that no directive shall be issued by the Secretary under this subsection so long as the head of the contracting department or agency, or his or her designee, continues to object to the issuance of such directive;

(b) after consulting with each affected contracting department or agency, provide that one or more contracting departments or agencies shall refrain from entering into further contracts, or extensions or other

modifications of existing contracts, with any noncomplying contractor, until such contractor has satisfied the Secretary that such contractor has complied with and will carry out the provisions of this order: Provided, that before issuing a directive under this subsection, the Secretary shall provide the head of each contracting department or agency an opportunity to offer written objections to the issuance of such a directive, which objections shall include a complete statement of reasons for the objections, among which reasons shall be a finding that further contracts or extensions or other modifications of existing contracts with the noncomplying contractor are essential to the agency's mission: And provided further, that no directive shall be issued by the Secretary under this subsection so long as the head of a contracting department or agency, or his or her designee, continues to object to the issuance of such directive; and

(c) publish, or cause to be published, the names of contractors that have, in the judgment of the Secretary, failed to comply with the provisions of this order or of related rules, regulations, and orders of the Secretary.

SEC. 8. *Reports*. Whenever the Secretary invokes section 7(a) or 7(b) of this order, the contracting department or agency shall report to the Secretary the results of the action it has taken within such time as the Secretary shall specify.

SEC. 9. *Cooperation*. Each contracting department and agency shall cooperate with the Secretary and provide such information and assistance as the Secretary may require in the performance of the Secretary's functions under this order.

SEC. 10. *Sufficiency of Remedies*. If the Secretary finds that the authority vested in the Secretary by sections 5 through 9 of this order is not sufficient to effectuate the purposes of this order, the Secretary shall develop recommendations on how better to effectuate those purposes.

SEC. 11. *Delegation*. The Secretary may, in accordance with law, delegate any function or duty of the Secretary under this order to any officer in the Department of Labor or to any other officer in the executive branch of the Government, with the consent of the head of the department or agency in which that officer serves.

SEC. 12. *Implementation*. To the extent permitted by law, the Federal Acquisition Regulatory Council (FAR Council) shall take whatever action is required to implement in the Federal Acquisition Regulation (FAR) the provisions of this order and any related rules, regulations, or orders issued by the Secretary under this order and shall amend the FAR to require each solicitation of offers for a contract to include a provision that implements section 2 of this order.

SEC. 13. *Revocation of Prior Order and Actions*. Executive Order 13201 of February 17, 2001, is revoked. The heads of executive departments and agencies shall, to the extent permitted by law, revoke expeditiously any orders, rules, regulations, guidelines, or policies implementing or enforcing Executive Order 13201.

SEC. 14. *Severability*. If any provision of this order, or the application of such provision to any person or circumstance, is held to be invalid, the remainder of this order and the application of the provisions of such to any person or circumstances shall not be affected thereby.

SEC. 15. *General Provisions*.

(a) Nothing in this order shall be construed to impair or otherwise affect:

(i) authority granted by law to a department, agency, or the head thereof; or

(ii) functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order 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.

SEC. 16. *Effective Date*. This order shall become effective immediately, and shall apply to contracts resulting from solicitations issued on or after the effective date of the rule promulgated by the Secretary pursuant to section 3(b) of this order.

BARACK OBAMA.

DEFINITIONS

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

§ 254a. Cost-type research and development contracts with educational institutions

On and after September 5, 1962, provision may be made in cost-type research and development contracts (including grants) with universities, colleges, or other educational institutions for payment of reimbursable indirect costs on the basis of predetermined fixed-percentage rates applied to the total, or an element thereof, of the reimbursable direct costs incurred.

(Pub. L. 87–638, Sept. 5, 1962, 76 Stat. 437.)

CODIFICATION

Section was not enacted as part of title III of act June 30, 1949, ch. 288, 63 Stat. 393, which comprises this subchapter.

§ 254b. Cost or pricing data: truth in negotiations

(a) Required cost or pricing data and certification

(1) The head of an executive agency shall require offerors, contractors, and subcontractors to make cost or pricing data available as follows:

(A) An offeror for a prime contract under this subchapter to be entered into using procedures other than sealed-bid procedures shall be required to submit cost or pricing data before the award of a contract if—

(i) in the case of a prime contract entered into after October 13, 1994, the price of the contract to the United States is expected to exceed $500,000; and

(ii) in the case of a prime contract entered into on or before October 13, 1994, the price of the contract to the United States is expected to exceed $100,000.

(B) The contractor for a prime contract under this subchapter shall be required to submit cost or pricing data before the pricing of a change or modification to the contract if—

(i) in the case of a change or modification made to a prime contract referred to in subparagraph (A)(i), the price adjustment is expected to exceed $500,000;

(ii) in the case of a change or modification made to a prime contract that was entered into on or before October 13, 1994, and that has been modified pursuant to paragraph (6), the price adjustment is expected to exceed $500,000; and

(iii) in the case of a change or modification not covered by clause (i) or (ii), the price adjustment is expected to exceed $100,000.

(C) An offeror for a subcontract (at any tier) of a contract under this subchapter shall be re-

quired to submit cost or pricing data before the award of the subcontract if the prime contractor and each higher-tier subcontractor have been required to make available cost or pricing data under this section and—

(i) in the case of a subcontract under a prime contract referred to in subparagraph (A)(i), the price of the subcontract is expected to exceed $500,000;

(ii) in the case of a subcontract entered into under a prime contract that was entered into on or before October 13, 1994, and that has been modified pursuant to paragraph (6), the price of the subcontract is expected to exceed $500,000; and

(iii) in the case of a subcontract not covered by clause (i) or (ii), the price of the subcontract is expected to exceed $100,000.

(D) The subcontractor for a subcontract covered by subparagraph (C) shall be required to submit cost or pricing data before the pricing of a change or modification to the subcontract if—

(i) in the case of a change or modification to a subcontract referred to in subparagraph (C)(i) or (C)(ii), the price adjustment is expected to exceed $500,000; and

(ii) in the case of a change or modification to a subcontract referred to in subparagraph (C)(iii), the price adjustment is expected to exceed $100,000.

(2) A person required, as an offeror, contractor, or subcontractor, to submit cost or pricing data under paragraph (1) (or required by the head of the procuring activity concerned to submit such data under subsection (c) of this section) shall be required to certify that, to the best of the person's knowledge and belief, the cost or pricing data submitted are accurate, complete, and current.

(3) Cost or pricing data required to be submitted under paragraph (1) (or under subsection (c) of this section), and a certification required to be submitted under paragraph (2), shall be submitted—

(A) in the case of a submission by a prime contractor (or an offeror for a prime contract), to the contracting officer for the contract (or to a designated representative of the contracting officer); or

(B) in the case of a submission by a subcontractor (or an offeror for a subcontract), to the prime contractor.

(4) Except as provided under subsection (b) of this section, this section applies to contracts entered into by the head of an executive agency on behalf of a foreign government.

(5) A waiver of requirements for submission of certified cost or pricing data that is granted under subsection (b)(1)(C) of this section in the case of a contract or subcontract does not waive the requirement under paragraph (1)(C) for submission of cost or pricing data in the case of subcontracts under that contract or subcontract unless the head of the procuring activity granting the waiver determines that the requirement under that paragraph should be waived in the case of such subcontracts and justifies in writing the reasons for the determination.

(6) Upon the request of a contractor that was required to submit cost or pricing data under paragraph (1) in connection with a prime contract entered into on or before October 13, 1994, the head of the executive agency that entered into such contract shall modify the contract to reflect subparagraphs (B)(ii) and (C)(ii) of paragraph (1). All such modifications shall be made without requiring consideration.

(7) Effective on October 1 of each year that is divisible by 5, each amount set forth in paragraph (1) shall be adjusted to the amount that is equal to the fiscal year 1994 constant dollar value of the amount set forth. Any amount, as so adjusted, that is not evenly divisible by $50,000 shall be rounded to the nearest multiple of $50,000. In the case of an amount that is evenly divisible by $25,000 but not evenly divisible by $50,000, the amount shall be rounded to the next higher multiple of $50,000.

(b) Exceptions

(1) In general

Submission of certified cost or pricing data shall not be required under subsection (a) of this section in the case of a contract, a subcontract, or a modification of a contract or subcontract—

(A) for which the price agreed upon is based on—

(i) adequate price competition; or

(ii) prices set by law or regulation;

(B) for the acquisition of a commercial item; or

(C) in an exceptional case when the head of the procuring activity, without delegation, determines that the requirements of this section may be waived and justifies in writing the reasons for such determination.

(2) Modifications of contracts and subcontracts for commercial items

In the case of a modification of a contract or subcontract for a commercial item that is not covered by the exception to the submission of certified cost or pricing data in paragraph (1)(A) or (1)(B), submission of certified cost or pricing data shall not be required under subsection (a) of this section if—

(A) the contract or subcontract being modified is a contract or subcontract for which submission of certified cost or pricing data may not be required by reason of paragraph (1)(A) or (1)(B); and

(B) the modification would not change the contract or subcontract, as the case may be, from a contract or subcontract for the acquisition of a commercial item to a contract or subcontract for the acquisition of an item other than a commercial item.

(c) Cost or pricing data on below-threshold contracts

(1) Authority to require submission

Subject to paragraph (2), when certified cost or pricing data are not required to be submitted by subsection (a) of this section for a contract, subcontract, or modification of a contract or subcontract, such data may nevertheless be required to be submitted by the head of the procuring activity, but only if the head of the procuring activity determines that such data are necessary for the evaluation by the

agency of the reasonableness of the price of the contract, subcontract, or modification of a contract or subcontract. In any case in which the head of the procuring activity requires such data to be submitted under this subsection, the head of the procuring activity shall justify in writing the reason for such requirement.

(2) Exception

The head of the procuring activity may not require certified cost or pricing data to be submitted under this paragraph for any contract or subcontract, or modification of a contract or subcontract, covered by the exceptions in subparagraph (A) or (B) of subsection (b)(1) of this section.

(3) Delegation of authority prohibited

The head of a procuring activity may not delegate the functions under this paragraph.

(d) Submission of other information

(1) Authority to require submission

When certified cost or pricing data are not required to be submitted under this section for a contract, subcontract, or modification of a contract or subcontract, the contracting officer shall require submission of data other than certified cost or pricing data to the extent necessary to determine the reasonableness of the price of the contract, subcontract, or modification of the contract or subcontract. Except in the case of a contract or subcontract covered by the exceptions in subsection (b)(1)(A) of this section, the contracting officer shall require that the data submitted include, at a minimum, appropriate information on the prices at which the same item or similar items have previously been sold that is adequate for evaluating the reasonableness of the price for the procurement.

(2) Limitations on authority

The Federal Acquisition Regulation shall include the following provisions regarding the types of information that contracting officers may require under paragraph (1):

(A) Reasonable limitations on requests for sales data relating to commercial items.

(B) A requirement that a contracting officer limit, to the maximum extent practicable, the scope of any request for information relating to commercial items from an offeror to only that information that is in the form regularly maintained by the offeror in commercial operations.

(C) A statement that any information received relating to commercial items that is exempt from disclosure under section 552(b) of title 5 shall not be disclosed by the Federal Government.

(e) Price reductions for defective cost or pricing data

(1)(A) A prime contract (or change or modification to a prime contract) under which a certificate under subsection (a)(2) of this section is required shall contain a provision that the price of the contract to the United States, including profit or fee, shall be adjusted to exclude any significant amount by which it may be determined by the head of the executive agency that such price was increased because the contractor (or any subcontractor required to make available such a certificate) submitted defective cost or pricing data.

(B) For the purposes of this section, defective cost or pricing data are cost or pricing data which, as of the date of agreement on the price of the contract (or another date agreed upon between the parties), were inaccurate, incomplete, or noncurrent. If for purposes of the preceding sentence the parties agree upon a date other than the date of agreement on the price of the contract, the date agreed upon by the parties shall be as close to the date of agreement on the price of the contract as is practicable.

(2) In determining for purposes of a contract price adjustment under a contract provision required by paragraph (1) whether, and to what extent, a contract price was increased because the contractor (or a subcontractor) submitted defective cost or pricing data, it shall be a defense that the United States did not rely on the defective data submitted by the contractor or subcontractor.

(3) It is not a defense to an adjustment of the price of a contract under a contract provision required by paragraph (1) that—

(A) the price of the contract would not have been modified even if accurate, complete, and current cost or pricing data had been submitted by the contractor or subcontractor because the contractor or subcontractor—

(i) was the sole source of the property or services procured; or

(ii) otherwise was in a superior bargaining position with respect to the property or services procured;

(B) the contracting officer should have known that the cost or pricing data in issue were defective even though the contractor or subcontractor took no affirmative action to bring the character of the data to the attention of the contracting officer;

(C) the contract was based on an agreement between the contractor and the United States about the total cost of the contract and there was no agreement about the cost of each item procured under such contract; or

(D) the prime contractor or subcontractor did not submit a certification of cost or pricing data relating to the contract as required under subsection (a)(2) of this section.

(4)(A) A contractor shall be allowed to offset an amount against the amount of a contract price adjustment under a contract provision required by paragraph (1) if—

(i) the contractor certifies to the contracting officer (or to a designated representative of the contracting officer) that, to the best of the contractor's knowledge and belief, the contractor is entitled to the offset; and

(ii) the contractor proves that the cost or pricing data were available before the date of agreement on the price of the contract (or price of the modification), or, if applicable consistent with paragraph (1)(B), another date agreed upon between the parties, and that the data were not submitted as specified in subsection (a)(3) of this section before such date.

(B) A contractor shall not be allowed to offset an amount otherwise authorized to be offset under subparagraph (A) if—

(i) the certification under subsection (a)(2) of this section with respect to the cost or pricing data involved was known to be false when signed; or

(ii) the United States proves that, had the cost or pricing data referred to in subparagraph (A)(ii) been submitted to the United States before the date of agreement on the price of the contract (or price of the modification) or, if applicable under paragraph (1)(B), another date agreed upon between the parties, the submission of such cost or pricing data would not have resulted in an increase in that price in the amount to be offset.

(f) Interest and penalties for certain overpayments

(1) If the United States makes an overpayment to a contractor under a contract with an executive agency subject to this section and the overpayment was due to the submission by the contractor of defective cost or pricing data, the contractor shall be liable to the United States—

(A) for interest on the amount of such overpayment, to be computed—

(i) for the period beginning on the date the overpayment was made to the contractor and ending on the date the contractor repays the amount of such overpayment to the United States; and

(ii) at the current rate prescribed by the Secretary of the Treasury under section 6621 of title 26; and

(B) if the submission of such defective data was a knowing submission, for an additional amount equal to the amount of the overpayment.

(2) Any liability under this subsection of a contractor that submits cost or pricing data but refuses to submit the certification required by subsection (a)(2) of this section with respect to the cost or pricing data shall not be affected by the refusal to submit such certification.

(g) Right of United States to examine contractor records

For the purpose of evaluating the accuracy, completeness, and currency of cost or pricing data required to be submitted by this section, an executive agency shall have the authority provided by section 254d(a)(2) of this title.

(h) Definitions

In this section:

(1) Cost or pricing data

The term ''cost or pricing data'' means all facts that, as of the date of agreement on the price of a contract (or the price of a contract modification) or, if applicable consistent with subsection (e)(1)(B) of this section, another date agreed upon between the parties, a prudent buyer or seller would reasonably expect to affect price negotiations significantly. Such term does not include information that is judgmental, but does include the factual information from which a judgment was derived.

(2) Subcontract

The term ''subcontract'' includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractor or a subcontractor.

(3) Commercial item

The term ''commercial item'' has the meaning provided such term by section 403(12) of this title.

(June 30, 1949, ch. 288, title III, § 304A, as added Pub. L. 103–355, title I, § 1251(a)(2), Oct. 13, 1994, 108 Stat. 3278; amended Pub. L. 104–106, div. D, title XLII, § 4201(b), title XLIII, § 4321(e)(3), (4), Feb. 10, 1996, 110 Stat. 651, 675; Pub. L. 105–261, div. A, title VIII, §§ 805(b), 808(b), Oct. 17, 1998, 112 Stat. 2083, 2085.)

AMENDMENTS

1998—Subsec. (a)(5). Pub. L. 105–261, § 805(b), amended par. (5) generally. Prior to amendment, par. (5) read as follows: ''For purposes of paragraph (1)(C), a contractor or subcontractor granted a waiver under subsection (b)(1)(B) of this section shall be considered as having been required to make available cost or pricing data under this section.''

Subsec. (d)(1). Pub. L. 105–261, § 808(b), substituted ''the contracting officer shall require that the data submitted'' for ''the data submitted shall''.

1996—Subsec. (b). Pub. L. 104–106, § 4201(b)(1), amended subsec. (b) generally, substituting pars. (1) and (2) relating to submission of certified cost or pricing data for former pars. (1) and (2) relating to submission of cost or pricing data and striking out par. (3) relating to FAR standards.

Subsec. (c). Pub. L. 104–106, § 4201(b)(1), amended subsec. (c) generally, substituting pars. (1) to (3) relating to authority to require submission of certified cost or pricing data for former par. (1) relating to authority to require submission of cost or pricing data and striking out former par. (2) relating to authority to require information other than certified cost or pricing data.

Subsec. (c)(1). Pub. L. 104–106, § 4321(e)(3), which directed amendment of heading of par. (1) by changing each letter that is capitalized (other than the first letter of the first word) to lowercase, could not be executed because of the general amendment of subsec. (c) by Pub. L. 104–106, § 4201(b)(1). See above.

Subsec. (d). Pub. L. 104–106, § 4201(b)(1), amended subsec. (d) generally, substituting pars. (1) and (2) relating to submission of other information for former pars. (1) to (6) relating to additional exceptions regarding commercial items.

Subsec. (d)(2)(A)(ii). Pub. L. 104–106, § 4321(e)(4), which directed amendment of par. (2)(A)(ii) by inserting ''to'' after ''The information referred'', could not be executed because par. (2)(A) did not contain a cl. (ii) or the phrase ''The information referred'', subsequent to the general amendment of subsec. (d) by Pub. L. 104–106, § 4201(b)(1). See above.

Subsecs. (h), (i). Pub. L. 104–106, § 4201(b)(2), redesignated subsec. (i) as (h) and struck out heading and text of former subsec. (h). Text read as follows: ''The Federal Acquisition Regulation shall include regulations concerning the types of information that offerors must submit for a contracting officer to consider in determining whether the price of a procurement to the Government is fair and reasonable when certified cost or pricing data are not required to be submitted under this section because the price of the procurement to the United States is not expected to exceed the applicable threshold amount set forth in subsection (a) of this section (as adjusted pursuant to paragraph (7) of such subsection). Such information, at a minimum, shall include appropriate information on the prices at which the same item or similar items have previously been sold that is adequate for evaluating the reasonableness of the price of a proposed contract or subcontract for the procurement.''

EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104–106, see section 4401 of Pub. L. 104–106, set out as a note under section 251 of this title.

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.

Section 1251(b) of Pub. L. 103–355, as amended by Pub. L. 104–106, div. D, title XLIII, § 4321(a)(3), Feb. 10, 1996, 110 Stat. 671, provided that: ''Subsection (a) of section 304A of the Federal Property and Administrative Services Act of 1949 [subsec. (a) of this section], as added by subsection (a), shall apply according to the provisions thereof on and after the date of the enactment of this Act [Oct. 13, 1994], notwithstanding section 10001(b) [see Effective Date of 1994 Amendment note set out under section 251 of this title].''

[Section 4321(a) of Pub. L. 104–106 provided that the amendment made by that section to section 1251(b) of Pub. L. 103–355, set out above, is effective as of Oct. 13, 1994, and as if included in Pub. L. 103–355 as enacted.]

LIMITATIONS ON TIERING OF SUBCONTRACTORS

Pub. L. 110–417, [div. A], title VIII, § 866, Oct. 14, 2008, 122 Stat. 4551, provided that:

''(a) REGULATIONS.—Not later than one year after the date of the enactment of this Act [Oct. 14, 2008], the Federal Acquisition Regulation shall be amended, for executive agencies other than the Department of Defense, to minimize the excessive use by contractors of subcontractors, or of tiers of subcontractors, that add no or negligible value, and to ensure that neither a contractor nor a subcontractor receives indirect costs or profit on work performed by a lower-tier subcontractor to which the higher-tier contractor or subcontractor adds no, or negligible, value (but not to limit charges for indirect costs and profit based on the direct costs of managing lower-tier subcontracts).

''(b) COVERED CONTRACTS.—This section applies to any cost-reimbursement type contract or task or delivery order in an amount greater than the simplified acquisition threshold (as defined by section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. 403)).

''(c) RULE OF CONSTRUCTION.—Nothing in this section shall be construed as limiting the ability of the Department of Defense to implement more restrictive limitations on the tiering of subcontractors.

''(d) APPLICABILITY.—The Department of Defense shall continue to be subject to guidance on limitations on tiering of subcontractors issued by the Department pursuant to section 852 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Public Law 109–364; 120 Stat. 2340 [10 U.S.C. 2324 note]).

''(e) EXECUTIVE AGENCY DEFINED.—In this section, the term 'executive agency' has the meaning given such term in section 4(1) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(1)).''

MINIMIZING ABUSE OF COMMERCIAL SERVICES ITEM AUTHORITY

Pub. L. 110–417, [div. A], title VIII, § 868, Oct. 14, 2008, 122 Stat. 4552, provided that:

''(a) REGULATIONS REQUIRED.—Not later than 180 days after the date of the enactment of this Act [Oct. 14, 2008], the Federal Acquisition Regulation shall be amended with respect to the procurement of commercial services.

''(b) APPLICABILITY OF COMMERCIAL PROCEDURES.—

''(1) SERVICES OF A TYPE SOLD IN MARKETPLACE.—The regulations modified pursuant to subsection (a) shall ensure that services that are not offered and sold competitively in substantial quantities in the commercial marketplace, but are of a type offered and sold competitively in substantial quantities in the commercial marketplace, may be treated as commercial items for purposes of section 254b of title 41, United States Code (relating to truth in negotiations), only if the contracting officer determines in writing that the offeror has submitted sufficient information to evaluate, through price analysis, the reasonableness of the price for such services.

''(2) INFORMATION SUBMITTED.—To the extent necessary to make a determination under paragraph (1), the contracting officer may request the offeror to submit—

''(A) prices paid for the same or similar commercial items under comparable terms and conditions by both government and commercial customers; and

''(B) if the contracting officer determines that the information described in subparagraph (A) is not sufficient to determine the reasonableness of price, other relevant information regarding the basis for price or cost, including information on labor costs, material costs, and overhead rates.''

ELIGIBILITY FOR CONTRACTS AND SUBCONTRACTS TO BE CONDITIONED ON COMPLIANCE

Pub. L. 105–261, div. A, title VIII, § 808(c), Oct. 17, 1998, 112 Stat. 2085, provided that: ''Not later than 180 days after the date of the enactment of this Act [Oct. 17, 1998], the Federal Acquisition Regulation shall be amended to provide that an offeror's compliance with a requirement to submit data for a contract or subcontract in accordance with section 2306a(d)(1) of title 10, United States Code, or section 304A(d)(1) of the Federal Property and Administrative Services Act of 1949 [41 U.S.C. 254b(d)(1)] shall be a condition for the offeror to be eligible to enter into the contract or subcontract, subject to such exceptions as the Federal Acquisition Regulatory Council determines appropriate.''

CRITERIA FOR DETERMINING SPECIFIC PRICE INFORMATION REQUIRED

Pub. L. 105–261, div. A, title VIII, § 808(d), Oct. 17, 1998, 112 Stat. 2085, provided that: ''Not later than 180 days after the date of the enactment of this Act [Oct. 17, 1998], the Federal Acquisition Regulation shall be amended to include criteria for contracting officers to apply for determining the specific price information that an offeror should be required to submit under section 2306a(d) of title 10, United States Code, or section 304A(d) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 254b(d)).''

§ 254c. Multiyear contracts

(a) Authority

An executive agency may enter into a multiyear contract for the acquisition of property or services if—

(1) funds are available and obligated for such contract, for the full period of the contract or for the first fiscal year in which the contract is in effect, and for the estimated costs associated with any necessary termination of such contract; and

(2) the executive agency determines that—

(A) the need for the property or services is reasonably firm and continuing over the period of the contract; and

(B) a multiyear contract will serve the best interests of the United States by encouraging full and open competition or promoting economy in administration, performance, and operation of the agency's programs.

(b) Termination clause

A multiyear contract entered into under the authority of this section shall include a clause that provides that the contract shall be terminated if funds are not made available for the

continuation of such contract in any fiscal year covered by the contract. Amounts available for paying termination costs shall remain available for such purpose until the costs associated with termination of the contract are paid.

(c) Cancellation ceiling notice

Before any contract described in subsection (a) of this section that contains a clause setting forth a cancellation ceiling in excess of $10,000,000 may be awarded, the executive agency shall give written notification of the proposed contract and of the proposed cancellation ceiling for that contract to the Congress, and such contract may not then be awarded until the end of a period of 30 days beginning on the date of such notification.

(d) Multiyear contract defined

For the purposes of this section, a multiyear contract is a contract for the purchase of property or services for more than one, but not more than five, program years. Such a contract may provide that performance under the contract during the second and subsequent years of the contract is contingent upon the appropriation of funds and (if it does so provide) may provide for a cancellation payment to be made to the contractor if such appropriations are not made.

(e) Rule of construction

Nothing in this section is intended to modify or affect any other provision of law that authorizes multiyear contracts.

(June 30, 1949, ch. 288, title III, § 304B, as added Pub. L. 103–355, title I, § 1072, Oct. 13, 1994, 108 Stat. 3270.)

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.

§ 254d. Examination of records of contractor

(a) Agency authority

(1) The head of an executive agency, acting through an authorized representative, is authorized to inspect the plant and audit the records of—

(A) a contractor performing a cost-reimbursement, incentive, time-and-materials, labor-hour, or price-redeterminable contract, or any combination of such contracts, made by that executive agency under this subchapter; and

(B) a subcontractor performing any cost-reimbursement, incentive, time-and-materials, labor-hour, or price-redeterminable subcontract or any combination of such subcontracts under a contract referred to in subparagraph (A).

(2) The head of an executive agency, acting through an authorized representative, is authorized, for the purpose of evaluating the accuracy, completeness, and currency of certified cost or pricing data required to be submitted pursuant to section 254b of this title with respect to a contract or subcontract, to examine all records of the contractor or subcontractor related to—

(A) the proposal for the contract or subcontract;

(B) the discussions conducted on the proposal;

(C) pricing of the contract or subcontract; or

(D) performance of the contract or subcontract.

(b) Subpoena power

(1) The Inspector General of an executive agency appointed under section 3 or 8G[1] of the Inspector General Act of 1978 (5 U.S.C. App.) or, upon request of the head of an executive agency, the Director of the Defense Contract Audit Agency (or any successor agency) of the Department of Defense or the Inspector General of the General Services Administration may require by subpoena the production of records of a contractor, access to which is provided for that executive agency by subsection (a) of this section.

(2) Any such subpoena, in the case of contumacy or refusal to obey, shall be enforceable by order of an appropriate United States district court.

(3) The authority provided by paragraph (1) may not be delegated.

(4) In the year following a year in which authority provided in paragraph (1) is exercised for an executive agency, the head of the executive agency shall submit to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives a report on the exercise of such authority during such preceding year and the reasons why such authority was exercised in any instance.

(c) Comptroller General authority

(1) Except as provided in paragraph (2), each contract awarded after using procedures other than sealed bid procedures shall provide that the Comptroller General and his representatives are authorized to examine any records of the contractor, or any of its subcontractors, that directly pertain to, and involve transactions relating to, the contract or subcontract and to interview any current employee regarding such transactions.

(2) Paragraph (1) does not apply to a contract or subcontract with a foreign contractor or foreign subcontractor if the executive agency concerned determines, with the concurrence of the Comptroller General or his designee, that the application of that paragraph to the contract or subcontract would not be in the public interest. However, the concurrence of the Comptroller General or his designee is not required—

(A) where the contractor or subcontractor is a foreign government or agency thereof or is precluded by the laws of the country involved from making its records available for examination; and

(B) where the executive agency determines, after taking into account the price and availability of the property and services from United States sources, that the public interest would be best served by not applying paragraph (1).

(3) Paragraph (1) may not be construed to require a contractor or subcontractor to create or maintain any record that the contractor or sub-

[1] See References in Text note below.

contractor does not maintain in the ordinary course of business or pursuant to another provision of law.

(d) Limitation on audits relating to indirect costs

An executive agency may not perform an audit of indirect costs under a contract, subcontract, or modification before or after entering into the contract, subcontract, or modification in any case in which the contracting officer determines that the objectives of the audit can reasonably be met by accepting the results of an audit that was conducted by any other department or agency of the Federal Government within one year preceding the date of the contracting officer's determination.

(e) Limitation

The authority of an executive agency under subsection (a) of this section, and the authority of the Comptroller General under subsection (c) of this section, with respect to a contract or subcontract shall expire three years after final payment under such contract or subcontract.

(f) Inapplicability to certain contracts

This section does not apply to the following contracts:

(1) Contracts for utility services at rates not exceeding those established to apply uniformly to the public, plus any applicable reasonable connection charge.

(2) A contract or subcontract that is not greater than the simplified acquisition threshold.

(g) Form of original record storage

Nothing in this section shall be construed to preclude a contractor from duplicating or storing original records in electronic form.

(h) Use of images of original records

An executive agency shall not require a contractor or subcontractor to provide original records in an audit carried out pursuant to this section if the contractor or subcontractor provides photographic or electronic images of the original records and meets the following requirements:

(1) The contractor or subcontractor has established procedures to ensure that the imaging process preserves the integrity, reliability, and security of the original records.

(2) The contractor or subcontractor maintains an effective indexing system to permit timely and convenient access to the imaged records.

(3) The contractor or subcontractor retains the original records for a minimum of one year after imaging to permit periodic validation of the imaging systems.

(i) "Records" defined

In this section, the term ''records'' includes books, documents, accounting procedures and practices, and other data, regardless of type and regardless of whether such items are in written form, in the form of computer data, or in any other form.

(June 30, 1949, ch. 288, title III, § 304C, as added and amended Pub. L. 103–355, title II, § 2251(a), title IV, § 4103(d), Oct. 13, 1994, 108 Stat. 3318, 3341; Pub. L. 104–106, div. D, title XLIII, § 4321(e)(5), Feb. 10, 1996, 110 Stat. 675; Pub. L. 104–201, div. A, title VIII, § 808(b), Sept. 23, 1996, 110 Stat. 2607; Pub. L. 110–417, [div. A], title VIII, § 871(a), Oct. 14, 2008, 122 Stat. 4555.)

REFERENCES IN TEXT

Section 3 and 8G of the Inspector General Act of 1978, referred to in subsec. (b)(1), are sections 3 and 8G of Pub. L. 95–452, which are set out in the Appendix to Title 5, Government Organization and Employees.

AMENDMENTS

2008—Subsec. (c)(1). Pub. L. 110–417 inserted before period at end ''and to interview any current employee regarding such transactions''.

1996—Subsec. (a)(2). Pub. L. 104–106 substituted ''section 254b'' for ''section 254c''.

Subsec. (d). Pub. L. 104–201 amended heading and text of subsec. (d) generally. Prior to amendment, text read as follows: ''An executive agency may not perform a preaward audit to evaluate proposed indirect costs under any contract, subcontract, or modification to be entered into in accordance with this subchapter in any case in which the contracting officer determines that the objectives of the audit can reasonably be met by accepting the results of an audit conducted by any other department or agency of the Federal Government within one year preceding the date of the contracting officer's determination.''

1994—Subsec. (f)(2). Pub. L. 103–355, § 4103(d), added par. (2).

CHANGE OF NAME

Committee on Governmental Affairs of Senate changed to Committee on Homeland Security and Governmental Affairs of Senate, effective Jan. 4, 2005, by Senate Resolution No. 445, One Hundred Eighth Congress, Oct. 9, 2004.

Committee on Government Operations of House of Representatives treated as referring to Committee on Government Reform and Oversight of House of Representatives by section 1(a) of Pub. L. 104–14, set out as a note preceding section 21 of Title 2, The Congress. Committee on Government Reform and Oversight of House of Representatives changed to Committee on Government Reform of House of Representatives by House Resolution No. 5, One Hundred Sixth Congress, Jan. 6, 1999. 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.

EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104–106, see section 4401 of Pub. L. 104–106, set out as a note under section 251 of this title.

EFFECTIVE DATE

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

§ 255. Contract financing

(a) Payment authority

Any executive agency may—

(1) make advance, partial, progress or other payments under contracts for property or services made by the agency; and

(2) insert in solicitations for procurement of property or services a provision limiting to small business concerns advance or progress payments.

(b) Performance-based payments

Whenever practicable, payments under subsection (a) of this section shall be made on any of the following bases:

(1) Performance measured by objective, quantifiable methods such as delivery of acceptable items, work measurement, or statistical process controls.

(2) Accomplishment of events defined in the program management plan.

(3) Other quantifiable measures of results.

(c) Payment amount

Payments made under subsection (a) of this section may not exceed the unpaid contract price.

(d) Security for advance payments

Advance payments under subsection (a) of this section may be made only upon adequate security and a determination by the agency head that to do so would be in the public interest. Such security may be in the form of a lien in favor of the Government on the property contracted for, on the balance in an account in which such payments are deposited, and on such of the property acquired for performance of the contract as the parties may agree. This lien shall be paramount to all other liens and is effective immediately upon the first advancement of funds without filing, notice, or any other action by the United States.

(e) Conditions for progress payments

(1) The executive agency shall ensure that any payment for work in progress (including materials, labor, and other items) under a contract of an executive agency that provides for such payments is commensurate with the work accomplished that meets standards established under the contract. The contractor shall provide such information and evidence as the executive agency determines necessary to permit the executive agency to carry out the preceding sentence.

(2) The executive agency shall ensure that progress payments referred to in paragraph (1) are not made for more than 80 percent of the work accomplished under the contract so long as the executive agency has not made the contractual terms, specifications, and price definite.

(3) This subsection applies to any contract in an amount greater than $25,000.

(f) Conditions for payments for commercial items

(1) Payments under subsection (a) of this section for commercial items may be made under such terms and conditions as the head of the executive agency determines are appropriate or customary in the commercial marketplace and are in the best interests of the United States. The head of the executive agency shall obtain adequate security for such payments. If the security is in the form of a lien in favor of the United States, such lien is paramount to all other liens and is effective immediately upon the first payment, without filing, notice, or other action by the United States.

(2) Advance payments made under subsection (a) of this section for commercial items may include payments, in a total amount of not more than 15 percent of the contract price, in advance of any performance of work under the contract.

(3) The conditions of subsections (d) and (e) of this section need not be applied if they would be inconsistent, as determined by the head of the executive agency, with commercial terms and conditions pursuant to paragraphs (1) and (2).

(g) Action in case of fraud

(1) In any case in which the remedy coordination official of an executive agency finds that there is substantial evidence that the request of a contractor for advance, partial, or progress payment under a contract awarded by that executive agency is based on fraud, the remedy coordination official shall recommend that the executive agency reduce or suspend further payments to such contractor.

(2) The head of an executive agency receiving a recommendation under paragraph (1) in the case of a contractor's request for payment under a contract shall determine whether there is substantial evidence that the request is based on fraud. Upon making such a determination, the head of the executive agency may reduce or suspend further payments to the contractor under such contract.

(3) The extent of any reduction or suspension of payments by an executive agency under paragraph (2) on the basis of fraud shall be reasonably commensurate with the anticipated loss to the United States resulting from the fraud.

(4) A written justification for each decision of the head of an executive agency whether to reduce or suspend payments under paragraph (2), and for each recommendation received by the executive agency in connection with such decision, shall be prepared and be retained in the files of the executive agency.

(5) The head of each executive agency shall prescribe procedures to ensure that, before the head of the executive agency decides to reduce or suspend payments in the case of a contractor under paragraph (2), the contractor is afforded notice of the proposed reduction or suspension and an opportunity to submit matters to the executive agency in response to such proposed reduction or suspension.

(6) Not later than 180 days after the date on which the head of an executive agency reduces or suspends payments to a contractor under paragraph (2), the remedy coordination official of the executive agency shall—

(A) review the determination of fraud on which the reduction or suspension is based; and

(B) transmit a recommendation to the head of such executive agency whether the suspension or reduction should continue.

(7) The head of each executive agency who receives recommendations made by a remedy coordination official of the executive agency to reduce or suspend payments under paragraph (2) during a fiscal year shall prepare for such year a report that contains the recommendations, the actions taken on the recommendations and the reasons for such actions, and an assessment of the effects of such actions on the Federal Government. Any such report shall be available to any Member of Congress upon request.

(8) The head of an executive agency may not delegate responsibilities under this subsection to any person in a position below level IV of the Executive Schedule.

(9) In this subsection, the term ''remedy coordination official'', with respect to an execu-

tive agency, means the person or entity in that executive agency who coordinates within that executive agency the administration of criminal, civil, administrative, and contractual remedies resulting from investigations of fraud or corruption related to procurement activities.

(June 30, 1949, ch. 288, title III, § 305, 63 Stat. 396; July 12, 1952, ch. 703, § 1(m), 66 Stat. 594; Pub. L. 85–800, § 4, Aug. 28, 1958, 72 Stat. 966; Pub. L. 103–355, title II, § 2051(a)–(e), Oct. 13, 1994, 108 Stat. 3303, 3304; Pub. L. 104–106, div. D, title XLIII, § 4321(a)(4), Feb. 10, 1996, 110 Stat. 671.)

REFERENCES IN TEXT

Level IV of the Executive Schedule, referred to in subsec. (g)(8), is set out in section 5315 of Title 5, Government Organization and Employees.

AMENDMENTS

1996—Subsecs. (e) to (g). Pub. L. 104–106 made technical correction to directory language of Pub. L. 103–355, § 2051(e). See 1994 Amendment note below.

1994—Pub. L. 103–355, § 2051(a)(1), inserted section catchline.

Subsec. (a). Pub. L. 103–355, § 2051(a)(2), (c), inserted heading and struck out ''bid'' before ''solicitations'' in par. (2).

Subsec. (b). Pub. L. 103–355, § 2051(a)(5), (b), added subsec. (b) and redesignated former subsec. (b) as (c).

Pub. L. 103–355, § 2051(a)(3), inserted heading.

Subsec. (c). Pub. L. 103–355, § 2051(a)(5), redesignated subsec. (b) as (c). Former subsec. (c) redesignated (d).

Pub. L. 103–355, § 2051(a)(4), inserted heading.

Subsec. (d). Pub. L. 103–355, § 2051(d), inserted before period at end of third sentence ''and is effective immediately upon the first advancement of funds without filing, notice, or any other action by the United States''.

Pub. L. 103–355, § 2051(a)(5), redesignated subsec. (c) as (d).

Subsecs. (e) to (g). Pub. L. 103–355, § 2051(e), as amended by Pub. L. 104–106, added subsecs. (e) to (g).

1958—Pub. L. 85–800 authorized advance or other payments under contracts for property or services by agency and insertion in bid solicitations of provision limiting advance or progress payments to small business concerns, restricted payments under subsec. (a) of this section to unpaid contract price, and reworded generally conditions for making advance payments.

1952—Subsecs. (a), (b). Act July 12, 1952, substituted ''property'' for ''supplies'' wherever appearing.

EFFECTIVE DATE OF 1996 AMENDMENT

Section 4321(a) of Pub. L. 104–106 provided that the amendment made by that section is effective as of Oct. 13, 1994, and as if included in Pub. L. 103–355 as enacted.

EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103–355, see section 10001 of Pub. L. 103–355, 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.

EXEMPTION OF FUNCTIONS

Functions authorized by Foreign Assistance Act of 1961, as amended, as exempt, see Ex. Ord. No. 11223, eff. May 12, 1965, 30 F.R. 6635, set out as a note under section 2393 of Title 22, Foreign Relations and Intercourse.

RELATIONSHIP TO PROMPT PAYMENT REQUIREMENTS

Section 2051(f) of Pub. L. 103–355 provided that: ''The amendments made by this section [amending this section] are not intended to impair or modify procedures required by the provisions of chapter 39 of title 31, United States Code, and the regulations issued pursuant to such provisions of law (as such procedures are in effect on the date of the enactment of this Act [Oct. 13, 1994]), except that the Government may accept payment terms offered by a contractor offering a commercial item.''

DEFINITIONS

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

§ 256. Allowable costs

(a) Indirect cost that violates FAR cost principle

An executive agency shall require that a covered contract provide that if the contractor submits to the executive agency a proposal for settlement of indirect costs incurred by the contractor for any period after such costs have been accrued and if that proposal includes the submission of a cost which is unallowable because the cost violates a cost principle in the Federal Acquisition Regulation (referred to in section 421(c)(1) of this title) or an executive agency supplement to the Federal Acquisition Regulation, the cost shall be disallowed.

(b) Penalty for violation of cost principle

(1) If the executive agency determines that a cost submitted by a contractor in its proposal for settlement is expressly unallowable under a cost principle referred to in subsection (a) of this section that defines the allowability of specific selected costs, the executive agency shall assess a penalty against the contractor in an amount equal to—

(A) the amount of the disallowed cost allocated to covered contracts for which a proposal for settlement of indirect costs has been submitted; plus

(B) interest (to be computed based on provisions in the Federal Acquisition Regulation) to compensate the United States for the use of any funds which a contractor has been paid in excess of the amount to which the contractor was entitled.

(2) If the executive agency determines that a proposal for settlement of indirect costs submitted by a contractor includes a cost determined to be unallowable in the case of such contractor before the submission of such proposal, the executive agency shall assess a penalty against the contractor in an amount equal to two times the amount of the disallowed cost allocated to covered contracts for which a proposal for settlement of indirect costs has been submitted.

(c) Waiver of penalty

The Federal Acquisition Regulation shall provide for a penalty under subsection (b) of this section to be waived in the case of a contractor's proposal for settlement of indirect costs when—

(1) the contractor withdraws the proposal before the formal initiation of an audit of the proposal by the Federal Government and resubmits a revised proposal;

(2) the amount of unallowable costs subject to the penalty is insignificant; or

(3) the contractor demonstrates, to the contracting officer's satisfaction, that—

(A) it has established appropriate policies and personnel training and an internal control and review system that provide assurances that unallowable costs subject to penalties are precluded from being included in the contractor's proposal for settlement of indirect costs; and

(B) the unallowable costs subject to the penalty were inadvertently incorporated into the proposal.

(d) Applicability of contract disputes procedure to disallowance of cost and assessment of penalty

An action of an executive agency under subsection (a) or (b) of this section—

(1) shall be considered a final decision for the purposes of section 605 of this title; and

(2) is appealable in the manner provided in section 606 of this title.

(e) Specific costs not allowable

(1) The following costs are not allowable under a covered contract:

(A) Costs of entertainment, including amusement, diversion, and social activities, and any costs directly associated with such costs (such as tickets to shows or sports events, meals, lodging, rentals, transportation, and gratuities).

(B) Costs incurred to influence (directly or indirectly) legislative action on any matter pending before Congress, a State legislature, or a legislative body of a political subdivision of a State.

(C) Costs incurred in defense of any civil or criminal fraud proceeding or similar proceeding (including filing of any false certification) brought by the United States where the contractor is found liable or had pleaded nolo contendere to a charge of fraud or similar proceeding (including filing of a false certification).

(D) Payments of fines and penalties resulting from violations of, or failure to comply with, Federal, State, local, or foreign laws and regulations, except when incurred as a result of compliance with specific terms and conditions of the contract or specific written instructions from the contracting officer authorizing in advance such payments in accordance with applicable provisions of the Federal Acquisition Regulation.

(E) Costs of membership in any social, dining, or country club or organization.

(F) Costs of alcoholic beverages.

(G) Contributions or donations, regardless of the recipient.

(H) Costs of advertising designed to promote the contractor or its products.

(I) Costs of promotional items and memorabilia, including models, gifts, and souvenirs.

(J) Costs for travel by commercial aircraft which exceed the amount of the standard commercial fare.

(K) Costs incurred in making any payment (commonly known as a ''golden parachute payment'') which is—

(i) in an amount in excess of the normal severance pay paid by the contractor to an employee upon termination of employment; and

(ii) is paid to the employee contingent upon, and following, a change in management control over, or ownership of, the contractor or a substantial portion of the contractor's assets.

(L) Costs of commercial insurance that protects against the costs of the contractor for correction of the contractor's own defects in materials or workmanship.

(M) Costs of severance pay paid by the contractor to foreign nationals employed by the contractor under a service contract performed outside the United States, to the extent that the amount of severance pay paid in any case exceeds the amount paid in the industry involved under the customary or prevailing practice for firms in that industry providing similar services in the United States, as determined under the Federal Acquisition Regulation.

(N) Costs of severance pay paid by the contractor to a foreign national employed by the contractor under a service contract performed in a foreign country if the termination of the employment of the foreign national is the result of the closing of, or the curtailment of activities at, a United States facility in that country at the request of the government of that country.

(O) Costs incurred by a contractor in connection with any criminal, civil, or administrative proceeding commenced by the United States or a State, to the extent provided in subsection (k) of this section.

(P) Costs of compensation of senior executives of contractors for a fiscal year, regardless of the contract funding source, to the extent that such compensation exceeds the benchmark compensation amount determined applicable for the fiscal year by the Administrator for Federal Procurement Policy under section 435 of this title.

(2)(A) Pursuant to the Federal Acquisition Regulation and subject to the availability of appropriations, an executive agency, in awarding a covered contract, may waive the application of the provisions of paragraphs (1)(M) and (1)(N) to that contract if the executive agency determines that—

(i) the application of such provisions to the contract would adversely affect the continuation of a program, project, or activity that provides significant support services for employees of the executive agency posted outside the United States;

(ii) the contractor has taken (or has established plans to take) appropriate actions within the contractor's control to minimize the amount and number of incidents of the payment of severance pay by the contractor to employees under the contract who are foreign nationals; and

(iii) the payment of severance pay is necessary in order to comply with a law that is generally applicable to a significant number of businesses in the country in which the foreign national receiving the payment performed services under the contract or is necessary to comply with a collective bargaining agreement.

(B) An executive agency shall include in the solicitation for a covered contract a statement indicating—

(i) that a waiver has been granted under subparagraph (A) for the contract; or

(ii) whether the executive agency will consider granting such a waiver, and, if the executive agency will consider granting a waiver, the criteria to be used in granting the waiver.

(C) An executive agency shall make the final determination regarding whether to grant a waiver under subparagraph (A) with respect to a covered contract before award of the contract.

(3) The provisions of the Federal Acquisition Regulation implementing this section may establish appropriate definitions, exclusions, limitations, and qualifications. Any submission by a contractor of costs which are incurred by the contractor and which are claimed to be allowable under Department of Energy management and operating contracts shall be considered a ''proposal for settlement of indirect costs incurred by the contractor for any period after such costs have been accrued'', as used in this section.

(f) Required regulations

(1) The Federal Acquisition Regulation shall contain provisions on the allowability of contractor costs. Such provisions shall define in detail and in specific terms those costs which are unallowable, in whole or in part, under covered contracts. The regulations shall, at a minimum, clarify the cost principles applicable to contractor costs of the following:

(A) Air shows.

(B) Membership in civic, community, and professional organizations.

(C) Recruitment.

(D) Employee morale and welfare.

(E) Actions to influence (directly or indirectly) executive branch action on regulatory and contract matters (other than costs incurred in regard to contract proposals pursuant to solicited or unsolicited bids).

(F) Community relations.

(G) Dining facilities.

(H) Professional and consulting services, including legal services.

(I) Compensation.

(J) Selling and marketing.

(K) Travel.

(L) Public relations.

(M) Hotel and meal expenses.

(N) Expense of corporate aircraft.

(O) Company-furnished automobiles.

(P) Advertising.

(Q) Conventions.

(2) The Federal Acquisition Regulation shall require that a contracting officer not resolve any questioned costs until the contracting officer has obtained—

(A) adequate documentation with respect to such costs; and

(B) the opinion of the contract auditor on the allowability of such costs.

(3) The Federal Acquisition Regulation shall provide that, to the maximum extent practicable, a contract auditor be present at any negotiation or meeting with the contractor regarding a determination of the allowability of indirect costs of the contractor.

(4) The Federal Acquisition Regulation shall require that all categories of costs designated in the report of a contract auditor as questioned with respect to a proposal for settlement be resolved in such a manner that the amount of the individual questioned costs that are paid will be reflected in the settlement.

(g) Applicability of regulations to subcontractors

The regulations referred to in subsections (e) and (f)(1) of this section shall require prime contractors of a covered contract, to the maximum extent practicable, to apply the provisions of such regulations to all subcontractors of the covered contract.

(h) Contractor certification required

(1) A proposal for settlement of indirect costs applicable to a covered contract shall include a certification by an official of the contractor that, to the best of the certifying official's knowledge and belief, all indirect costs included in the proposal are allowable. Any such certification shall be in a form prescribed in the Federal Acquisition Regulation.

(2) An executive agency may, in an exceptional case, waive the requirement for certification under paragraph (1) in the case of any contract if the agency—

(A) determines in such case that it would be in the interest of the United States to waive such certification; and

(B) states in writing the reasons for that determination and makes such determination available to the public.

(i) Penalties for submission of cost known as not allowable

The submission to an executive agency of a proposal for settlement of costs for any period after such costs have been accrued that includes a cost that is expressly specified by statute or regulation as being unallowable, with the knowledge that such cost is unallowable, shall be subject to the provisions of section 287 of title 18 and section 3729 of title 31.

(j) Contractor to have burden of proof

In a proceeding before a board of contract appeals, the United States Court of Federal Claims, or any other Federal court in which the reasonableness of indirect costs for which a contractor seeks reimbursement from the United States is in issue, the burden of proof shall be upon the contractor to establish that those costs are reasonable.

(k) Proceeding costs not allowable

(1) Except as otherwise provided in this subsection, costs incurred by a contractor in connection with any criminal, civil, or administrative proceeding commenced by the United States or a State are not allowable as reimbursable costs under a covered contract if the proceeding (A) relates to a violation of, or failure to comply with, a Federal or State statute or regulation, and (B) results in a disposition described in paragraph (2).

(2) A disposition referred to in paragraph (1)(B) is any of the following:

(A) In the case of a criminal proceeding, a conviction (including a conviction pursuant to

a plea of nolo contendere) by reason of the violation or failure referred to in paragraph (1).

(B) In the case of a civil or administrative proceeding involving an allegation of fraud or similar misconduct, a determination of contractor liability on the basis of the violation or failure referred to in paragraph (1).

(C) In the case of any civil or administrative proceeding, the imposition of a monetary penalty by reason of the violation or failure referred to in paragraph (1).

(D) A final decision—

(i) to debar or suspend the contractor,

(ii) to rescind or void the contract, or

(iii) to terminate the contract for default,

by reason of the violation or failure referred to in paragraph (1).

(E) A disposition of the proceeding by consent or compromise if such action could have resulted in a disposition described in subparagraph (A), (B), (C), or (D).

(3) In the case of a proceeding referred to in paragraph (1) that is commenced by the United States and is resolved by consent or compromise pursuant to an agreement entered into by a contractor and the United States, the costs incurred by the contractor in connection with such proceeding that are otherwise not allowable as reimbursable costs under such paragraph may be allowed to the extent specifically provided in such agreement.

(4) In the case of a proceeding referred to in paragraph (1) that is commenced by a State, the executive agency that awarded the covered contract involved in the proceeding may allow the costs incurred by the contractor in connection with such proceeding as reimbursable costs if the executive agency determines, in accordance with the Federal Acquisition Regulation, that the costs were incurred as a result of (A) a specific term or condition of the contract, or (B) specific written instructions of the executive agency.

(5)(A) Except as provided in subparagraph (C), costs incurred by a contractor in connection with a criminal, civil, or administrative proceeding commenced by the United States or a State in connection with a covered contract may be allowed as reimbursable costs under the contract if such costs are not disallowable under paragraph (1), but only to the extent provided in subparagraph (B).

(B)(i) The amount of the costs allowable under subparagraph (A) in any case may not exceed the amount equal to 80 percent of the amount of the costs incurred, to the extent that such costs are determined to be otherwise allowable and allocable under the Federal Acquisition Regulation.

(ii) Regulations issued for the purpose of clause (i) shall provide for appropriate consideration of the complexity of procurement litigation, generally accepted principles governing the award of legal fees in civil actions involving the United States as a party, and such other factors as may be appropriate.

(C) In the case of a proceeding referred to in subparagraph (A), contractor costs otherwise allowable as reimbursable costs under this paragraph are not allowable if (i) such proceeding involves the same contractor misconduct alleged as the basis of another criminal, civil, or administrative proceeding, and (ii) the costs of such other proceeding are not allowable under paragraph (1).

(6) In this subsection:

(A) The term ''proceeding'' includes an investigation.

(B) The term ''costs'', with respect to a proceeding—

(i) means all costs incurred by a contractor, whether before or after the commencement of any such proceeding; and

(ii) includes—

(I) administrative and clerical expenses;

(II) the cost of legal services, including legal services performed by an employee of the contractor;

(III) the cost of the services of accountants and consultants retained by the contractor; and

(IV) the pay of directors, officers, and employees of the contractor for time devoted by such directors, officers, and employees to such proceeding.

(C) The term ''penalty'' does not include restitution, reimbursement, or compensatory damages.

(*l*) "Covered contract" defined

(1) In this section, the term ''covered contract'' means a contract for an amount in excess of $500,000 that is entered into by an executive agency, except that such term does not include a fixed-price contract without cost incentives or any firm, fixed price contract for the purchase of commercial items.

(2) Effective on October 1 of each year that is divisible by five, the amount set forth in paragraph (1) shall be adjusted to the equivalent amount in constant fiscal year 1994 dollars. An amount, as so adjusted, that is not evenly divisible by $50,000 shall be rounded to the nearest multiple of $50,000. In the case of an amount that is evenly divisible by $25,000 but is not evenly divisible by $50,000, the amount shall be rounded to the next higher multiple of $50,000.

(m) Other definitions

In this section:

(1) The term ''compensation'', for a fiscal year, means the total amount of wages, salary, bonuses and deferred compensation for the fiscal year, whether paid, earned, or otherwise accruing, as recorded in an employer's cost accounting records for the fiscal year.

(2) The term ''senior executives'', with respect to a contractor, means the five most highly compensated employees in management positions at each home office and each segment of the contractor.

(3) The term ''fiscal year'' means a fiscal year established by a contractor for accounting purposes.

(June 30, 1949, ch. 288, title III, §306, as added Pub. L. 100–700, §8(a)(1), Nov. 19, 1988, 102 Stat. 4634; amended Pub. L. 103–355, title II, §2151, Oct. 13, 1994, 108 Stat. 3309; Pub. L. 105–85, div. A, title VIII, §808(b), Nov. 18, 1997, 111 Stat. 1836; Pub. L. 105–261, div. A, title VIII, §804(b), Oct. 17, 1998, 112 Stat. 2083.)

PRIOR PROVISIONS

A prior section 256, act June 30, 1949, ch. 288, title III, § 306, 63 Stat. 396, related to waiver of liquidated damages, prior to repeal by act Sept. 5, 1950, ch. 849, § 10(b), 64 Stat. 591, eff. July 1, 1949. See section 256a of this title.

AMENDMENTS

1998—Subsec. (m)(2). Pub. L. 105–261 amended par. (2) generally. Prior to amendment, par. (2) read as follows: ''The term 'senior executive', with respect to a contractor, means—

''(A) the chief executive officer of the contractor or any individual acting in a similar capacity for the contractor;

''(B) the four most highly compensated employees in management positions of the contractor other than the chief executive officer; and

''(C) in the case of a contractor that has components which report directly to the contractor's headquarters, the five most highly compensated individuals in management positions at each such component.''

1997—Subsec. (e)(1)(P). Pub. L. 105–85, § 808(b)(1), added subpar. (P).

Subsec. (m). Pub. L. 105–85, § 808(b)(2), added subsec. (m).

1994—Pub. L. 103–355 amended section generally, substituting present provisions for provisions outlining limitations on allowability of costs incurred by contractors in criminal, civil, or administrative proceedings relating to violations of Federal or State statutes or regulations, which resulted in dispositions against contractors based on such violations.

EFFECTIVE DATE OF 1998 AMENDMENT

Amendment by Pub. L. 105–261 applicable with respect to costs of compensation of senior executives incurred after Jan. 1, 1999, under covered contracts entered into before, on, or after Oct. 17, 1998, see section 804(d) of Pub. L. 105–261, set out as a note under section 2324 of Title 10, Armed Forces.

EFFECTIVE DATE OF 1997 AMENDMENT

Amendment by Pub. L. 105–85 effective on date that is 90 days after Nov. 18, 1997, and applicable with respect to costs of compensation incurred after Jan. 1, 1998, under covered contracts entered into before, on, or after Nov. 18, 1997, see section 808(e) of Pub. L. 105–85, set out as an Effective Date note under section 435 of this title.

EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103–355, see section 10001 of Pub. l. 103–355, set out as a note under section 251 of this title.

EFFECTIVE DATE

Section effective with respect to contracts awarded after Nov. 19, 1988, see section 8(e) of Pub. L. 100–700, set out as an Effective and Termination Dates of 1988 Amendment note under section 2324 of Title 10, Armed Forces.

REVISION OF COST PRINCIPLE RELATING TO ENTERTAINMENT, GIFT, AND RECREATION COSTS FOR CONTRACTOR EMPLOYEES

Section 2192 of Pub. L. 103–355 provided that:

''(a) COSTS NOT ALLOWABLE.—(1) The costs of gifts or recreation for employees of a contractor or members of their families that are provided by the contractor to improve employee morale or performance or for any other purpose are not allowable under a covered contract unless, within 120 days after the date of the enactment of this Act [Oct. 13, 1994], the Federal Acquisition Regulatory Council prescribes amendments to the Federal Acquisition Regulation specifying circumstances under which such costs are allowable under a covered contract.

''(2) Not later than 90 days after the date of the enactment of this Act, the Federal Acquisition Regulatory Council shall amend the cost principle in the Federal Acquisition Regulation that is set out in section 31.205–14 of title 48, Code of Federal Regulations, relating to unallowability of entertainment costs—

''(A) by inserting in the cost principle a statement that costs made specifically unallowable under that cost principle are not allowable under any other cost principle; and

''(B) by striking out '(but see 31.205–1 and 31.205–13)'.

''(b) DEFINITIONS.—In this section:

''(1) The term 'employee' includes officers and directors of a contractor.

''(2) The term 'covered contract' has the meaning given such term in section 2324(*l*) of title 10, United States Code (as amended by section 2101(c)), and section 306(*l*) of the Federal Property and Administrative Services Act of 1949 (as added by section 2151) [41 U.S.C. 256(*l*)].

''(c) EFFECTIVE DATE.—Any amendments to the Federal Acquisition Regulation made pursuant to subsection (a) shall apply with respect to costs incurred after the date on which the amendments made by section 2101 apply (as provided in section 10001) [set out as an Effective Date of 1994 Amendment note under section 251 of this title]) or the date on which the amendments made by section 2151 apply (as provided in section 10001), whichever is later.''

EX. ORD. NO. 13494. ECONOMY IN GOVERNMENT CONTRACTING

Ex. Ord. No. 13494, Jan. 30, 2009, 74 F.R. 6101, as amended by Ex. Ord. No. 13517, § 2, Oct. 30, 2009, 74 F.R. 57239, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 101 *et seq.*, it is hereby ordered that:

SECTION 1. To promote economy and efficiency in Government contracting, certain costs that are not directly related to the contractors' provision of goods and services to the Government shall be unallowable for payment, thereby directly reducing Government expenditures. This order is also consistent with the policy of the United States to remain impartial concerning any labor-management dispute involving Government contractors. This order does not restrict the manner in which recipients of Federal funds may expend those funds.

SEC. 2. It is the policy of the executive branch in procuring goods and services that, to ensure the economical and efficient administration of Government contracts, contracting departments and agencies, when they enter into, receive proposals for, or make disbursements pursuant to a contract as to which certain costs are treated as unallowable, shall treat as unallowable the costs of any activities undertaken to persuade employees—whether employees of the recipient of the Federal disbursements or of any other entity—to exercise or not to exercise, or concerning the manner of exercising, the right to organize and bargain collectively through representatives of the employees' own choosing. Such unallowable costs shall be excluded from any billing, claim, proposal, or disbursement applicable to any such Federal Government contract.

SEC. 3. Contracting departments and agencies shall treat as allowable costs incurred in maintaining satisfactory relations between the contractor and its employees (other than the costs of any activities undertaken to persuade employees to exercise or not to exercise, or concerning the manner of exercising, the right to organize and bargain collectively), including costs of labor management committees, employee publications, and other related activities. See 48 C.F.R. 31.205–21.

SEC. 4. Examples of costs unallowable under section 2 of this order include the costs of the following activities, when they are undertaken to persuade employees to exercise or not to exercise, or concern the manner of exercising, rights to organize and bargain collectively:

(a) preparing and distributing materials;

(b) hiring or consulting legal counsel or consultants;

(c) holding meetings (including paying the salaries of the attendees at meetings held for this purpose); and

(d) planning or conducting activities by managers, supervisors, or union representatives during work hours.

SEC. 5. Within 150 days of the effective date of this order, the Federal Acquisition Regulatory Council (FAR Council) shall adopt such rules and regulations and issue such orders as are deemed necessary and appropriate to carry out this order. Such rules, regulations, and orders shall minimize the costs of compliance for contractors and shall not interfere with the ability of contractors to engage in advocacy through activities for which they do not claim reimbursement.

SEC. 6. Each contracting department or agency shall cooperate with the FAR Council and provide such information and assistance as the FAR Council may require in the performance of its functions under this order.

SEC. 7. (a) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(b) This order 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.

SEC. 8. This order shall become effective immediately, and shall apply to contracts resulting from solicitations issued on or after the effective date of the action taken by the FAR Council under section 5 of this order.

BARACK OBAMA.

§ 256a. Waiver of liquidated damages

Whenever any contract made on behalf of the Government by the head of any Federal Agency, or by officers authorized by him so to do, includes a provision for liquidated damages for delay, the Secretary of the Treasury upon recommendation of such head is authorized and empowered to remit the whole or any part of such damages as in his discretion may be just and equitable.

(Sept. 5, 1950, ch. 849, § 10(a), 64 Stat. 591; Pub. L. 104–316, title II, § 202(u), Oct. 19, 1996, 110 Stat. 3845.)

CODIFICATION

Section was not enacted as part of title III of act June 30, 1949, ch. 288, 63 Stat. 393, which comprises this subchapter.

AMENDMENTS

1996—Pub. L. 104–316 substituted ''Secretary of the Treasury'' for ''Comptroller General''.

§ 257. Administrative determinations

(a) Conclusiveness; delegation of powers

Determinations and decisions provided in this Act to be made by the Administrator or other agency head shall be final. Such determinations or decisions may be made with respect to individual purchases or contracts or, except for determinations or decisions under sections 253, 253a, and 253b of this title, with respect to classes of purchases or contracts. Except as provided in section 253(d)(2) of this title, and except as provided in section 121(d)(1) and (2) of title 40 with respect to the Administrator, the agency head is authorized to delegate his powers provided by this Act, including the making of such determinations and decisions, in his discretion and subject to his direction, to any other officer or officers or officials of the agency.

(b) Basis of determinations; finding conclusive; preservation of findings; copy

Each determination or decision required by section 254 or by section 255(d) of this title shall be based upon written findings made by the official making such determination, which findings shall be final and shall be available within the agency for a period of at least six years following the date of the determination.

(June 30, 1949, ch. 288, title III, § 307, 63 Stat. 396; Pub. L. 85–800, § 5, Aug. 28, 1958, 72 Stat. 967; Pub. L. 89–343, §§ 3, 4, Nov. 8, 1965, 79 Stat. 1303; Pub. L. 98–369, div. B, title VII, § 2714(a)(4), July 18, 1984, 98 Stat. 1184; Pub. L. 104–106, div. D, title XLIII, § 4321(e)(6), Feb. 10, 1996, 110 Stat. 675; Pub. L. 104–316, title I, § 121(c), Oct. 19, 1996, 110 Stat. 3836.)

REFERENCES IN TEXT

This Act, referred to in subsec. (a), is act June 30, 1949, ch. 288, 63 Stat. 377, as amended, known as the Federal Property and Administrative Services Act of 1949. Except for title III of the Act, which is classified generally to this subchapter, the Act was repealed and reenacted by Pub. L. 107–217, §§ 1, 6(b), Aug. 21, 2002, 116 Stat. 1062, 1304, as chapters 1 to 11 of Title 40, Public Buildings, Property, and Works.

CODIFICATION

''Section 121(d)(1) and (2) of title 40'' substituted in subsec. (a) for ''section 205(d)'', meaning section 205(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

1996—Subsec. (b). Pub. L. 104–316 struck out at end ''A copy of the findings shall be submitted to the General Accounting Office with the contract.''

Pub. L. 104–106 substituted ''section 255(d)'' for ''section 255(c)''.

1984—Subsec. (a). Pub. L. 98–369, § 2714(a)(4), substituted provision that determinations and decisions provided in this Act to be made by the Administrator or other agency head shall be final for provision that such determinations and decisions provided in this subchapter to be made by such official would be final, and inserted exception for determinations or decisions under sections 253, 253a, and 253b of this title, substituted ''Except as provided in section 253(d)(2) of this title'' for ''Except as provided in subsection (b) of this section'', and directed the substitution of ''this Act'' for ''this chapter'' after ''powers provided by'', which substitution was not capable of literal execution because the original text read ''this title''. Consequently, the amendment was executed by substituting ''this Act'' for ''this title'' as the probable intent of Congress.

Subsecs. (b), (c). Pub. L. 98–369, § 2714(a)(4)(D)–(F), redesignated subsec. (c) as (b), struck out ''paragraphs (11), (12), (13), or of section 253(c)'', and struck out former subsec. (b) which related to nondelegable powers and powers delegable to certain persons.

Subsec. (d). Pub. L. 98–369, § 2714(a)(4)(G), struck out subsec. (d) which related to preservation of data relating to contracts negotiated pursuant to the former provisions of section 252(c) of this title.

1965—Subsec. (a). Pub. L. 89–343, § 3, inserted ''and except as provided in section 486(d) of title 40 with respect to the Administrator''.

Subsec. (b). Pub. L. 89–343, § 4, struck out provisions which made the power of Administrator to make the delegations and determinations specified in section

252(a) of this title delegable only to Deputy Administrator or to chief official of any principal organizational unit of General Services Administration.

1958—Subsec. (b). Pub. L. 85–800, § 5(a), (b), substituted ''(12)'' for ''(11)'', ''(13)'' for ''(12)'', and ''(11)'' for ''(10)'' and struck out ''and in section 255(a) of this title'' before ''shall not be delegable'' in first sentence.

Subsec. (c). Pub. L. 85–800, § 5(a), (c), substituted ''(11), (12), (13), or (14)'' for ''(10), (11), (12), or (13)'', and ''255(c)'' for ''255(a)''.

EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104–106, see section 4401 of Pub. L. 104–106, set out as a note under section 251 of this title.

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.

DEFINITIONS

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

§ 258. Repealed. Pub. L. 103–355, title VII, § 7205, Oct. 13, 1994, 108 Stat. 3382

Section, acts June 30, 1949, ch. 288, title III, § 308, 63 Stat. 397; July 18, 1984, Pub. L. 98–369, div. B, title VII, § 2714(a)(5), 98 Stat. 1185, related to application of certain laws to purchases or contracts.

§ 259. Definitions

As used in this subchapter—

(a) The term ''agency head'' shall mean the head or any assistant head of any executive agency, and may at the option of the Administrator include the chief official of any principal organizational unit of the General Services Administration.

(b) The term ''competitive procedures'' means procedures under which an executive agency enters into a contract pursuant to full and open competition. Such term also includes—

(1) procurement of architectural or engineering services conducted in accordance with title IX of this Act;[1]

(2) the competitive selection of basic research proposals resulting from a general solicitation and the peer review or scientific review (as appropriate) of such proposals;

(3) the procedures established by the Administrator for the multiple awards schedule program of the General Services Administration if—

(A) participation in the program has been open to all responsible sources; and

(B) orders and contracts under such procedures result in the lowest overall cost alternative to meet the needs of the Government;

(4) procurements conducted in furtherance of section 644 of title 15 as long as all responsible business concerns that are entitled to submit offers for such procurements are permitted to compete; and

(5) a competitive selection of research proposals resulting from a general solicitation and peer review or scientific review (as appropriate) solicited pursuant to section 638 of title 15.

(c) The following terms have the meanings provided such terms in section 403 of this title:

(1) The term ''procurement''.
(2) The term ''procurement system''.
(3) The term ''standards''.
(4) The term ''full and open competition''.
(5) The term ''responsible source''.
(6) The term ''technical data''.
(7) The term ''major system''.
(8) The term ''item''.
(9) The term ''item of supply''.
(10) The term ''supplies''.
(11) The term ''commercial item''.
(12) The term ''nondevelopmental item''.
(13) The term ''commercial component''.
(14) The term ''component''.

(d)(1) The term ''simplified acquisition threshold'' has the meaning provided that term in section 403 of this title, except that, in the case of any contract to be awarded and performed, or purchase to be made, outside the United States in support of a contingency operation or a humanitarian or peacekeeping operation, the term means an amount equal to two times the amount specified for that term in section 403 of this title.

(2) In paragraph (1):

(A) The term ''contingency operation'' has the meaning given such term in section 101(a) of title 10.

(B) The term ''humanitarian or peacekeeping operation'' means a military operation in support of the provision of humanitarian or foreign disaster assistance or in support of a peacekeeping operation under chapter VI or VII of the Charter of the United Nations. The term does not include routine training, force rotation, or stationing.

(e) The term ''Federal Acquisition Regulation'' means the Federal Acquisition Regulation issued pursuant to section 421(c)(1) of this title.

(June 30, 1949, ch. 288, title III, § 309, 63 Stat. 397; July 12, 1952, ch. 703, § 1(h), 66 Stat. 593; Pub. L. 98–369, div. B, title VII, § 2711(a)(3), July 18, 1984, 98 Stat. 1180; Pub. L. 98–577, title V, § 504(a)(3), (4), Oct. 30, 1984, 98 Stat. 3086; Pub. L. 103–355, title I, § 1551, Oct. 13, 1994, 108 Stat. 3298; Pub. L. 104–201, div. A, title VIII, § 807(b), Sept. 23, 1996, 110 Stat. 2606; Pub. L. 105–85, div. A, title X, § 1073(g)(1), Nov. 18, 1997, 111 Stat. 1906.)

REFERENCES IN TEXT

This Act, referred to in subsec. (b)(1), is the Federal Property and Administrative Services Act of 1949, approved June 30, 1949, ch. 288, 63 Stat. 377. Title IX of this Act, which was classified generally to subchapter VI (§ 541 et seq.) of chapter 10 of former Title 40, Public Buildings, Property, and Works, was repealed and reenacted by Pub. L. 107–217, §§ 1, 6(b), Aug. 21, 2002, 116 Stat. 1062, 1304, as chapter 11 (§ 1101 et seq.) of Title 40, Public Buildings, Property, and Works. For disposition of sections of former Title 40 to revised Title 40, see Table preceding section 101 of Title 40. For complete classification of this Act to the Code, see Tables.

[1] See References in Text note below.

AMENDMENTS

1997—Subsec. (b)(2). Pub. L. 105–85 struck out ''and'' at end.

1996—Subsec. (d). Pub. L. 104–201 designated existing provisions as par. (1), inserted ''or a humanitarian or peacekeeping operation'' after ''contingency operation'', and added par. (2).

1994—Subsecs. (c) to (e). Pub. L. 103–355 added subsecs. (c) to (e) and struck out former subsec. (c) which read as follows: ''The terms 'full and open competition', 'responsible source', 'technical data', 'major system', 'item', 'item of supply', and 'supplies' have the same meanings provided such terms in section 403 of this title.''

1984—Subsec. (b). Pub. L. 98–369 added subsec. (b).

Subsec. (b)(4), (5). Pub. L. 98–577, § 504(a)(3), added pars. (4) and (5).

Subsec. (c). Pub. L. 98–577, § 504(a)(4), substituted '', 'responsible source', 'technical data', 'major system', 'item', 'item of supply', and 'supplies' have'' for ''and 'responsible source' have'' before ''the meaning''. Pub. L. 98–369 added subsec. (c).

1952—Subsec. (b). Act July 12, 1952, repealed subsec. (b) which defined ''supplies''.

EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103–355, see section 10001 of Pub. L. 103–355, set out as a note under section 251 of this title.

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.

SMALL BUSINESS ACT

Amendment to this section by section 2711(a)(3) of Pub. L. 98–369 not to affect or supersede the provisions of section 637(a) of Title 15, Commerce and Trade, see section 2711(c) of Pub. L. 98–369, set out as a note under section 253 of this title.

DEFINITIONS

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

§ 260. Laws not applicable to contracts

Sections 5, 8, and 13 of this title shall not apply to the procurement of property or services made by an executive agency pursuant to this subchapter. Any provision of law which authorizes an executive agency (other than an executive agency which is exempted from the provisions of this subchapter by section 252(a) of this title), to procure any property or services without advertising or without regard to said section 5 of this title shall be construed to authorize the procurement of such property or services pursuant to the provisions of this subchapter relating to procedures other than sealed-bid procedures.

(June 30, 1949, ch. 288, title III, § 310, 63 Stat. 397; July 12, 1952, ch. 703, § 1(m), (n), 66 Stat. 594; Pub. L. 85–800, § 6, Aug. 28, 1958, 72 Stat. 967; Pub. L. 89–343, § 5, Nov. 8, 1965, 79 Stat. 1303; Pub. L. 98–369, div. B, title VII, § 2714(a)(6), July 18, 1984, 98 Stat. 1185.)

AMENDMENTS

1984—Pub. L. 98–369 substituted ''the provisions of this subchapter relating to procedures other than sealed-bid procedures'' for ''section 252(c)(15) of this title without regard to the advertising requirements of sections 252(c) and 253 of this title''.

1965—Pub. L. 89–343 substituted provisions making sections 5, 8, and 13 of this title inapplicable to the procurement of property or services made by an executive agency pursuant to this subchapter, and requiring any provision of law which authorizes an executive agency (other than an executive agency which is exempted from the provisions of this subchapter by section 252(a) of this title) to procure any property or services without advertising or without regard to said section 5 of this title to be construed to authorize the procurement of such property or services pursuant to section 252(c)(15) of this title without regard to the advertising requirements of section 252(c) and 253 of this title, for provisions which made sections 5, 6, 6a, and 13 of this title inapplicable to the procurement of property or services by the General Services Administration, or within the scope of authority delegated by the Administrator to any other executive agency, and which required reference in any Act to the applicability of section 5 of this title to the procurement of property or services by the General Services Administration or any constituent organization thereof or any other executive agency delegated authority pursuant to section 252(a)(2) of this title to be deemed a reference to section 252(c) of this title.

1958—Subsec. (b). Pub. L. 85–800 inserted ''or any other executive agency delegated authority pursuant to section 252(a)(2) of this title''.

1952—Act July 12, 1952, designated existing provisions as subsec. (a), added subsec. (b), and substituting ''property'' for ''supplies'' in subsec. (a).

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.

§ 261. Assignment and delegation of procurement functions and responsibilities

(a) In general

Except to the extent expressly prohibited by another provision of law, the head of an executive agency may delegate to any other officer or official of that agency, any power under this subchapter.

(b) Procurements for or with other agencies

Subject to subsection (a) of this section, to facilitate the procurement of property and services covered by this subchapter by each executive agency for any other executive agency, and to facilitate joint procurement by those executive agencies—

(1) the head of an executive agency may delegate functions and assign responsibilities relating to procurement to any officer or employee within such agency;

(2) the heads of two or more executive agencies may by agreement delegate procurement functions and assign procurement responsibilities, consistent with section 1535 of title 31 and regulations issued under section 1074 of the Federal Acquisition Streamlining Act of 1994, from one executive agency to another of those executive agencies or to an officer or ci-

vilian employee of another of those executive agencies; and

(3) the heads of two or more executive agencies may establish joint or combined offices to exercise procurement functions and responsibilities.

(June 30, 1949, ch. 288, title III, § 311, as added Pub. L. 103–355, title I, § 1552, Oct. 13, 1994, 108 Stat. 3299.)

REFERENCES IN TEXT

Section 1074 of the Federal Acquisition Streamling Act of 1994, referred to in subsec. (b)(2), is section 1074 of Pub. L. 103–355, which is set out as a note under section 1535 of Title 31, Money and Finance.

PRIOR PROVISIONS

A prior section 261, Pub. L. 101–509, title V, § 532, Nov. 5, 1990, 104 Stat. 1470; Pub. L. 102–393, title V, § 529, Oct. 6, 1992, 106 Stat. 1761, related to Internal Revenue Service procurement of expert services, prior to repeal by Pub. L. 103–355, § 1055(c).

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.

§ 262. Determinations and decisions

(a) Individual or class determinations and decisions authorized

Determinations and decisions required to be made under this subchapter by the head of an executive agency may be made for an individual purchase or contract or, except to the extent expressly prohibited by another provision of law, for a class of purchases or contracts. Such determinations and decisions are final.

(b) Written findings required

(1) Each determination under section 255(d) of this title or section 254d(c)(2)(B) of this title shall be based on a written finding by the person making the determination or decision. The finding shall set out facts and circumstances that support the determination or decision.

(2) Each finding referred to in paragraph (1) is final.

(3) The head of an executive agency shall maintain for a period of not less than 6 years a copy of each finding referred to in paragraph (1) that is made by a person in that executive agency. The period begins on the date of the determination or decision to which the finding relates.

(June 30, 1949, ch. 288, title III, § 312, as added Pub. L. 103–355, title I, § 1553, Oct. 13, 1994, 108 Stat. 3300.)

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.

§ 263. Performance based management: acquisition programs

(a) Congressional policy

It is the policy of Congress that the head of each executive agency should achieve, on average, 90 percent of the cost, performance, and schedule goals established for major acquisition programs of the agency.

(b) Establishment of goals

(1) The head of each executive agency shall approve or define the cost, performance, and schedule goals for major acquisition programs of the agency.

(2) The chief financial officer of an executive agency shall evaluate the cost goals proposed for each major acquisition program of the agency.

(c) Identification of noncompliant programs

Whenever it is necessary to do so in order to implement the policy set out in subsection (a) of this section, the head of an executive agency shall—

(1) determine whether there is a continuing need for programs that are significantly behind schedule, over budget, or not in compliance with performance or capability requirements; and

(2) identify suitable actions to be taken, including termination, with respect to such programs.

(June 30, 1949, ch. 288, title III, § 313, as added Pub. L. 103–355, title V, § 5051(a), Oct. 13, 1994, 108 Stat. 3351; amended Pub. L. 105–85, div. A, title VIII, § 851(a), Nov. 18, 1997, 111 Stat. 1851.)

AMENDMENTS

1997—Subsec. (a). Pub. L. 105–85 amended heading and text of subsec. (a) generally. Prior to amendment, text read as follows: ''It is the policy of Congress that the head of each executive agency should achieve, on average, 90 percent of the cost and schedule goals established for major and nonmajor acquisition programs of the agency without reducing the performance or capabilities of the items being acquired.''

ENHANCED SYSTEM OF PERFORMANCE INCENTIVES

Section 5051(c) of Pub. L. 103–355 provided that: ''Within one year after the date of the enactment of this Act [Oct. 13, 1994], the Deputy Director for Management of the Office of Management and Budget, in consultation with appropriate officials in other departments and agencies of the Federal Government, shall, to the maximum extent consistent with applicable law—

''(1) establish policies and procedures for the heads of such departments and agencies to designate acquisition positions and manage employees (including the accession, education, training and career development of employees) in the designated acquisition positions; and

''(2) review the incentives and personnel actions available to the heads of departments and agencies of the Federal Government for encouraging excellence in the acquisition workforce of the Federal Government and provide an enhanced system of incentives for the encouragement of excellence in such workforce which—

''(A) relates pay to performance (including the extent to which the performance of personnel in such workforce contributes to achieving the cost goals, schedule goals, and performance goals established for acquisition programs pursuant to section 313(b) of the Federal Property and Administrative Services Act of 1949, as added by subsection (a) [41 U.S.C. 263(b)]); and

''(B) provides for consideration, in personnel evaluations and promotion decisions, of the extent to which the performance of personnel in such workforce contributes to achieving such cost goals, schedule goals, and performance goals.''

RECOMMENDED LEGISLATION

Section 5051(d) of Pub. L. 103–355 provided that: ''Not later than one year after the date of the enactment of this Act [Oct. 13, 1994], the Administrator for Federal Procurement Policy shall submit to Congress any recommended legislation that the Secretary considers necessary to carry out section 313 of the Federal Property and Administrative Services Act of 1949, as added by subsection (a) [41 U.S.C. 263], and otherwise to facilitate and enhance management of Federal Government acquisition programs and the acquisition workforce of the Federal Government on the basis of performance.''

§264. Relationship of commercial item provisions to other provisions of law

(a) Applicability of subchapter

Unless otherwise specifically provided, nothing in this section, section 264a of this title, or section 264b of this title shall be construed as providing that any other provision of this subchapter relating to procurement is inapplicable to the procurement of commercial items.

(b) List of laws inapplicable to contracts for acquisition of commercial items

No contract for the procurement of a commercial item entered into by the head of an executive agency shall be subject to any law properly listed in the Federal Acquisition Regulation (pursuant to section 430 of this title).

(June 30, 1949, ch. 288, title III, §314, as added Pub. L. 103–355, title VIII, §8201, Oct. 13, 1994, 108 Stat. 3394.)

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.

REGULATIONS

Pub. L. 103–355, title VIII, §8002, Oct. 13, 1994, 108 Stat. 3386, as amended by Pub. L. 108–136, div. A, title XIV, §1432, Nov. 24, 2003, 117 Stat. 1672, provided that:

''(a) IN GENERAL.—The Federal Acquisition Regulation shall provide regulations to implement paragraphs (12) through (15) of section 4 of the Office of Federal Procurement Policy Act [41 U.S.C. 403(12)–(15)], chapter 140 of title 10, United States Code, and sections 314 through 314B of the Federal Property and Administrative Services Act of 1949 [41 U.S.C. 264–264b].

''(b) CONTRACT CLAUSES.—(1) The regulations prescribed under subsection (a) shall contain a list of contract clauses to be included in contracts for the acquisition of commercial end items. Such list shall, to the maximum extent practicable, include only those contract clauses—

''(A) that are required to implement provisions of law or executive orders applicable to acquisitions of commercial items or commercial components, as the case may be; or

''(B) that are determined to be consistent with standard commercial practice.

''(2) Such regulations shall provide that a prime contractor shall not be required by the Federal Government to apply to any of its divisions, subsidiaries, affiliates, subcontractors, or suppliers that are furnishing commercial items any contract clause except those—

''(A) that are required to implement provisions of law or executive orders applicable to subcontractors furnishing commercial items or commercial components, as the case may be; or

''(B) that are determined to be consistent with standard commercial practice.

''(3) To the maximum extent practicable, only the contract clauses listed pursuant to paragraph (1) may be used in a contract, and only the contract clauses referred to in paragraph (2) may be required to be used in a subcontract, for the acquisition of commercial items or commercial components by or for an executive agency.

''(4) The Federal Acquisition Regulation shall provide standards and procedures for waiving the use of contract clauses required pursuant to paragraph (1), other than those required by law, including standards for determining the cases in which a waiver is appropriate.

''(5) For purposes of this subsection, the term 'subcontract' includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractor or subcontractor.

''(c) MARKET ACCEPTANCE.—(1) The Federal Acquisition Regulation shall provide that under appropriate conditions the head of an executive agency may require offerors to demonstrate that the items offered—

''(A) have either—

''(i) achieved commercial market acceptance; or

''(ii) been satisfactorily supplied to an executive agency under current or recent contracts for the same or similar requirements; and

''(B) otherwise meet the item description, specifications, or other criteria prescribed in the public notice and solicitation relating to the contract.

''(2) The Federal Acquisition Regulation shall provide guidance to ensure that the criteria for determining commercial market acceptance include the consideration of—

''(A) the minimum needs of the executive agency concerned; and

''(B) the entire relevant commercial market, including small businesses.

''(d) PROVISIONS RELATING TO TYPES OF CONTRACTS FOR COMMERCIAL ITEMS.—(1) [The] Federal Acquisition Regulation shall include, for acquisitions of commercial items—

''(A) a requirement that firm, fixed price contracts or fixed price with economic price adjustment contracts be used to the maximum extent practicable;

''(B) a prohibition on use of cost type contracts; and

''(C) subject to paragraph (2), authority for use of a time-and-materials contract or a labor-hour contract for the procurement of commercial services that are commonly sold to the general public through such contracts and are purchased by the procuring agency on a competitive basis.

''(2) A time-and-materials contract or a labor-hour contract may be used pursuant to the authority referred to in paragraph (1)(C)—

''(A) only for a procurement of commercial services in a category of commercial services described in paragraph (3); and—

''(B) only if the contracting officer for such procurement—

''(i) executes a determination and findings that no other contract type is suitable;

''(ii) includes in the contract a ceiling price that the contractor exceeds at its own risk; and

''(iii) authorizes any subsequent change in the ceiling price only upon a determination, documented in the contract file, that it is in the best interest of the procuring agency to change such ceiling price.

''(3) The categories of commercial services referred to in paragraph (2) are as follows:

''(A) Commercial services procured for support of a commercial item, as described in section 4(12)(E) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(12)(E)).

''(B) Any other category of commercial services that is designated by the Administrator for Federal Procurement Policy in the Federal Acquisition Regulation for the purposes of this paragraph on the basis that—

''(i) the commercial services in such category are of a type of commercial services that are commonly

sold to the general public through use of time-and-materials or labor-hour contracts; and

''(ii) it would be in the best interests of the Federal Government to authorize use of time-and-materials or labor-hour contracts for purchases of the commercial services in such category.

''(e) CONTRACT QUALITY REQUIREMENTS.—The regulations prescribed under subsection (a) shall include provisions that—

''(1) permit, to the maximum extent practicable, a contractor under a commercial items acquisition to use the existing quality assurance system of the contractor as a substitute for compliance with an otherwise applicable requirement for the Government to inspect or test the commercial items before the contractor's tender of those items for acceptance by the Government;

''(2) require that, to the maximum extent practicable, the executive agency take advantage of warranties (including extended warranties) offered by offerors of commercial items and use such warranties for the repair and replacement of commercial items; and

''(3) set forth guidance regarding the use of past performance of commercial items and sources as a factor in contract award decisions.

''(f) DEFENSE CONTRACT CLAUSES.—(1) Section 824(b) of the National Defense Authorization Act for Fiscal Years 1990 and 1991 (Public Law 101–189; [former] 10 U.S.C. 2325 note) shall cease to be effective on the date on which the regulations implementing this section become effective [Oct. 1, 1995, see 60 F.R. 48231, Sept. 18, 1995].

''(2) Notwithstanding subsection (b), a contract of the Department of Defense entered into before the date on which section 824(b) ceases to be effective under paragraph (1), and a subcontract entered into before such date under such a contract, may include clauses developed pursuant to paragraphs (2) and (3) of section 824(b) of the National Defense Authorization Act for Fiscal Years 1990 and 1991 (Public Law 101–189; [former] 10 U.S.C. 2325 note).''

PROVISIONS NOT AFFECTED BY TITLE VIII OF PUB. L. 103–355

Section 8304 of title VIII of Pub. L. 103–355 provided that: ''Nothing in this title [enacting this section, sections 264a, 264b, and 430 of this title, sections 2375 to 2377 of Title 10, Armed Forces, and section 334 of former Title 40, Public Buildings, Property, and Works, now section 3707 of Title 40, amending sections 57, 58, 253g, 254, 403, 416, 418, 422, 423, and 701 of this title, sections 2306, 2320, 2321, 2384, 2393, 2397, 2397b, 2397c, 2402, 2408, and 2410b of Title 10, section 1368 of Title 33, Navigation and Navigable Waters, and section 40118 of Title 49, Transportation, repealing section 424 of this title and section 2325 of Title 10, enacting provisions set out as notes under this section, sections 264b and 430 of this title, and section 7606 of Title 42, The Public Health and Welfare, and amending provisions set out as notes under sections 2301 and 2327 of Title 10] shall be construed as modifying or superseding, or as intended to impair or restrict, authorities or responsibilities under—

''(1) section 2323 of title 10, United States Code, or section 7102 of the Federal Acquisition Streamlining Act of 1994 [Pub. L. 103–355, 15 U.S.C. 644 note];

''(2) the Brooks Automatic Data Processing Act (section 111 of the Federal Property and Administrative Services Act of 1949 ([former] 40 U.S.C. 759));

''(3) Brooks Architect-Engineers Act (title IX of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 541 et seq.) [now 40 U.S.C. 1101–1104]);

''(4) subsections (a) and (d) of section 8 of the Small Business Act (15 U.S.C. 637(a) and (d)); or

''(5) the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c).''

§ 264a. Definitions relating to procurement of commercial items

As used in this subchapter, the terms ''commercial item'', ''nondevelopmental item'', ''component'', and ''commercial component'' have the meanings provided in section 403 of this title.

(June 30, 1949, ch. 288, title III, § 314A, as added Pub. L. 103–355, title VIII, § 8202, Oct. 13, 1994, 108 Stat. 3394; amended Pub. L. 104–106, div. D, title XLIII, § 4321(e)(7), Feb. 10, 1996, 110 Stat. 675.)

AMENDMENTS

1996—Pub. L. 104–106 inserted ''relating to procurement of commercial items'' after ''Definitions'' in section catchline.

EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104–106, see section 4401 of Pub. L. 104–106, set out as a note under section 251 of this title.

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.

§ 264b. Preference for acquisition of commercial items

(a) Preference

The head of each executive agency shall ensure that, to the maximum extent practicable—

(1) requirements of the executive agency with respect to a procurement of supplies or services are stated in terms of—

(A) functions to be performed;

(B) performance required; or

(C) essential physical characteristics;

(2) such requirements are defined so that commercial items or, to the extent that commercial items suitable to meet the executive agency's needs are not available, nondevelopmental items other than commercial items, may be procured to fulfill such requirements; and

(3) offerors of commercial items and nondevelopmental items other than commercial items are provided an opportunity to compete in any procurement to fill such requirements.

(b) Implementation

The head of each executive agency shall ensure that procurement officials in that executive agency, to the maximum extent practicable—

(1) acquire commercial items or nondevelopmental items other than commercial items to meet the needs of the executive agency;

(2) require prime contractors and subcontractors at all levels under the executive agency contracts to incorporate commercial items or nondevelopmental items other than commercial items as components of items supplied to the executive agency;

(3) modify requirements in appropriate cases to ensure that the requirements can be met by commercial items or, to the extent that commercial items suitable to meet the executive agency's needs are not available, nondevelopmental items other than commercial items;

(4) state specifications in terms that enable and encourage bidders and offerors to supply commercial items or, to the extent that commercial items suitable to meet the executive agency's needs are not available, nondevelopmental items other than commercial items in response to the executive agency solicitations;

(5) revise the executive agency's procurement policies, practices, and procedures not required by law to reduce any impediments in those policies, practices, and procedures to the acquisition of commercial items; and

(6) require training of appropriate personnel in the acquisition of commercial items.

(c) Preliminary market research

(1) The head of an executive agency shall conduct market research appropriate to the circumstances—

(A) before developing new specifications for a procurement by that executive agency; and

(B) before soliciting bids or proposals for a contract in excess of the simplified acquisition threshold.

(2) The head of an executive agency shall use the results of market research to determine whether there are commercial items or, to the extent that commercial items suitable to meet the executive agency's needs are not available, nondevelopmental items other than commercial items available that—

(A) meet the executive agency's requirements;

(B) could be modified to meet the executive agency's requirements; or

(C) could meet the executive agency's requirements if those requirements were modified to a reasonable extent.

(3) In conducting market research, the head of an executive agency should not require potential sources to submit more than the minimum information that is necessary to make the determinations required in paragraph (2).

(June 30, 1949, ch. 288, title III, § 314B, as added Pub. L. 103–355, title VIII, § 8203, Oct. 13, 1994, 108 Stat. 3394.)

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.

COMPTROLLER GENERAL REVIEW OF FEDERAL GOVERNMENT USE OF MARKET RESEARCH

Section 8305 of Pub. L. 103–355 provided that:

''(a) REPORT REQUIRED.—Not later than 2 years after the date of the enactment of this Act [Oct. 13, 1994], the Comptroller General of the United States shall submit to the Congress a report on the use of market research by the Federal Government in support of the procurement of commercial items and nondevelopmental items.

''(b) CONTENT OF REPORT.—The report shall include the following:

''(1) A review of existing Federal Government market research efforts to gather data concerning commercial and other nondevelopmental items.

''(2) A review of the feasibility of creating a Government-wide data base for storing, retrieving, and analyzing market data, including use of existing Federal Government resources.

''(3) Any recommendations for changes in law or regulations that the Comptroller General considers appropriate.''

§ 265. Contractor employees: protection from reprisal for disclosure of certain information

(a) Prohibition of reprisals

An employee of a contractor may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a Member of Congress or an authorized official of an executive agency or the Department of Justice information relating to a substantial violation of law related to a contract (including the competition for or negotiation of a contract).

(b) Investigation of complaints

A person who believes that the person has been subjected to a reprisal prohibited by subsection (a) of this section may submit a complaint to the Inspector General of the executive agency. Unless the Inspector General determines that the complaint is frivolous, the Inspector General shall investigate the complaint and, upon completion of such investigation, submit a report of the findings of the investigation to the person, the contractor concerned, and the head of the agency. In the case of an executive agency that does not have an Inspector General, the duties of the Inspector General under this section shall be performed by an official designated by the head of the executive agency.

(c) Remedy and enforcement authority

(1) If the head of an executive agency determines that a contractor has subjected a person to a reprisal prohibited by subsection (a) of this section, the head of the executive agency may take one or more of the following actions:

(A) Order the contractor to take affirmative action to abate the reprisal.

(B) Order the contractor to reinstate the person to the position that the person held before the reprisal, together with the compensation (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.

(C) Order the contractor to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal, as determined by the head of the executive agency.

(2) Whenever a person fails to comply with an order issued under paragraph (1), the head of the executive agency shall file an action for enforcement of such order in the United States district court for a district in which the reprisal was found to have occurred. In any action brought under this paragraph, the court may grant appropriate relief, including injunctive relief and compensatory and exemplary damages.

(3) Any person adversely affected or aggrieved by an order issued under paragraph (1) may obtain review of the order's conformance with this subsection, and any regulations issued to carry out this section, in the United States court of

appeals for a circuit in which the reprisal is alleged in the order to have occurred. No petition seeking such review may be filed more than 60 days after issuance of the order by the head of the agency. Review shall conform to chapter 7 of title 5.

(d) Construction

Nothing in this section may be construed to authorize the discharge of, demotion of, or discrimination against an employee for a disclosure other than a disclosure protected by subsection (a) of this section or to modify or derogate from a right or remedy otherwise available to the employee.

(e) Definitions

In this section:

(1) The term ''contract'' means a contract awarded by the head of an executive agency.

(2) The term ''contractor'' means a person awarded a contract with an executive agency.

(3) The term ''Inspector General'' means an Inspector General appointed under the Inspector General Act of 1978.

(June 30, 1949, ch. 288, title III, § 315, as added Pub. L. 103–355, title VI, § 6006, Oct. 13, 1994, 108 Stat. 3365; amended Pub. L. 104–106, div. D, title XLIII, § 4321(e)(8), Feb. 10, 1996, 110 Stat. 675.)

REFERENCES IN TEXT

The Inspector General Act of 1978, referred to in subsec. (e)(3), is Pub. L. 95–452, Oct. 12, 1978, 92 Stat. 1101, as amended, which is set out in the Appendix to Title 5, Government Organization and Employees.

AMENDMENTS

1996—Subsec. (b). Pub. L. 104–106 substituted ''Inspector General'' for ''inspector general'' after ''does not have an'' and after ''the duties of the''.

EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104–106, see section 4401 of Pub. L. 104–106, set out as a note under section 251 of this title.

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.

§ 266. Merit-based award of grants for research and development

(a) Policy

It is the policy of Congress that an executive agency should not be required by legislation to award a new grant for research, development, test, or evaluation to a non-Federal Government entity. It is further the policy of Congress that any program, project, or technology identified in legislation be awarded through merit-based selection procedures.

(b) Rule of construction

A provision of law may not be construed as requiring a new grant to be awarded to a specified non-Federal Government entity unless that provision of law—

(1) specifically refers to this subsection;

(2) specifically identifies the particular non-Federal Government entity involved; and

(3) specifically states that the award to that entity is required by such provision of law in contravention of the policy set forth in subsection (a) of this section.

(c) New grant defined

For purposes of this section, a grant is a new grant unless the work provided for in the grant is a continuation of the work performed by the specified entity under a preceding grant.

(d) Inapplicability to certain grants

This section shall not apply with respect to any grant that calls upon the National Academy of Sciences to investigate, examine, or experiment upon any subject of science or art of significance to an executive agency and to report on such matters to Congress or any agency of the Federal Government.

(June 30, 1949, ch. 288, title III, § 316, as added Pub. L. 103–355, title VII, § 7203(b)(2), Oct. 13, 1994, 108 Stat. 3381; amended Pub. L. 104–106, div. D, title XLIII, § 4321(e)(9), Feb. 10, 1996, 110 Stat. 675.)

AMENDMENTS

1996—Pub. L. 104–106 made technical amendment to section catchline in original.

EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104–106, see section 4401 of Pub. L. 104–106, set out as a note under section 251 of this title.

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.

§ 266a. Share-in-savings contracts

(a) Authority to enter into share-in-savings contracts

(1) The head of an executive agency may enter into a share-in-savings contract for information technology (as defined in section 11101(6) of title 40) in which the Government awards a contract to improve mission-related or administrative processes or to accelerate the achievement of its mission and share with the contractor in savings achieved through contract performance.

(2)(A) Except as provided in subparagraph (B), a share-in-savings contract shall be awarded for a period of not more than five years.

(B) A share-in-savings contract may be awarded for a period greater than five years, but not more than 10 years, if the head of the agency determines in writing prior to award of the contract that—

(i) the level of risk to be assumed and the investment to be undertaken by the contractor is likely to inhibit the government from obtaining the needed information technology competitively at a fair and reasonable price if the contract is limited in duration to a period of five years or less; and

(ii) usage of the information technology to be acquired is likely to continue for a period of time sufficient to generate reasonable benefit for the government.

(3) Contracts awarded pursuant to the authority of this section shall, to the maximum extent

practicable, be performance-based contracts that identify objective outcomes and contain performance standards that will be used to measure achievement and milestones that must be met before payment is made.

(4) Contracts awarded pursuant to the authority of this section shall include a provision containing a quantifiable baseline that is to be the basis upon which a savings share ratio is established that governs the amount of payment a contractor is to receive under the contract. Before commencement of performance of such a contract, the senior procurement executive of the agency shall determine in writing that the terms of the provision are quantifiable and will likely yield value to the Government.

(5)(A) The head of the agency may retain savings realized through the use of a share-in-savings contract under this section that are in excess of the total amount of savings paid to the contractor under the contract, but may not retain any portion of such savings that is attributable to a decrease in the number of civilian employees of the Federal Government performing the function. Except as provided in subparagraph (B), savings shall be credited to the appropriation or fund against which charges were made to carry out the contract and shall be used for information technology.

(B) Amounts retained by the agency under this subsection shall—

(i) without further appropriation, remain available until expended; and

(ii) be applied first to fund any contingent liabilities associated with share-in-savings procurements that are not fully funded.

(b) Cancellation and termination

(1) If funds are not made available for the continuation of a share-in-savings contract entered into under this section in a subsequent fiscal year, the contract shall be canceled or terminated. The costs of cancellation or termination may be paid out of—

(A) appropriations available for the performance of the contract;

(B) appropriations available for acquisition of the information technology procured under the contract, and not otherwise obligated; or

(C) funds subsequently appropriated for payments of costs of cancellation or termination, subject to the limitations in paragraph (3).

(2) The amount payable in the event of cancellation or termination of a share-in-savings contract shall be negotiated with the contractor at the time the contract is entered into.

(3)(A) Subject to subparagraph (B), the head of an executive agency may enter into share-in-savings contracts under this section in any given fiscal year even if funds are not made specifically available for the full costs of cancellation or termination of the contract if funds are available and sufficient to make payments with respect to the first fiscal year of the contract and the following conditions are met regarding the funding of cancellation and termination liability:

(i) The amount of unfunded contingent liability for the contract does not exceed the lesser of—

(I) 25 percent of the estimated costs of a cancellation or termination; or

(II) $5,000,000.

(ii) Unfunded contingent liability in excess of $1,000,000 has been approved by the Director of the Office of Management and Budget or the Director's designee.

(B) The aggregate number of share-in-savings contracts that may be entered into under subparagraph (A) by all executive agencies to which this subchapter[1] applies in a fiscal year may not exceed 5 in each of fiscal years 2003, 2004, and 2005.

(c) Definitions

In this section:

(1) The term ''contractor'' means a private entity that enters into a contract with an agency.

(2) The term ''savings'' means—

(A) monetary savings to an agency; or

(B) savings in time or other benefits realized by the agency, including enhanced revenues (other than enhanced revenues from the collection of fees, taxes, debts, claims, or other amounts owed the Federal Government).

(3) The term ''share-in-savings contract'' means a contract under which—

(A) a contractor provides solutions for—

(i) improving the agency's mission-related or administrative processes; or

(ii) accelerating the achievement of agency missions; and

(B) the head of the agency pays the contractor an amount equal to a portion of the savings derived by the agency from—

(i) any improvements in mission-related or administrative processes that result from implementation of the solution; or

(ii) acceleration of achievement of agency missions.

(d) Termination

No share-in-savings contracts may be entered into under this section after September 30, 2005.

(June 30, 1949, ch. 288, title III, § 317, as added Pub. L. 107–347, title II, § 210(b), Dec. 17, 2002, 116 Stat. 2934.)

REFERENCES IN TEXT

The words ''this subchapter'', referred to in subsec. (b)(3)(B), were in the original ''this chapter'' and have been translated as if they read ''this title'' in the original, meaning title III of act June 30, 1949, ch. 288, to reflect the probable intent of Congress.

EFFECTIVE DATE

Section effective 120 days after Dec. 17, 2002, see section 402(a) of Pub. L. 107–347, set out as a note under section 3601 of Title 44, Public Printing and Documents.

SUBCHAPTER V—FOREIGN EXCESS PROPERTY

§§ 271 to 274. Transferred

CODIFICATION

Section 271, act June 30, 1949, ch. 288, title IV, § 401, 63 Stat. 397, which related to disposal of foreign excess property, was transferred to section 511 of former Title

[1] See References in Text note below.

40, Public Buildings, Property, and Works, and was repealed and reenacted as section 701(b)(1), (b)(2)(B), (c) of Title 40, Public Buildings, Property, and Works, by Pub. L. 107–217, §§1, 6(b), Aug. 21, 2002, 116 Stat. 1062, 1304.

Section 272, act June 30, 1949, ch. 288, title IV, § 402, 63 Stat. 398, which related to methods and terms of disposal, was transferred to section 512 of former Title 40, and was repealed and reenacted as sections 702 to 704 of Title 40, Public Buildings, Property, and Works, by Pub. L. 107–217, §§1, 6(b), Aug. 21, 2002, 116 Stat. 1062, 1304.

Section 273, act June 30, 1949, ch. 288, title IV, § 403, 63 Stat. 398, which related to proceeds from disposals, was transferred to section 513 of former Title 40, and was repealed and reenacted as section 705 of Title 40, Public Buildings, Property, and Works, by Pub. L. 107–217, §§1, 6(b), Aug. 21, 2002, 116 Stat. 1062, 1304.

Section 274, act June 30, 1949, ch. 288, title IV, § 404, 63 Stat. 398, which related to general provisions, was transferred to section 514 of former Title 40, and was repealed and reenacted as section 701(a), (b)(1), (2)(A), (3), (4) of Title 40, Public Buildings, Property, and Works, by Pub. L. 107–217, §§1, 6(b), Aug. 21, 2002, 116 Stat. 1062, 1304.

SUBCHAPTER VI—FEDERAL RECORD MANAGEMENT

§§ 281 to 291. Transferred

CODIFICATION

Section 281, acts June 30, 1949, ch. 288, title V, § 502; Sept. 5, 1950, ch. 849, § 6(d), 64 Stat. 583, which related to custody and control of property, was transferred to section 392 of former Title 44, Public Printing and Documents.

Section 282, acts June 30, 1949, ch. 288, title V, § 503; Sept. 5, 1950, ch. 849, § 6(d), 64 Stat. 583, which related to National Historical Publications Commission, was transferred to section 393 of former Title 44.

Section 283, acts June 30, 1949, ch. 288, title V, § 504; Sept. 5, 1950, ch. 849, § 6(d), 64 Stat. 583, which related to establishment of Federal Records Council, was transferred to section 394 of former Title 44.

Section 284, acts June 30, 1949, ch. 288, title V, § 505; Sept. 5, 1950, ch. 849, § 6(d), 64 Stat. 583, which related to records management by Administrator, was transferred to section 395 of former Title 44.

Section 285, acts June 30, 1949, ch. 288, title V, § 506; Sept. 5, 1950, ch. 849, § 6(d), 64 Stat. 583, which related to records management by agency heads, was transferred to section 396 of former Title 44.

Section 286, acts June 30, 1949, ch. 288, title V, § 507; Sept. 5, 1950, ch. 849, § 6(d), 64 Stat. 583, which related to Archival administration, was transferred to section 397 of former Title 44.

Section 287, acts June 30, 1949, ch. 288, title V, § 508; Sept. 5, 1950, ch. 849, § 6(d), 64 Stat. 583, which related to reports, was transferred to section 398 of former Title 44.

Section 288, acts June 30, 1949, ch. 288, title V, § 509; Sept. 5, 1950, ch. 849, § 6(d), 64 Stat. 583, which related to legal status of reproductions; official seal; fees for copies and reproductions, was transferred to section 399 of former Title 44.

Section 289, acts June 30, 1949, ch. 288, title V, § 510; Sept. 5, 1950, ch. 849, § 6(d), 64 Stat. 583, which related to limitation on liability, was transferred to section 400 of former Title 44.

Section 290, acts June 30, 1949, ch. 288, title V, § 511; Sept. 5, 1950, ch. 849, § 6(d), 64 Stat. 583, which related to definitions, was transferred to section 401 of former Title 44.

Section 291, act Aug. 2, 1946, ch. 753, title I, § 140, 60 Stat. 833, which related to transfer of records of Congress, was transferred to section 402 of former Title 44.

Sections 392 to 402 of former Title 44 are covered by chapter 21 (§ 2101 et seq.), chapter 25 (§ 2501 et seq.), chapter 27 (§ 2701 et seq.), chapter 29 (§ 2901 et seq.), and chapter 31 (§ 3101 et seq.) of Title 44, Public Printing and Documents.

CHAPTER 5—JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS

Sec.
321. Limitation on pleading contract provisions relating to finality; standards of review.
322. Contract provisions making decisions final on questions of law.

§ 321. Limitation on pleading contract provisions relating to finality; standards of review

No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however*, That any such decision shall be final and conclusive unless the same is fradulent[1] or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

(May 11, 1954, ch. 199, § 1, 68 Stat. 81.)

AGENCY ACTIONS GENERALLY, JUDICIAL REVIEW

Judicial review of agency actions generally, see section 701 et seq. of Title 5, Government Organization and Employees.

§ 322. Contract provisions making decisions final on questions of law

No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.

(May 11, 1954, ch. 199, § 2, 68 Stat. 81.)

CHAPTER 6—SERVICE CONTRACT LABOR STANDARDS

Sec.
351. Required contract provisions; minimum wages.
352. Violations.
353. Law governing authority of Secretary.
354. List of violators; prohibition of contract award to firms appearing on list; actions to recover underpayments; payment of sums recovered.
355. Exclusion of fringe benefit payments in determining overtime pay.
356. Exemptions.
357. Definitions.
358. Wage and fringe benefit determinations of Secretary.

§ 351. Required contract provisions; minimum wages

(a) Every contract (and any bid specification therefor) entered into by the United States or the District of Columbia in excess of $2,500, except as provided in section 356 of this title, whether negotiated or advertised, the principal

[1] So in original. Probably should be ''fraudulent''.

purpose of which is to furnish services in the United States through the use of service employees, shall contain the following:

(1) A provision specifying the minimum monetary wages to be paid the various classes of service employees in the performance of the contract or any subcontract thereunder, as determined by the Secretary, or his authorized representative, in accordance with prevailing rates for such employees in the locality, or, where a collective-bargaining agreement covers any such service employees, in accordance with the rates for such employees provided for in such agreement, including prospective wage increases provided for in such agreement as a result of arm's length negotiations. In no case shall such wages be lower than the minimum specified in subsection (b) of this section.

(2) A provision specifying the fringe benefits to be furnished in the various classes of service employees, engaged in the performance of the contract or any subcontract thereunder, as determined by the Secretary or his authorized representative to be prevailing for such employees in the locality, or, where a collective-bargaining agreement covers any such service employees, to be provided for in such agreement, including prospective fringe benefits increases provided for in such agreement as a result of arm's-length negotiations. Such fringe benefits shall include medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, unemployment benefits, life insurance, disability and sickness insurance, accident insurance, vacation and holiday pay, costs of apprenticeship or other similar programs and other bona fide fringe benefits not otherwise required by Federal, State, or local law to be provided by the contractor or subcontractor. The obligation under this subparagraph may be discharged by furnishing any equivalent combinations of fringe benefits or by making equivalent or differential payments in cash under rules and regulations established by the Secretary.

(3) A provision that no part of the services covered by this chapter will be performed in buildings or surroundings or under working conditions, provided by or under the control or supervision of the contractor or any subcontractor, which are unsanitary or hazardous or dangerous to the health or safety of service employees engaged to furnish the services.

(4) A provision that on the date a service employee commences work on a contract to which this chapter applies, the contractor or subcontractor will deliver to the employee a notice of the compensation required under paragraphs (1) and (2) of this subsection, on a form prepared by the Federal agency, or will post a notice of the required compensation in a prominent place at the worksite.

(5) A statement of the rates that would be paid by the Federal agency to the various classes of service employees if section 5341 or section 5332 of title 5 were applicable to them. The Secretary shall give due consideration to such rates in making the wage and fringe benefit determinations specified in this section.

(b)(1) No contractor who enters into any contract with the Federal Government the principal purpose of which is to furnish services through the use of service employees and no subcontractor thereunder shall pay any of his employees engaged in performing work on such contracts less than the minimum wage specified under section 206(a)(1) of title 29.

(2) The provisions of sections 352 to 354 of this title shall be applicable to violations of this subsection.

(Pub. L. 89–286, §2, Oct. 22, 1965, 79 Stat. 1034; Pub. L. 92–473, §§1, 2, Oct. 9, 1972, 86 Stat. 789; Pub. L. 94–489, §§1, 2, Oct. 13, 1976, 90 Stat. 2358.)

AMENDMENTS

1976—Subsec. (a). Pub. L. 94–489, §1(a), struck out ''as defined herein'' after ''use of service employees''.

Subsec. (a)(5). Pub. L. 94–489, §2, inserted ''or section 5332'' after ''section 5341''.

Subsec. (b)(1). Pub. L. 94–489, §1(b), struck out ''as defined herein'' after ''use of service employees''.

1972—Subsec. (a)(1). Pub. L. 92–473, §1(a), provided for minimum monetary wages to be paid service employees where collective-bargaining agreement covers any such service employees in accordance with the rates for such employees provided for in such agreement, including prospective wage increases provided for in such agreement as a result of arm's-length negotiations.

Subsec. (a)(2). Pub. L. 92–473, §1(b), provided for fringe benefits to be furnished service employees where collective-bargaining agreement covers any such service employees, to be provided for in such agreement, including prospective fringe increases provided for in such agreement as a result of arm's-length negotiations.

Subsec. (a)(5). Pub. L. 92–473, §2, added par. (5).

EFFECTIVE DATE

Section 9 of Pub. L. 89–286 provided that: ''This Act [enacting this chapter] shall apply to all contracts entered into pursuant to negotiations concluded or invitations for bids issued on or after ninety days from the date of enactment of this Act [Oct. 22, 1965].''

SHORT TITLE

Section 1 of Pub. L. 89–286 provided that: ''This Act [enacting this chapter] may be cited as the 'Service Contract Act of 1965'.''

EX. ORD. NO. 13495. NONDISPLACEMENT OF QUALIFIED WORKERS UNDER SERVICE CONTRACTS

Ex. Ord. No. 13495, Jan. 30, 2009, 74 F.R. 6103, provided:

When a service contract expires, and a follow-on contract is awarded for the same service, at the same location, the successor contractor or its subcontractors often hires the majority of the predecessor's employees. On some occasions, however, a successor contractor or its subcontractors hires a new work force, thus displacing the predecessor's employees.

The Federal Government's procurement interests in economy and efficiency are served when the successor contractor hires the predecessor's employees. A carryover work force reduces disruption to the delivery of services during the period of transition between contractors and provides the Federal Government the benefits of an experienced and trained work force that is familiar with the Federal Government's personnel, facilities, and requirements.

Therefore, by the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 101 *et seq.*, and in order to promote economy and efficiency in Federal Government procurement, it is hereby ordered as follows:

SECTION 1. *Policy*. It is the policy of the Federal Government that service contracts and solicitations for such contracts shall include a clause that requires the

contractor, and its subcontractors, under a contract that succeeds a contract for performance of the same or similar services at the same location, to offer those employees (other than managerial and supervisory employees) employed under the predecessor contract whose employment will be terminated as a result of the award of the successor contract, a right of first refusal of employment under the contract in positions for which they are qualified. There shall be no employment openings under the contract until such right of first refusal has been provided. Nothing in this order shall be construed to permit a contractor or subcontractor to fail to comply with any provision of any other Executive Order or law of the United States.

SEC. 2. *Definitions*.

(a) ''Service contract'' or ''contract'' means any contract or subcontract for services entered into by the Federal Government or its contractors that is covered by the Service Contract Act of 1965, as amended, 41 U.S.C. 351 *et seq*., and its implementing regulations.

(b) ''Employee'' means a service employee as defined in the Service Contract Act of 1965, 41 U.S.C. 357(b).

SEC. 3. *Exclusions*. This order shall not apply to:

(a) contracts or subcontracts under the simplified acquisition threshold as defined in 41 U.S.C. 403;

(b) contracts or subcontracts awarded pursuant to the Javits-Wagner-O'Day Act, 41 U.S.C. 46–48c;

(c) guard, elevator operator, messenger, or custodial services provided to the Federal Government under contracts or subcontracts with sheltered workshops employing the severely handicapped as described in section 505 of the Treasury, Postal Services [sic] and General Government Appropriations Act, 1995, Public Law 103–329;

(d) agreements for vending facilities entered into pursuant to the preference regulations issued under the Randolph-Sheppard Act, 20 U.S.C. 107; or

(e) employees who were hired to work under a Federal service contract and one or more nonfederal service contracts as part of a single job, provided that the employees were not deployed in a manner that was designed to avoid the purposes of this order.

SEC. 4. *Authority to Exempt Contracts*. If the head of a contracting department or agency finds that the application of any of the requirements of this order would not serve the purposes of this order or would impair the ability of the Federal Government to procure services on an economical and efficient basis, the head of such department or agency may exempt its department or agency from the requirements of any or all of the provisions of this order with respect to a particular contract, subcontract, or purchase order or any class of contracts, subcontracts, or purchase orders.

SEC. 5. *Contract Clause*. The following contract clause shall be included in solicitations for and service contracts that succeed contracts for performance of the same or similar work at the same location:

''NONDISPLACEMENT OF QUALIFIED WORKERS

''(a) Consistent with the efficient performance of this contract, the contractor and its subcontractors shall, except as otherwise provided herein, in good faith offer those employees (other than managerial and supervisory employees) employed under the predecessor contract whose employment will be terminated as a result of award of this contract or the expiration of the contract under which the employees were hired, a right of first refusal of employment under this contract in positions for which employees are qualified. The contractor and its subcontractors shall determine the number of employees necessary for efficient performance of this contract and may elect to employ fewer employees than the predecessor contractor employed in connection with performance of the work. Except as provided in paragraph (b) there shall be no employment opening under this contract, and the contractor and any subcontractors shall not offer employment under this contract, to any person prior to having complied fully with this obligation. The contractor and its subcontractors shall make an express offer of employment to each employee as provided herein and shall state the time within which the employee must accept such offer, but in no case shall the period within which the employee must accept the offer of employment be less than 10 days.

''(b) Notwithstanding the obligation under paragraph (a) above, the contractor and any subcontractors (1) may employ under this contract any employee who has worked for the contractor or subcontractor for at least 3 months immediately preceding the commencement of this contract and who would otherwise face lay-off or discharge, (2) are not required to offer a right of first refusal to any employee(s) of the predecessor contractor who are not service employees within the meaning of the Service Contract Act of 1965, as amended, 41 U.S.C. 357(b), and (3) are not required to offer a right of first refusal to any employee(s) of the predecessor contractor whom the contractor or any of its subcontractors reasonably believes, based on the particular employee's past performance, has failed to perform suitably on the job.

''(c) In accordance with Federal Acquisition Regulation 52.222–41(n), the contractor shall, not less than 10 days before completion of this contract, furnish the Contracting Officer a certified list of the names of all service employees working under this contract and its subcontracts during the last month of contract performance. The list shall also contain anniversary dates of employment of each service employee under this contract and its predecessor contracts either with the current or predecessor contractors or their subcontractors. The Contracting Officer will provide the list to the successor contractor, and the list shall be provided on request to employees or their representatives.

''(d) If it is determined, pursuant to regulations issued by the Secretary of Labor (Secretary), that the contractor or its subcontractors are not in compliance with the requirements of this clause or any regulation or order of the Secretary, appropriate sanctions may be imposed and remedies invoked against the contractor or its subcontractors, as provided in Executive Order (No.) _____ [13495], the regulations, and relevant orders of the Secretary, or as otherwise provided by law.

''(e) In every subcontract entered into in order to perform services under this contract, the contractor will include provisions that ensure that each subcontractor will honor the requirements of paragraphs (a) through (b) with respect to the employees of a predecessor subcontractor or subcontractors working under this contract, as well as of a predecessor contractor and its subcontractors. The subcontract shall also include provisions to ensure that the subcontractor will provide the contractor with the information about the employees of the subcontractor needed by the contractor to comply with paragraph 5(c), above. The contractor will take such action with respect to any such subcontract as may be directed by the Secretary as a means of enforcing such provisions, including the imposition of sanctions for non-compliance: provided, however, that if the contractor, as a result of such direction, becomes involved in litigation with a subcontractor, or is threatened with such involvement, the contractor may request that the United States enter into such litigation to protect the interests of the United States.''

SEC. 6. *Enforcement*. (a) The Secretary of Labor (Secretary) is responsible for investigating and obtaining compliance with this order. In such proceedings, the Secretary shall have the authority to issue final orders prescribing appropriate sanctions and remedies, including, but not limited to, orders requiring employment and payment of wages lost. The Secretary also may provide that where a contractor or subcontractor has failed to comply with any order of the Secretary or has committed willful violations of this order or the regulations issued pursuant thereto, the contractor or subcontractor, and its responsible officers, and any firm in which the contractor or subcontractor has a substantial interest, shall be ineligible to be awarded any contract of the United States for a period of up to 3 years. Neither an order for debarment of any contractor or subcontractor from further Government contracts

under this section nor the inclusion of a contractor or subcontractor on a published list of noncomplying contractors shall be carried out without affording the contractor or subcontractor an opportunity for a hearing.

(b) This order creates no rights under the Contract Disputes Act [of 1978], and disputes regarding the requirement of the contract clause prescribed by section 5 of this order, to the extent permitted by law, shall be disposed of only as provided by the Secretary in regulations issued under this order. To the extent practicable, such regulations shall favor the resolution of disputes by efficient and informal alternative dispute resolution methods. The Secretary shall, in consultation with the Federal Acquisition Regulatory Council, issue regulations, within 180 days of the date of this order, to the extent permitted by law, to implement the requirements of this order. The Federal Acquisition Regulatory Council shall issue, within 180 days of the date of this order, to the extent permitted by law, regulations in the Federal Acquisition Regulation to provide for inclusion of the contract clause in Federal solicitations and contracts subject to this order.

SEC. 7. *Revocation*. Executive Order 13204 of February 17, 2001, is revoked.

SEC. 8. *Severability*. If any provision of this order, or the application of such provision or amendment to any person or circumstance, is held to be invalid, the remainder of this order and the application of the provisions of such to any person or circumstances shall not be affected thereby.

SEC. 9. *General Provisions*. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) authority granted by law to an executive department, agency, or the head thereof; or

(ii) functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order 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. This order is not intended, however, to preclude judicial review of final decisions by the Secretary in accordance with the Administrative Procedure Act, 5 U.S.C. 701 *et seq*.

SEC. 10. *Effective Date*. This order shall become effective immediately and shall apply to solicitations issued on or after the effective date for the action taken by the Federal Acquisition Regulatory Council under section 6(b) of this order.

BARACK OBAMA.

§ 352. Violations

(a) Liability of responsible party; withholding payments due on contract; payment of underpaid employees from withheld payments

Any violation of any of the contract stipulations required by section 351(a)(1) or (2) or of section 351(b) of this title shall render the party responsible therefor liable for a sum equal to the amount of any deductions, rebates, refunds, or underpayment of compensation due to any employee engaged in the performance of such contract. So much of the accrued payment due on the contract or any other contract between the same contractor and the Federal Government may be withheld as is necessary to pay such employees. Such withheld sums shall be held in a deposit fund. On order of the Secretary, any compensation which the head of the Federal agency or the Secretary has found to be due pursuant to this chapter shall be paid directly to the underpaid employees from any accrued payments withheld under this chapter.

(b) Enforcement of section

In accordance with regulations prescribed pursuant to section 353 of this title, the Federal agency head or the Secretary is hereby authorized to carry out the provisions of this section.

(c) Cancellation of contract; contracts for completion of original contract; liability of original contractor for additional cost

In addition, when a violation is found of any contract stipulation, the contract is subject upon written notice to cancellation by the contracting agency. Whereupon, the United States may enter into other contracts or arrangements for the completion of the original contract, charging any additional cost to the original contractor.

(Pub. L. 89–286, § 3, Oct. 22, 1965, 79 Stat. 1035.)

§ 353. Law governing authority of Secretary

(a) Enforcement of chapter

Sections 38 and 39 of this title shall govern the Secretary's authority to enforce this chapter, make rules, regulations, issue orders, hold hearings, and make decisions based upon findings of fact, and take other appropriate action hereunder.

(b) Limitations and regulations allowing variations, tolerances, and exemptions

The Secretary may provide such reasonable limitations and may make such rules and regulations allowing reasonable variation, tolerances, and exemptions to and from any or all provisions of this chapter (other than section 358 of this title), but only in special circumstances where he determines that such limitation, variation, tolerance, or exemption is necessary and proper in the public interest or to avoid the serious impairment of government business, and is in accord with the remedial purpose of this chapter to protect prevailing labor standards.

(c) Predecessor contracts; employees' wages and fringe benefits

No contractor or subcontractor under a contract, which succeeds a contract subject to this chapter and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm's-length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract: *Provided*, That in any of the foregoing circumstances such obligations shall not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality.

(d) Duration of contract

Subject to limitations in annual appropriation Acts but notwithstanding any other provision of law, contracts to which this chapter applies

may, if authorized by the Secretary, be for any term of years not exceeding five, if each such contract provides for the periodic adjustment of wages and fringe benefits pursuant to future determinations, issued in the manner prescribed in section 351 of this title no less often than once every two years during the term of the contract, covering the various classes of service employees.

(Pub. L. 89–286, § 4, Oct. 22, 1965, 79 Stat. 1035; Pub. L. 92–473, § 3, Oct. 9, 1972, 86 Stat. 789.)

AMENDMENTS

1972—Subsec. (b). Pub. L. 92–473, § 3(a), excluded section 358 of this title from being subject to Secretary's authority to provide limitations and to make regulations respecting application of provisions of this chapter, substituted ''but only in special circumstances where he determines that such limitation, variation, tolerance, or exemption is necessary and proper'' for ''as he may find necessary and proper'', and authorized administrative action in accord with the remedial purpose of this chapter to protect prevailing labor standards.

Subsecs. (c), (d). Pub. L. 92–473, § 3(b), added subsecs. (c) and (d).

§ 354. List of violators; prohibition of contract award to firms appearing on list; actions to recover underpayments; payment of sums recovered

(a) The Comptroller General is directed to distribute a list to all agencies of the Government giving the names of persons or firms that the Federal agencies or the Secretary have found to have violated this chapter. Unless the Secretary otherwise recommends because of unusual circumstances, no contract of the United States shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership, or association in which such persons or firms have a substantial interest until three years have elapsed from the date of publication of the list containing the name of such persons or firms. Where the Secretary does not otherwise recommend because of unusual circumstances, he shall, not later than ninety days after a hearing examiner has made a finding of a violation of this chapter, forward to the Comptroller General the name of the individual or firm found to have violated the provisions of this chapter.

(b) If the accrued payments withheld under the terms of the contract are insufficient to reimburse all service employees with respect to whom there has been a failure to pay the compensation required pursuant to this chapter, the United States may bring action against the contractor, subcontractor, or any sureties in any court of competent jurisdiction to recover the remaining amount of underpayments. Any sums thus recovered by the United States shall be held in the deposit fund and shall be paid, on order of the Secretary, directly to the underpaid employee or employees. Any sum not paid to an employee because of inability to do so within three years shall be covered into the Treasury of the United States as miscellaneous receipts.

(Pub. L. 89–286, § 5, Oct. 22, 1965, 79 Stat. 1035; Pub. L. 92–473, § 4, Oct. 9, 1972, 86 Stat. 790.)

AMENDMENTS

1972—Subsec. (a). Pub. L. 92–473 authorized award of contracts to violators because of unusual circumstances and required the Secretary to forward names of violators to Comptroller General within ninety days of hearing examiner's finding of a violation where the Secretary does not recommend awards because of unusual circumstances.

§ 355. Exclusion of fringe benefit payments in determining overtime pay

In determining any overtime pay to which such service employees are entitled under any Federal law, the regular or basic hourly rate of pay of such an employee shall not include any fringe benefit payments computed hereunder which are excluded from the regular rate under the Fair Labor Standards Act [29 U.S.C. 201 et seq.] by provisions of section 7(d) thereof [29 U.S.C. 207(d)].

(Pub. L. 89–286, § 6, Oct. 22, 1965, 79 Stat. 1035.)

REFERENCES IN TEXT

The Fair Labor Standards Act, referred to in text, is act June 25, 1938, ch. 676, 52 Stat. 1060, as amended, known as the Fair Labor Standards Act of 1938, which is classified generally to chapter 8 (§ 201 et seq.) of Title 29, Labor. For complete classification of this Act to the Code, see section 201 of Title 29 and Tables.

§ 356. Exemptions

This chapter shall not apply to—

(1) any contract of the United States or District of Columbia for construction, alteration and/or repair, including painting and decorating of public buildings or public works;

(2) any work required to be done in accordance with the provisions of the Walsh-Healey Public Contracts Act [41 U.S.C. 35 et seq.];

(3) any contract for the carriage of freight or personnel by vessel, airplane, bus, truck, express, railway line or oil or gas pipeline where published tariff rates are in effect;

(4) any contract for the furnishing of services by radio, telephone, telegraph, or cable companies, subject to the Communications Act of 1934 [47 U.S.C. 151 et seq.];

(5) any contract for public utility services, including electric light and power, water, steam, and gas;

(6) any employment contract providing for direct services to a Federal agency by an individual or individuals; and

(7) any contract with the United States Postal Service, the principal purpose of which is the operation of postal contract stations.

(Pub. L. 89–286, § 7, Oct. 22, 1965, 79 Stat. 1035; Pub. L. 91–375, §§ 4(a), 6(*o*), Aug. 12, 1970, 84 Stat. 773, 783.)

REFERENCES IN TEXT

The Walsh-Healey Public Contracts Act, referred to in par. (2), probably means act June 30, 1936, ch. 881, 49 Stat. 2036, as amended, known as the Walsh-Healey Act, which is classified generally to sections 35 to 45 of this title. For complete classification of this Act to the Code, see Short Title note under section 35 of this title and Tables. See also section 262 of Title 29, Labor.

The Communications Act of 1934, as amended, referred to in par. (4), is act June 19, 1934, ch. 652, 48 Stat. 1064, as amended, which is classified principally to chapter 5 (§ 151 et seq.) of Title 47, Telegraphs, Tele-

phones, and Radiotelegraphs. For complete classification of this Act to the Code, see section 609 of Title 47 and Tables.

CHANGE OF NAME

In par. (7), ''United States Postal Service'' substituted for ''Post Office Department'' pursuant to Pub. L. 91–375, §§4(a), 6(*o*), Aug. 12, 1970, 84 Stat. 773, 783, which are set out as notes preceding section 101 of Title 39, Postal Service, and under section 201 of Title 39, respectively, which abolished Post Office Department, transferred its functions to United States Postal Service, and provided that references in other laws to Post Office Department shall be considered a reference to United States Postal Service.

§ 357. Definitions

For the purposes of this chapter—

(a) ''Secretary'' means Secretary of Labor.

(b) The term ''service employee'' means any person engaged in the performance of a contract entered into by the United States and not exempted under section 356 of this title, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States (other than any person employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in part 541 of title 29, Code of Federal Regulations, as of July 30, 1976, and any subsequent revision of those regulations); and shall include all such persons regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons.

(c) The term ''compensation'' means any of the payments or fringe benefits described in section 351 of this title.

(d) The term ''United States'' when used in a geographical sense shall include any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf lands as defined in the Outer Continental Shelf Lands Act, American Samoa, Guam, Wake Island, Eniwetok Atoll, Kwajalein Atoll, Johnston Island, and Canton Island, but shall not include any other territory under the jurisdiction of the United States or any United States base or possession within a foreign country.

(Pub. L. 89–286, §8, Oct. 22, 1965, 79 Stat. 1036; Pub. L. 93–57, §1, July 6, 1973, 87 Stat. 140; Pub. L. 94–489, §3, Oct. 13, 1976, 90 Stat. 2358.)

REFERENCES IN TEXT

The Outer Continental Shelf Lands Act, referred to in subsec. (d), is act Aug. 7, 1953, ch. 345, 67 Stat. 462, as amended, which is classified generally to subchapter III (§1331 et seq.) of chapter 29 of Title 43, Public Lands. For complete classification of this Act to the Code, see Short Title note set out under section 1331 of Title 43 and Tables.

AMENDMENTS

1976—Subsec. (b). Pub. L. 94–489 substituted provision defining service employees to include all employees, but excluding bona fide executive, administrative, and professional employees, for provision defining service employees as guards, watchmen, any person engaged in a recognized trade or craft, or in unskilled, semiskilled, or skilled manual labor occupations; and any other employee including a foreman or supervisor in a position having trade, craft, or laboring experience as the paramount requirement.

1973—Subsec. (d). Pub. L. 93–57 defined ''United States'' to include Canton Island.

EFFECTIVE DATE OF 1973 AMENDMENT

Section 2 of Pub. L. 93–57 provided that: ''The amendment made hereby [amending this section] shall be effective with respect to all contracts entered into at any time after the date of enactment [July 6, 1973].''

§ 358. Wage and fringe benefit determinations of Secretary

It is the intent of the Congress that determinations of minimum monetary wages and fringe benefits for the various classes of service employees under the provisions of paragraphs (1) and (2) of section 351[1] of this title should be made with respect to all contracts subject to this chapter, as soon as it is administratively feasible to do so. In any event, the Secretary shall make such determinations with respect to at least the following contracts subject to this chapter which are entered into during the applicable fiscal year:

(1) For the fiscal year ending June 30, 1973, all contracts under which more than twenty-five service employees are to be employed.

(2) For the fiscal year ending June 30, 1974, all contracts, under which more than twenty service employees are to be employed.

(3) For the fiscal year ending June 30, 1975, all contracts under which more than fifteen service employees are to be employed.

(4) For the fiscal year ending June 30, 1976, all contracts under which more than ten service employees are to be employed.

(5) On or after July 1, 1976, all contracts under which more than five service employees are to be employed.

(Pub. L. 89–286, §10, as added Pub. L. 92–473, §5, Oct. 9, 1972, 86 Stat. 790; amended Pub. L. 94–273, §29, Apr. 21, 1976, 90 Stat. 380.)

AMENDMENTS

1976—Par. (5). Pub. L. 94–273 substituted ''On or after July 1, 1976'' for ''For the fiscal year ending June 30, 1977, and for each fiscal year thereafter''.

CHAPTER 7—OFFICE OF FEDERAL PROCUREMENT POLICY

Sec.
401, 402. Repealed.
403. Definitions.
404. Establishment of Office of Federal Procurement Policy; appointment of Administrator.
405. Authority and functions of the Administrator.
405a. Uniform Federal procurement regulations and procedures.
405b. Conflict of interest standards for individuals providing consulting services.
405c. Ethics safeguards related to contractor conflicts of interest.
406. Administrative powers.
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409. Repealed.
410. Authorization of appropriations.
411. Delegation of authority by Administrator.
412. Comptroller General's access to information from Administrator; rule making procedure.

[1] So in original. Probably should be section ''351(a)''.

Sec.
413. Tests of innovative procurement methods and procedures.
414. Chief Acquisition Officers and senior procurement executives.
414a. Personnel evaluation.
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415. Repealed.
416. Procurement notice.
417. Record requirements.
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417b. Database for Federal agency contract and grant officers and suspension and debarment officials.
418. Advocates for competition.
418a. Rights in technical data.
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419. Contracting functions performed by Federal personnel.
420. Repealed.
421. Federal Acquisition Regulatory Council.
422. Cost Accounting Standards Board.
423. Restrictions on disclosing and obtaining contractor bid or proposal information or source selection information.
424. Repealed.
425. Contract clauses and certifications.
426. Use of electronic commerce in Federal procurement.
426a. Repealed.
427. Simplified acquisition procedures.
428. Procedures applicable to purchases below micro-purchase threshold.
428a. Special emergency procurement authority.
429. List of laws inapplicable to contracts not greater than simplified acquisition threshold in Federal Acquisition Regulation.
430. List of laws inapplicable to procurements of commercial items in Federal Acquisition Regulation.
431. Commercially available off-the-shelf item acquisitions: lists of inapplicable laws in Federal Acquisition Regulation.
431a. Inflation adjustment of acquisition-related dollar thresholds.
432. Value engineering.
433. Acquisition workforce.
433a. Federal acquisition workforce improvements.
434. Modular contracting for information technology.
435. Levels of compensation of certain contractor personnel not allowable as costs under certain contracts.
436. Protection of constitutional rights of contractors.
437. Incentives for efficient performance of services contracts.
438. Civilian Board of Contract Appeals.
439. Public-private competition required before conversion to contractor performance.
440. Contingency Contracting Corps.

§§ 401, 402. Repealed. Pub. L. 104–106, div. D, title XLIII, § 4305(a)(2), Feb. 10, 1996, 110 Stat. 665

Section 401, Pub. L. 93–400, § 2, Aug. 30, 1974, 88 Stat. 796; Pub. L. 96–83, § 2, Oct. 10, 1979, 93 Stat. 648; Pub. L. 98–191, § 3, Dec. 1, 1983, 97 Stat. 1325; Pub. L. 100–679, § 2(a), Nov. 17, 1988, 102 Stat. 4055; Pub. L. 103–355, title I, § 1091(a), Oct. 13, 1994, 108 Stat. 3272, stated policy of United States Government relating to procurement of property and services.

Section 402, Pub. L. 93–400, § 3, Aug. 30, 1974, 88 Stat. 796; Pub. L. 100–679, § 2(b), Nov. 17, 1988, 102 Stat. 4055, stated findings of Congress and purpose of this chapter.

Effective Date of Repeal

For effective date and applicability of repeal, see section 4401 of Pub. L. 104–106, set out as an Effective Date of 1996 Amendment note under section 251 of this title.

Effective Date of 1979 Amendment

Section 12 of Pub. L. 96–83 provided that: ''Except to the extent otherwise provided therein, the amendments made by this Act [see Short Title of 1979 Amendment note below] shall take effect on October 1, 1979.''

Short Title of 2003 Amendment

Pub. L. 108–136, div. A, title XIV, § 1401, Nov. 24, 2003, 117 Stat. 1663, provided that: ''This title [enacting sections 414b, 428a, and 437 of this title, amending sections 403, 414, 433, and 436 of this title, section 2855 of Title 10, Armed Forces, and section 1115 of Title 31, Money and Finance, enacting provisions set out as notes under sections 253, 253a, 405, 428a, and 433 of this title and section 1103 of Title 40, Public Buildings, Property, and Works, amending provisions set out as notes under section 264 of this title, section 2304 of Title 10, and section 501 of Title 31, and repealing provisions set out as a note under section 2302 of Title 10] may be cited as the 'Services Acquisition Reform Act of 2003'.''

Short Title of 1988 Amendment

Section 1 of Pub. L. 100–679 provided that: ''This Act [enacting sections 421 to 424 of this title, amending this section, sections 402, 403, 405, 410, and 420 of this title, sections 5312 to 5315, 8331, 8401, 8701, and 8901 of Title 5, Government Organization and Employees, and section 541 of former Title 40, Public Buildings, Property, and Works, repealing section 2168 of Title 50, Appendix, War and National Defense, and enacting provisions set out as notes under sections 405 and 423 of this title and section 5312 of Title 5] may be cited as the 'Office of Federal Procurement Policy Act Amendments of 1988'.''

Short Title of 1983 Amendment

Section 1 of Pub. L. 98–191 provided: ''That this Act [enacting sections 413 to 415 of this title, amending this section, sections 5, 6a–1, 252, 403, 405, 407, 409, 410, and 411 of this title, section 831h of Title 16, Conservation, and sections 474, 481, and 487 of former Title 40, Public Buildings, Property, and Works] may be cited as the 'Office of Federal Procurement Policy Act Amendments of 1983'.''

Short Title of 1979 Amendment

Section 1(a) of Pub. L. 96–83 provided that: ''This Act [amending this section, sections 403, 405, 407, and 409 to 412 of this title, and sections 474, 481, and 487 of former Title 40, Public Buildings, Property and Works, and enacting provisions set out as notes under this section and section 405a of this title] may be cited as the 'Office of Federal Procurement Policy Act Amendments of 1979'.''

Short Title

Section 1(a) of Pub. L. 93–400, as amended by Pub. L. 103–355, title X, § 10005(a)(1), Oct. 13, 1994, 108 Stat. 3406, provided that: ''This Act [enacting this chapter and amending section 5315 of Title 5, Government Organization and Employees, and sections 474, 481, and 487 of former Title 40, Public Buildings, Property, and Works] may be cited as the 'Office of Federal Procurement Policy Act'.''

Stylistic Consistency

Section 10005(b)(1) of Pub. L. 103–355 provided that: ''The Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.) is amended so that the section designation and section heading of each section of such Act is in the same form and typeface as the section designation and heading of this section [108 Stat. 3406].''

Requirements for Use of Appropriations by Executive Agencies for Services by Contract

Pub. L. 102–394, title V, § 502, Oct. 6, 1992, 106 Stat. 1825, provided that: ''No part of any appropriation contained in this Act or subsequent Departments of Labor, Health and Human Services, and Education, and Relat-

ed Agencies Appropriations Acts shall be expended by an executive agency, as referred to in the Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.), pursuant to any obligation for services by contract, unless such executive agency has awarded and entered into such contract in full compliance with such Act and regulations promulgated thereunder.''

Similar provisions were contained in the following prior appropriation acts:

Pub. L. 102–170, title V, § 502, Nov. 26, 1991, 105 Stat. 1140.

Pub. L. 101–517, title V, § 502, Nov. 5, 1990, 104 Stat. 2221.

Pub. L. 101–166, title V, § 502, Nov. 21, 1989, 103 Stat. 1189.

Pub. L. 100–202, § 101(h) [title V, § 502], Dec. 22, 1987, 101 Stat. 1329–256, 1329–287.

Pub. L. 99–500, § 101(i) [H.R. 5233, title V, § 502], Oct. 18, 1986, 100 Stat. 1783–287, and Pub. L. 99–591, § 101(i) [H.R. 5233, title V, § 502], Oct. 30, 1986, 100 Stat. 3341–287.

Pub. L. 99–178, title V, § 502, Dec. 12, 1985, 99 Stat. 1132.

Pub. L. 98–619, title V, § 502, Nov. 8, 1984, 98 Stat. 3332.

Pub. L. 98–139, title V, § 502, Oct. 31, 1983, 97 Stat. 899.

Pub. L. 97–377, title I, § 101(e)(1) [title V, § 502], Dec. 21, 1982, 96 Stat. 1878, 1904.

EX. ORD. NO. 12073. FEDERAL PROCUREMENT IN LABOR SURPLUS AREAS

Ex. Ord. No. 12073, Aug. 16, 1978, 43 F.R. 36873, provided:

By the authority vested in me as President by the Constitution of the United States of America, and in order to strengthen the economic base of our Nation, it is hereby ordered as follows:

1–1. PROCUREMENTS IN LABOR SURPLUS AREAS

1–101. Executive agencies shall emphasize procurement set-asides in labor surplus areas in order to strengthen our Nation's economy.

1–102. Labor surplus area procurements shall be consistent with this Order and, to the extent funds are available, the priorities of Section 15 of the Small Business Act, as amended by Public Law 95–89 (15 U.S.C. 644).

1–2. ADMINISTRATOR OF GENERAL SERVICES

1–201. The Administrator shall coordinate with and advise State and local officials with regard to Federal efforts to encourage procurements in labor surplus areas with the aim of fostering economic development in labor surplus areas.

1–202. The Administrator shall establish specific labor surplus area procurement targets for Executive agencies in consultation with the heads of those agencies.

1–203. In cooperation with the heads of Executive agencies, the Administrator shall encourage the use of set-asides or other appropriate methods for meeting procurement targets in labor surplus areas.

1–204. The Administrator shall report every six months to the President on the progress of the agencies in achieving the procurement targets.

1–3. AGENCY RESPONSIBILITIES

1–301. The Secretary of Labor shall classify and designate labor markets which are labor surplus areas. The Secretary shall provide labor market data to the heads of agencies and State and local officials in order to promote the development of business opportunities in labor surplus areas.

1–302. The heads of Executive agencies shall cooperate with the Administrator in carrying out his responsibilities for labor surplus area programs and shall provide the information necessary for setting procurement targets and recording achievement. They shall keep the Administrator informed of plans and programs which affect labor surplus procurements, with particular attention to opportunities for minority firms.

1–303. In accord with Section 6 of the Office of Federal Procurement Policy Act (41 U.S.C. 405), the Administrator for Federal Procurement Policy shall be responsible for the overall direction and oversight of the policies affecting procurement programs for labor surplus areas.

JIMMY CARTER.

EXECUTIVE ORDER NO. 12092

Ex. Ord. No. 12092, Nov. 1, 1978, 43 F.R. 51375, as amended by Ex. Ord. No. 12161, Sept. 28, 1979, 44 F.R. 56663, which related to the prohibition against inflationary procurement practices, was revoked by Ex. Ord. No. 12288, Jan. 29, 1981, 46 F.R. 10135.

EXECUTIVE ORDER NO. 12352

Ex. Ord. No. 12352, Mar. 17, 1982, 47 F.R. 12125, which related to Federal procurement reform to support mission accomplishment more effectively, was revoked by Ex. Ord. No. 12931, § 4, Oct. 13, 1994, 59 F.R. 52388, set out below.

EXECUTIVE ORDER NO. 12818

Ex. Ord. No. 12818, Oct. 23, 1992, 57 F.R. 48713, which prohibited executive agencies from requiring labor agreements on Federal or federally funded construction projects, was revoked by Ex. Ord. No. 12836, § 1, Feb. 1, 1993, 58 F.R. 7045, which was itself revoked as it relates to notification of employee rights concerning payment of union dues or fees by Ex. Ord. No. 13201, § 11, Feb. 17, 2001, 66 F.R. 11221, which was itself revoked by Ex. Ord. No. 13496, § 13, Jan. 30, 2009, 74 F.R. 6110, set out as a note under section 254 of this title, and as it relates to project agreements by Ex. Ord. No. 13202, § 8, Feb. 17, 2001, 66 F.R. 11226, which was itself revoked by Ex. Ord. No. 13502, § 8, Feb. 6, 2009, 74 F.R. 6986, set out as a note under section 251 of this title.

EX. ORD. NO. 12931. FEDERAL PROCUREMENT REFORM

Ex. Ord. No. 12931, Oct. 13, 1994, 59 F.R. 52387, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to ensure effective and efficient spending of public funds through fundamental reforms in Government procurement, it is hereby ordered as follows:

SECTION 1. To make procurement more effective in support of mission accomplishment and consistent with recommendations of the National Performance Review, heads of executive agencies engaged in the procurement of supplies and services shall:

(a) Review agency procurement rules, reporting requirements, contractual requirements, certification procedures, and other administrative procedures over and above those required by statute, and, where practicable, replace them with guiding principles that encourage and reward innovation;

(b) Review existing and planned agency programs to assure that such programs meet agency mission needs;

(c) Ensure that procurement organizations focus on measurable results and on increased attention to understanding and meeting customer needs;

(d) Increase the use of commercially available items where practicable, place more emphasis on past contractor performance, and promote best value rather than simply low cost in selecting sources for supplies and services;

(e) Ensure that simplified acquisition procedures are used, to the maximum extent practicable, for procurements under the simplified acquisition threshold in order to reduce administrative burdens and more effectively support the accomplishment of agency missions;

(f) Expand the use of the Government purchase card by the agency and take maximum advantage of the micro-purchase authority provided in the Federal Acquisition Streamlining Act of 1994 [Pub. L. 103–355, see Short Title of 1994 Amendment note set out under section 251 of this title] by delegating the authority, to the maximum extent practicable, to the offices that will be using the supplies or services to be purchased;

(g) Establish clear lines of contracting authority and accountability;

(h) Establish career education programs for procurement professionals, including requirements for successful completion of educational requirements or mandatory training for entry level positions and for promotion to higher level positions, in order to ensure a highly qualified procurement work force;

(i) Designate a Procurement Executive with agency-wide responsibility to oversee development of procurement goals, guidelines, and innovation, measure and evaluate procurement office performance against stated goals, enhance career development of the procurement work force, and advise the agency heads whether goals are being achieved; and

(j) Review existing and planned information technology acquisitions and contracts to ensure that the agency receives the best value with regard to price and technology, and consider alternatives in cases where best value is not being obtained.

SEC. 2. The Director of the Office of Personnel Management, in consultation with the heads of executive agencies, shall ensure that personnel policies and classification standards meet the needs of executive agencies for a professional procurement work force.

SEC. 3. The Administrator of the Office of Federal Procurement Policy, after consultation with the Director of the Office of Management and Budget, shall work jointly with the heads of executive agencies to provide broad policy guidance and overall leadership necessary to achieve procurement reform, including, but not limited to:

(a) Coordinating Government-wide efforts;

(b) Assisting executive agencies in streamlining guidance for procurement processes;

(c) Identifying desirable Government-wide procurement system criteria; and

(d) Identifying major inconsistencies in law and policies relating to procurement that impose unnecessary burdens on the private sector and Federal procurement officials, and, following coordination with executive agencies, submitting necessary legislative initiatives to the Office of Management and Budget for the resolution of such inconsistencies.

SEC. 4. Executive Order No. 12352 is revoked.

WILLIAM J. CLINTON.

EXECUTIVE ORDER NO. 12969

Ex. Ord. No. 12969, Aug. 8, 1995, 60 F.R. 40989, which provided for Federal agencies to contract with companies that report in a public manner on toxic chemicals released to the environment, was revoked by Ex. Ord. No. 13148, § 901, Apr. 21, 2000, 65 F.R. 24604, formerly set out as a note under section 4321 of Title 42, The Public Health and Welfare.

STREAMLINING PROCUREMENT THROUGH ELECTRONIC COMMERCE

Memorandum of President of the United States, Oct. 28, 1993, 58 F.R. 58095, provided:

Memorandum for the Heads of Executive Departments and Agencies [and] the President's Management Council

The Federal Government spends $200 billion annually buying goods and services. Unfortunately, the red tape and burdensome paperwork of the current procurement system increases costs, produces unnecessary delays, and reduces Federal work force productivity. Moving to an electronic commerce system to simplify and streamline the purchasing process will promote customer service and cost-effectiveness. The electronic exchange of acquisition information between the private sector and the Federal Government also will increase competition by improving access to Federal contracting opportunities for the more than 300,000 vendors currently doing business with the Government, particularly small businesses, as well as many other vendors who find access to bidding opportunities difficult under the current system. For these reasons, I am committed to fundamentally altering and improving the way the Federal Government buys goods and services by ensuring that electronic commerce is implemented for appropriate Federal purchases as quickly as possible.

1. OBJECTIVES.

The objectives of this electronic commerce initiative are to:

(a) exchange procurement information—such as solicitations, offers, contracts, purchase orders, invoices, payments, and other contractual documents—electronically between the private sector and the Federal Government to the maximum extent practical;

(b) provide businesses, including small, small disadvantaged, and women-owned businesses, with greater access to Federal procurement opportunities;

(c) ensure that potential suppliers are provided simplified access to the Federal Government's electronic commerce system;

(d) employ nationally and internationally recognized data formats that serve to broaden and ease the electronic interchange of data; and

(e) use agency and industry systems and networks to enable the Government and potential suppliers to exchange information and access Federal procurement data.

2. IMPLEMENTATION.

The President's Management Council, in coordination with the Office of Federal Procurement Policy of the Office of Management and Budget, and in consultation with appropriate Federal agencies with applicable technical and functional expertise, as necessary, shall provide overall leadership, management oversight, and policy direction to implement electronic commerce in the executive branch through the following actions:

(a) by March 1994, define the architecture for the Government-wide electronic commerce acquisition system and identify executive departments or agencies responsible for developing, implementing, operating, and maintaining the Federal electronic system;

(b) by September 1994, establish an initial electronic commerce capability to enable the Federal Government and private vendors to electronically exchange standardized requests for quotations, quotes, purchase orders, and notice of awards and begin Government-wide implementation;

(c) by July 1995, implement a full scale Federal electronic commerce system that expands initial capabilities to include electronic payments, document interchange, and supporting databases; and

(d) by January 1997, complete Government-wide implementation of electronic commerce for appropriate Federal purchases, to the maximum extent possible.

This implementation schedule should be accelerated where practicable.

The head of each executive department or agency shall:

(a) ensure that budgetary resources are available, within approved budget levels, for electronic commerce implementation in each respective department or agency;

(b) assist the President's Management Council in implementing the electronic commerce system as quickly as possible in accordance with the schedules established herein; and

(c) designate one or more senior level employees to assist the President's Management Council and serve as a point of contact for the development and implementation of the Federal electronic commerce system within each respective department or agency.

3. NO PRIVATE RIGHTS CREATED.

This directive is for the internal management of the executive branch and does not create any right or benefit, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

The Director of the Office of Management and Budget is authorized and directed to publish this memorandum in the Federal Register.

WILLIAM J. CLINTON.

§ 403. Definitions

As used in this chapter:

(1) The term ''executive agency'' means—

(A) an executive department specified in section 101 of title 5;

(B) a military department specified in section 102 of such title;

(C) an independent establishment as defined in section 104(1) of such title; and

(D) a wholly owned Government corporation fully subject to the provisions of chapter 91 of title 31.

(2) The term ''procurement'' includes all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout.

(3) The term ''procurement system'' means the integration of the procurement process, the professional development of procurement personnel, and the management structure for carrying out the procurement function.

(4) The term ''standards'' means the criteria for determining the effectiveness of the procurement system by measuring the performance of the various elements of such system.

(5) The term ''competitive procedures'' means procedures under which an agency enters into a contract pursuant to full and open competition.

(6) The term ''full and open competition'', when used with respect to a procurement, means that all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement.

(7) The term ''responsible source'' means a prospective contractor who—

(A) has adequate financial resources to perform the contract or the ability to obtain such resources;

(B) is able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and Government business commitments;

(C) has a satisfactory performance record;

(D) has a satisfactory record of integrity and business ethics;

(E) has the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain such organization, experience, controls, and skills;

(F) has the necessary production, construction, and technical equipment and facilities, or the ability to obtain such equipment and facilities; and

(G) is otherwise qualified and eligible to receive an award under applicable laws and regulations.

(8) The term ''technical data'' means recorded information (regardless of the form or method of the recording) of a scientific or technical nature (including computer software documentation) relating to supplies procured by an agency. Such term does not include computer software or financial, administrative, cost or pricing, or management data or other information incidental to contract administration.

(9)(A) The term ''major system'' means a combination of elements that will function together to produce the capabilities required to fulfill a mission need, which elements may include hardware, equipment, software or any combination thereof, but excludes construction or other improvements to real property; and

(B) a system shall be considered a major system if (i) the Department of Defense is responsible for the system and the total expenditures for research, development, test and evaluation for the system are estimated to be more than $75,000,000 (based on fiscal year 1980 constant dollars) or the eventual total expenditure for procurement of more than $300,000,000 (based on fiscal year 1980 constant dollars); (ii) a civilian agency is responsible for the system and total expenditures for the system are estimated to exceed $750,000 (based on fiscal year 1980 constant dollars) or the dollar threshold for a ''major system'' established by the agency pursuant to Office of Management and Budget (OMB) Circular A–109, entitled ''Major Systems Acquisitions'', whichever is greater; or (iii) the system is designated a ''major system'' by the head of the agency responsible for the system.

(10) The term ''item'', ''item of supply'', or ''supplies'' means any individual part, component, subassembly, assembly, or subsystem integral to a major system, and other property which may be replaced during the service life of the system, and includes spare parts and replenishment spare parts, but does not include packaging or labeling associated with shipment or identification of an ''item''.

(11) The term ''simplified acquisition threshold'' means $100,000.

(12) The term ''commercial item'' means any of the following:

(A) Any item, other than real property, that is of a type customarily used by the general public or by nongovernmental entities for purposes other than governmental purposes, and that—

(i) has been sold, leased, or licensed to the general public; or

(ii) has been offered for sale, lease, or license to the general public.

(B) Any item that evolved from an item described in subparagraph (A) through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Federal Government solicitation.

(C) Any item that, but for—

(i) modifications of a type customarily available in the commercial marketplace, or

(ii) minor modifications made to meet Federal Government requirements,

would satisfy the criteria in subparagraph (A) or (B).

(D) Any combination of items meeting the requirements of subparagraph (A), (B), (C), or (E) that are of a type customarily combined and sold in combination to the general public.

(E) Installation services, maintenance services, repair services, training services, and other services if—

(i) the services are procured for support of an item referred to in subparagraph (A), (B), (C), or (D), regardless of whether such services are provided by the same source or at the same time as the item; and

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

(F) Services offered and sold competitively, in substantial quantities, in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions.

(G) Any item, combination of items, or service referred to in subparagraphs (A) through (F) notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor.

(H) A nondevelopmental item, if the procuring agency determines, in accordance with conditions set forth in the Federal Acquisition Regulation, that the item was developed exclusively at private expense and has been sold in substantial quantities, on a competitive basis, to multiple State and local governments.

(13) The term ''nondevelopmental item'' means any of the following:

(A) Any commercial item.

(B) Any previously developed item of supply that is in use by a department or agency of the United States, a State or local government, or a foreign government with which the United States has a mutual defense cooperation agreement.

(C) Any item of supply described in subparagraph (A) or (B) that requires only minor modification or modification of the type customarily available in the commercial marketplace in order to meet the requirements of the procuring department or agency.

(D) Any item of supply currently being produced that does not meet the requirements of subparagraph (A), (B), or (C) solely because the item is not yet in use.

(14) The term ''component'' means any item supplied to the Federal Government as part of an end item or of another component.

(15) The term ''commercial component'' means any component that is a commercial item.

(16) The term ''acquisition''—

(A) means the process of acquiring, with appropriated funds, by contract for purchase or lease, property or services (including construction) that support the missions and goals of an executive agency, from the point at which the requirements of the executive agency are established in consultation with the chief acquisition officer of the executive agency; and

(B) includes—

(i) the process of acquiring property or services that are already in existence, or that must be created, developed, demonstrated, and evaluated;

(ii) the description of requirements to satisfy agency needs;

(iii) solicitation and selection of sources;

(iv) award of contracts;

(v) contract performance;

(vi) contract financing;

(vii) management and measurement of contract performance through final delivery and payment; and

(viii) technical and management functions directly related to the process of fulfilling agency requirements by contract.

(17) The term ''Federal Acquisition Regulatory Council'' means the Federal Acquisition Regulatory Council established under section 421 of this title.

(Pub. L. 93–400, § 4, Aug. 30, 1974, 88 Stat. 797; Pub. L. 96–83, § 3, Oct. 10, 1979, 93 Stat. 649; Pub. L. 98–191, § 4, Dec. 1, 1983, 97 Stat. 1326; Pub. L. 98–369, div. B, title VII, § 2731, July 18, 1984, 98 Stat. 1195; Pub. L. 98–577, title I, § 102, Oct. 30, 1984, 98 Stat. 3067; Pub. L. 100–679, § 3(c), Nov. 17, 1988, 102 Stat. 4056; Pub. L. 101–510, div. A, title VIII, § 806(a)(1), Nov. 5, 1990, 104 Stat. 1592; Pub. L. 103–355, title IV, § 4001, title VIII, § 8001, Oct. 13, 1994, 108 Stat. 3338, 3384; Pub. L. 104–106, div. D, title XLII, § 4204, Feb. 10, 1996, 110 Stat. 655; Pub. L. 106–65, div. A, title VIII, § 805, Oct. 5, 1999, 113 Stat. 705; Pub. L. 108–136, div. A, title XIV, §§ 1411, 1433, Nov. 24, 2003, 117 Stat. 1663, 1673; Pub. L. 108–375, div. A, title VIII, § 807(b), Oct. 28, 2004, 118 Stat. 2011.)

REFERENCES IN TEXT

This chapter, referred to in text, was in the original ''this Act'', meaning Pub. L. 93–400, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 401 of this title and Tables.

CODIFICATION

Section 2731 of Pub. L. 98–369 directed in part that this section be redesignated as section 4 of Pub. L. 93–400 to correct an inconsistency in the language of the amendment by Pub. L. 98–191, which amended this section generally but referred to it as ''Sec. 3''. Since this section was enacted as section 4 of Pub. L. 93–400 no change was required.

AMENDMENTS

2004—Par. (17). Pub. L. 108–375 added par. (17).

2003—Par. (12)(F). Pub. L. 108–136, § 1433, inserted ''or specific outcomes to be achieved'' after ''performed''.

Par. (16). Pub. L. 108–136, § 1411, added par. (16).

1999—Par. (12)(E). Pub. L. 106–65 amended subpar. (E) generally. Prior to amendment, subpar. (E) read as follows: ''Installation services, maintenance services, repair services, training services, and other services if such services are procured for support of an item referred to in subparagraph (A), (B), (C), or (D) and if the source of such services—

''(i) offers such services to the general public and the Federal Government contemporaneously and under similar terms and conditions; and

''(ii) offers to use the same work force for providing the Federal Government with such services as the source uses for providing such services to the general public.''

1996—Par. (12)(F). Pub. L. 104–106 inserted ''or market'' after ''catalog''.

1994—Pub. L. 103–355, § 8001(b)(1), substituted ''this chapter:'' for ''this chapter—'' in introductory provisions.

Pars. (1) to (3). Pub. L. 103–355, § 8001(b)(2), (3), substituted ''The term'' for ''the term'' and period for semicolon at end.

Par. (4). Pub. L. 103–355, § 8001(b)(2), (4), substituted ''The term'' for ''the term'' and period for ''; and'' at end.

Pars. (5) to (9). Pub. L. 103–355, § 8001(b)(2), (3), substituted ''The term'' for ''the term'' and period for semicolon at end.

Par. (10). Pub. L. 103–355, § 8001(b)(2), (4), substituted ''The term'' for ''the term'' and period for ''; and'' at end.

Par. (11). Pub. L. 103–355, § 8001(b)(2), which directed substitution of ''The term'' for ''the term'' in par. (11), could not be executed because phrase ''the term'' did not appear subsequent to amendment by Pub. L. 103–355, § 4001. See below.

Pub. L. 103–355, § 4001, amended par. (11) generally. Prior to amendment, par. (11) read as follows: ''the term 'small purchase threshold' means $25,000, adjusted on October 1 of each year divisible by 5 to the amount equal to $25,000 in constant fiscal year 1990 dollars (rounded to the nearest $1,000).''

Pars. (12) to (15). Pub. L. 103–355, § 8001(a), added pars. (12) to (15).

1990—Par. (11). Pub. L. 101–510 added par. (11).

1988—Pars. (4) to (11). Pub. L. 100–679 redesignated pars. (5) to (11) as (4) to (10), respectively, and struck out former par. (4) which defined ''single system of Government-wide procurement regulations'' for purposes of this chapter.

1984—Pars. (6) to (8). Pub. L. 98–369 added pars. (6) to (8).

Pars. (9) to (11). Pub. L. 98–577 added pars. (9) to (11).

1983—Pub. L. 98–191 amended section generally, restating definitions of ''executive agency'' and ''procurement'' and inserting definitions of ''procurement system'', ''single-system of Government-wide procurement regulations'', and ''standards''.

1979—Pub. L. 96–83 designated existing provisions as subsec. (a) and added subsec. (b).

EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104–106, see section 4401 of Pub. L. 104–106, set out as a note under section 251 of this title.

EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103–355, see section 10001 of Pub. L. 103–355, set out as a note under section 251 of this title.

EFFECTIVE DATE OF 1979 AMENDMENT

Amendment by Pub. L. 96–83 effective Oct. 1, 1979, see section 12 of Pub. L. 96–83, set out as a note under section 401 of this title.

MODIFICATION OF FEDERAL ACQUISITION REGULATIONS

Section 2752 of Pub. L. 98–369 provided that: ''Not later than March 31, 1985, the single Government-wide procurement regulation referred to in section 4(4)(A) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(4)(A)) shall be modified to conform to the requirements of this title [title VII of Pub. L. 98–369, §§ 2701–2753, July 18, 1984, 98 Stat. 1175–1203] and the amendments made by this title [see Short Title of 1984 Amendment note set out under section 251 of this title].''

§ 404. Establishment of Office of Federal Procurement Policy; appointment of Administrator

(a) There is in the Office of Management and Budget an Office of Federal Procurement Policy (hereinafter referred to as the ''Office'') to provide overall direction of Government-wide procurement policies, regulations, procedures, and forms for executive agencies and to promote economy, efficiency, and effectiveness in the procurement of property and services by the executive branch of the Federal Government.

(b) There shall be at the head of the Office an Administrator for Federal Procurement Policy (hereinafter referred to as the ''Administrator''), who shall be appointed by the President, by and with the advice and consent of the Senate.

(Pub. L. 93–400, § 5, Aug. 30, 1974, 88 Stat. 797; Pub. L. 104–106, div. D, title XLIII, § 4305(a)(1), Feb. 10, 1996, 110 Stat. 665.)

AMENDMENTS

1996—Subsec. (a). Pub. L. 104–106 amended subsec. (a) generally. Prior to amendment, subsec. (a) read as follows: ''There is established in the Office of Management and Budget an office to be known as the Office of Federal Procurement Policy (hereinafter referred to as the 'Office').''

EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104–106, see section 4401 of Pub. L. 104–106, set out as a note under section 251 of this title.

§ 405. Authority and functions of the Administrator

(a) Development of procurement policy; leadership

The Administrator shall provide overall direction of procurement policy and leadership in the development of procurement systems of the executive agencies. To the extent that the Administrator considers appropriate, in carrying out the policies and functions set forth in this chapter, and with due regard for applicable laws and the program activities of the executive agencies, the Administrator may prescribe Government-wide procurement policies. These policies shall be implemented in a single Government-wide procurement regulation called the Federal Acquisition Regulation and shall be followed by executive agencies in the procurement of—

(1) property other than real property in being;

(2) services, including research and development; and

(3) construction, alteration, repair, or maintenance of real property.

(b) Government-wide procurement regulations

In any instance in which the Administrator determines that the Department of Defense, the National Aeronautics and Space Administration, and the General Services Administration are unable to agree on or fail to issue Government-wide regulations, procedures and forms in a timely manner, including any such regulations, procedures, and forms as are necessary to implement prescribed policy initiated by the Administrator under subsection (a) of this section, the Administrator shall, with due regard for applicable laws and the program activities of the executive agencies and consistent with the policies and functions set forth in this chapter, prescribe Government-wide regulations, procedures and forms which shall be followed by executive agencies in the procurement of—

(1) property other than real property in being;

(2) services, including research and development; and

(3) construction, alteration, repair, or maintenance of real property.

(c) Noninterference with executive agencies

The authority of the Administrator under this chapter shall not be construed to—

(1) impair or interfere with the determination by executive agencies of their need for, or their use of, specific property, services, or construction, including particular specifications therefor; or

(2) interfere with the determination by executive agencies of specific actions in the award or administration of procurement contracts.

(d) Enumeration of included functions

The functions of the Administrator shall include—

(1) providing leadership and ensuring action by the executive agencies in the establishment, development and maintenance of the single system of simplified Government-wide procurement regulations and resolving differences among the executive agencies in the development of simplified Government-wide procurement regulations, procedures and forms;

(2) coordinating the development of Government-wide procurement system standards that shall be implemented by the executive agencies in their procurement systems;

(3) providing leadership and coordination in the formulation of the executive branch position on legislation relating to procurement;

(4)(A) providing for and directing the activities of the computer-based Federal Procurement Data System (including recommending to the Administrator of General Services a sufficient budget for such activities), which shall be located in the General Services Administration, in order to adequately collect, develop, and disseminate procurement data; and

(B) ensuring executive agency compliance with the record requirements of section 417 of this title;

(5) providing for and directing the activities of the Federal Acquisition Institute (including recommending to the Administrator of General Services a sufficient budget for such activities), which shall be located in the General Services Administration, in order to—

(A) foster and promote the development of a professional acquisition workforce Government-wide;

(B) promote and coordinate Government-wide research and studies to improve the procurement process and the laws, policies, methods, regulations, procedures, and forms relating to acquisition by the executive agencies;

(C) collect data and analyze acquisition workforce data from the Office of Personnel Management, the heads of executive agencies, and, through periodic surveys, from individual employees;

(D) periodically analyze acquisition career fields to identify critical competencies, duties, tasks, and related academic prerequisites, skills, and knowledge;

(E) coordinate and assist agencies in identifying and recruiting highly qualified candidates for acquisition fields;

(F) develop instructional materials for acquisition personnel in coordination with private and public acquisition colleges and training facilities;

(G) evaluate the effectiveness of training and career development programs for acquisition personnel;

(H) promote the establishment and utilization of academic programs by colleges and universities in acquisition fields;

(I) facilitate, to the extent requested by agencies, interagency intern and training programs; and

(J) perform other career management or research functions as directed by the Administrator;

(6) administering the provisions of section 433 of this title;

(7) establishing criteria and procedures to ensure the effective and timely solicitation of the viewpoints of interested parties in the development of procurement policies, regulations, procedures, and forms;

(8) developing standard contract forms and contract language in order to reduce the Government's cost of procuring property and services and the private sector's cost of doing business with the Government;

(9) providing for a Government-wide award to recognize and promote vendor excellence;

(10) providing for a Government-wide award to recognize and promote excellence in officers and employees of the Federal Government serving in procurement-related positions;

(11) developing policies, in consultation with the Administrator of the Small Business Administration, that ensure that small businesses, qualified HUBZone small business concerns (as defined in section 632(p) of title 15), small businesses owned and controlled by socially and economically disadvantaged individuals, and small businesses owned and controlled by women are provided with the maximum practicable opportunities to participate in procurements that are conducted for amounts below the simplified acquisition threshold;

(12) developing policies that will promote achievement of goals for participation by small businesses, qualified HUBZone small business concerns (as defined in section 632(p) of title 15), small businesses owned and controlled by socially and economically disadvantaged individuals, and small businesses owned and controlled by women; and

(13) completing action, as appropriate, on the recommendations of the Commission on Government Procurement.

(e) Consultation; assistance of existing executive agencies; advisory committees and interagency groups

In carrying out the functions set forth in subsection (d) of this section, the Administrator—

(1) shall consult with the affected executive agencies, including the Small Business Administration;

(2) may, with the concurrence of the heads of affected executive agencies, designate an executive agency or executive agencies to assist in the performance of such functions; and

(3) may establish advisory committees or other interagency groups to assist in providing for the establishment, development, and maintenance of a single system of simplified Government-wide procurement regulations and to assist in the performance of any of the other functions which the Administrator considers appropriate.

(f) Oversight of regulations promulgated by other agencies relating to procurement

The Administrator, with the concurrence of the Director of the Office of Management and Budget, and with consultation with the head of the agency or agencies concerned, may deny the promulgation of or rescind any Government-wide regulation or final rule or regulation of any executive agency relating to procurement if the Administrator determines that such rule or regulation is inconsistent with any policies, regulations, or procedures issued pursuant to subsection (a) of this section.

(g) Assignment, delegation, or transfer of functions prohibited

Except as otherwise provided by law, no duties, functions, or responsibilities, other than those expressly assigned by this chapter, shall be assigned, delegated, or transferred to the Administrator.

(h) Real property procurement; Office of Management and Budget

Nothing in this chapter shall be construed to—

(1) impair or affect the authorities or responsibilities conferred by the Federal Property and Administrative Services Act of 1949[1] with respect to the procurement of real property; or

(2) limit the current authorities and responsibilities of the Director of the Office of Management and Budget.

(i) Recipients of Federal grants or assistance

(1) With due regard to applicable laws and the program activities of the executive agencies administering Federal programs of grants or assistance, the Administrator may prescribe Government-wide policies, regulations, procedures, and forms which the Administrator considers appropriate and which shall be followed by such executive agencies in providing for the procurement, to the extent required under such programs, of property or services referred to in clauses (1), (2), and (3) of subsection (a) of this section by recipients of Federal grants or assistance under such programs.

(2) Nothing in paragraph (1) shall be construed to—

(A) permit the Administrator to authorize procurement or supply support, either directly or indirectly, to recipients of Federal grants or assistance; or

(B) authorize any action by such recipients contrary to State and local laws, in the case of programs to provide Federal grants or assistance to States and political subdivisions.

(j) Policy regarding consideration of contractor past performance

(1) The Administrator shall prescribe for executive agencies guidance regarding consideration of the past contract performance of offerors in awarding contracts. The guidance shall include—

(A) standards for evaluating past performance with respect to cost (when appropriate), schedule, compliance with technical or functional specifications, and other relevant performance factors that facilitate consistent and fair evaluation by all executive agencies;

(B) policies for the collection and maintenance of information on past contract performance that, to the maximum extent practicable, facilitate automated collection, maintenance, and dissemination of information and provide for ease of collection, maintenance, and dissemination of information by other methods, as necessary;

(C) policies for ensuring that—

(i) offerors are afforded an opportunity to submit relevant information on past contract performance, including performance under contracts entered into by the executive agency concerned, contracts entered into by other departments and agencies of the Federal Government, contracts entered into by agencies of State and local governments, and contracts entered into by commercial customers; and

(ii) such information submitted by offerors is considered; and

(D) the period for which information on past performance of offerors may be maintained and considered.

(2) In the case of an offeror with respect to which there is no information on past contract performance or with respect to which information on past contract performance is not available, the offeror may not be evaluated favorably or unfavorably on the factor of past contract performance.

(k) Annual reporting requirement

The Administrator shall submit to Congress, on an annual basis, an assessment of the progress made in executive agencies in implementing the policy regarding major acquisitions that is stated in section 263(a) of this title. The Administrator shall use data from existing management systems in making the assessment.

(Pub. L. 93–400, §6, Aug. 30, 1974, 88 Stat. 797; Pub. L. 96–83, §4, Oct. 10, 1979, 93 Stat. 649; Pub. L. 98–191, §5, Dec. 1, 1983, 97 Stat. 1326; Pub. L. 98–369, div. B, title VII, §2732(b)(1), July 18, 1984, 98 Stat. 1199; Pub. L. 100–679, §3(a), Nov. 17, 1988, 102 Stat. 4055; Pub. L. 103–355, title I, §1091(b)(2), title V, §§5051(b), 5091, title VII, §7108, Oct. 13, 1994, 108 Stat. 3272, 3351, 3361, 3378; Pub. L. 104–106, div. D, title XLIII, §§4307(b), 4321(h)(1), (2), 4322(a)(1), div. E, title LVI, §5607(d), Feb. 10, 1996, 110 Stat. 668, 675, 677, 702; Pub. L. 104–201, div. A, title X, §1074(f)(1), Sept. 23, 1996, 110 Stat. 2661; Pub. L. 105–85, div. A, title VIII, §851(b), title X, §1073(g)(2)(B), Nov. 18, 1997, 111 Stat. 1851, 1906; Pub. L. 105–135, title VI, §604(f)(1), Dec. 2, 1997, 111 Stat. 2634.)

REFERENCES IN TEXT

The Federal Property and Administrative Services Act of 1949, referred to in subsec. (h)(1), is act June 30, 1949, ch. 288, 63 Stat. 377, as amended. Except for title

[1] See References in Text note below.

III of the Act, which is classified generally to subchapter IV (§ 251 et seq.) of chapter 4 of this title, the Act was repealed and reenacted by Pub. L. 107–217, §§ 1, 6(b), Aug. 21, 2002, 116 Stat. 1062, 1304, as chapters 1 to 11 of Title 40, Public Buildings, Property, and Works.

AMENDMENTS

1997—Subsec. (d)(5)(J). Pub. L. 105–85, § 1073(g)(2)(B)(i), substituted semicolon for period at end.

Subsec. (d)(6). Pub. L. 105–85, § 1073(g)(2)(B)(ii), realigned margins.

Subsec. (d)(11). Pub. L. 105–135, § 604(f)(1)(A), inserted ''qualified HUBZone small business concerns (as defined in section 632(p) of title 15),'' after ''ensure that small businesses,''.

Subsec. (d)(12). Pub. L. 105–135, § 604(f)(1)(B), inserted ''qualified HUBZone small business concerns (as defined in section 632(p) of title 15),'' after ''participation by small businesses,''.

Pub. L. 105–85, § 1073(g)(2)(B)(iii), substituted ''small businesses'' for ''small business'' after ''individuals, and''.

Subsec. (k). Pub. L. 105–85, § 851(b), inserted ''regarding major acquisitions that is'' after ''implementing the policy''.

1996—Subsec. (b). Pub. L. 104–106, § 4322(a)(1), struck out second comma after ''subsection (a) of this section''.

Subsec. (d)(5)(A). Pub. L. 104–106, § 4307(b)(2)(A), substituted ''the development of a professional acquisition workforce Government-wide'' for ''Government-wide career management programs for a professional procurement work force''.

Subsec. (d)(5)(B). Pub. L. 104–106, § 4307(b)(2)(B)(i), substituted ''acquisition by the'' for ''procurement by the''.

Subsec. (d)(5)(C) to (J). Pub. L. 104–106, § 4307(b)(2)(B)(ii), (iii), added subpars. (C) to (J) and struck out former subpar. (C) which read as follows: ''establish policies and procedures for the establishment and implementation of education and training programs authorized by this chapter, including the establishment and implementation of training, in conjunction with the General Services Administration, for critical procurement personnel designed to increase the participation of small business concerns owned and controlled by socially and economically disadvantaged individuals, women, and other minorities in procurement activities conducted by an executive agency.''

Subsec. (d)(6). Pub. L. 104–106, § 4307(b)(3), added par. (6). Former par. (6) redesignated (7).

Subsec. (d)(7) to (10). Pub. L. 104–106, § 4307(b)(1), redesignated pars. (6) to (9) as (7) to (10), respectively. Former par. (10) redesignated (11).

Subsec. (d)(11). Pub. L. 104–106, § 4321(h)(2), which directed substitution of ''small businesses'' for ''small business'', could not be executed because the words ''small business'' did not appear.

Pub. L. 104–106, § 4307(b)(1), redesignated par. (10) as (11). Former par. (11) redesignated (12).

Subsec. (d)(12). Pub. L. 104–106, § 4307(b)(1), redesignated par. (11) as (12). Former par. (12) redesignated (13).

Subsec. (d)(13). Pub. L. 104–106, § 4321(h)(1), which directed transferring par. (12) to end of subsec. (d), was executed by transferring par. (13) to end of subsec. (d) to reflect the probable intent of Congress and the redesignation of par. (12) as (13) by Pub. L. 104–106, § 4307(b)(1). See below.

Pub. L. 104–106, § 4307(b)(1), redesignated par. (12) as (13).

Subsec. (f). Pub. L. 104–201 struck out ''the policies set forth in section 401 of this title or'' after ''inconsistent with''.

Subsec. (h)(1). Pub. L. 104–106, § 5607(d), struck out ''of automatic data processing and telecommunications equipment and services or'' after ''with respect to the procurement''.

1994—Subsec. (d)(5)(C). Pub. L. 103–355, § 7108(b), added subpar. (C).

Subsec. (d)(8), (9). Pub. L. 103–355, § 5091, added pars. (8) and (9) at end. Former par. (8) redesignated (12).

Subsec. (d)(10), (11). Pub. L. 103–355, § 7108(a), added pars. (10) and (11).

Subsec. (d)(12). Pub. L. 103–355, § 5091(2), redesignated pars. (8) and (12).

Subsec. (j). Pub. L. 103–355, § 1091(b)(2), added subsec. (j).

Subsec. (k). Pub. L. 103–355, § 5051(b), added subsec. (k).

1988—Subsec. (a). Pub. L. 100–679, § 3(a)(1), substituted ''procurement policies. These policies shall be implemented in a single Government-wide procurement regulation called the Federal Acquisition Regulation and shall be'' for ''procurement policies which shall be implemented in the single system of Government-wide procurement regulations and shall be''.

Subsec. (b). Pub. L. 100–679, § 3(a)(2), inserted '', including any such regulations, procedures, and forms as are necessary to implement prescribed policy initiated by the Administrator under subsection (a) of this section,'' after ''timely manner'' and substituted ''Administrator shall'' for ''Administrator may''.

Subsec. (d)(4). Pub. L. 100–679, § 3(a)(3), added par. (4) and struck out former par. (4) which read as follows: ''providing for a computer-based Federal Procurement Data System which shall be located in the General Services Administration (acting as executive agent for the Administrator) and shall collect, develop, and disseminate procurement data;''.

Subsec. (d)(5). Pub. L. 100–679, § 3(a)(3), added par. (5) and struck out former par. (5) which read as follows: ''providing for a Federal Acquisition Institute which shall be located in the General Services Administration (acting as executive agent for the Administrator) and shall—

''(A) foster and promote Government-wide career management programs for a professional procurement work force; and

''(B) promote and coordinate Government-wide research and studies to improve the procurement process and the laws, policies, methods, regulations, procedures, and forms relating to procurement by the executive agencies;''.

Subsec. (f). Pub. L. 100–679, § 3(a)(4), substituted ''The Administrator, with the concurrence of the Director of the Office of Management and Budget, and with consultation with the head of the agency or agencies concerned,'' for ''The Director of the Office of Management and Budget''.

1984—Subsec. (e). Pub. L. 98–369 substituted ''subsection (d)'' for ''subsection (c)''.

1983—Pub. L. 98–191 amended section generally, revising and restating as subsecs. (a), (c), (d), (e), (g), (h), and (i) provisions of former subsecs. (a), (f), (d), (e), (g), (j), and (b), respectively, and by inserting provisions set out in new subsecs. (b) and (f).

1979—Subsec. (a). Pub. L. 96–83, § 4(a), substituted provisions setting forth the responsibilities of the Administrator with respect to the development and implementation of procurement policies, the coordination of programs to improve the quality and performance of personnel, and the development of a uniform procurement system, for provisions setting forth responsibility of the Administrator for overall direction of procurement policy, and functions with respect to issuance of policy, regulations, procedures, and forms.

Subsec. (c). Pub. L. 96–83, § 4(b), substituted provisions relating to development and proposal of a central management system, for provisions setting forth limitation of authority to procurement from appropriated funds and provisions relating to a study and report of procurement from nonappropriated funds.

Subsec. (d). Pub. L. 96–83, § 4(c), substituted provisions setting forth the review, development, etc., functions of the Administrator with respect to procurement policies, regulations, procedures, and forms, procurement data, procurement personnel, and procurement contracts, for provisions setting forth the establishment, monitoring, etc., functions of the Administrator

with respect to uniform procurement regulations, procurement policies, regulations, procedures, and forms, procurement data, and procurement personnel.

Subsec. (e). Pub. L. 96–83, §4(d), substituted provisions relating to consultation functions of the Administrator with respect to the development and implementation of the uniform procurement system, for provisions relating to the consultation functions of the Administrator with respect to the development of policies, regulations, procedures and forms to be authorized or prescribed by such Administrator.

Subsecs. (h) to (j). Pub. L. 96–83, §4(e), added subsecs. (h) to (j).

EFFECTIVE DATE OF 1997 AMENDMENT

Amendment by Pub. L. 105–135 effective Oct. 1, 1997, see section 3 of Pub. L. 105–135 set out as a note under section 631 of Title 15, Commerce and Trade.

EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by sections 4307(b), 4321(h)(1), (2), and 4322(a)(1) of Pub. L. 104–106, see section 4401 of Pub. L. 104–106, set out as a note under section 251 of this title.

Amendment by section 5607(d) of Pub. L. 104–106 effective 180 days after Feb. 10, 1996, see section 5701 of Pub. L. 104–106, Feb. 10, 1996, 110 Stat. 702.

EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103–355, see section 10001 of Pub. L. 103–355, set out as a note under section 251 of this title.

EFFECTIVE DATE OF 1979 AMENDMENT

Amendment by Pub. L. 96–83 effective Oct. 1, 1979, see section 12 of Pub. L. 96–83, set out as a note under section 401 of this title.

ENHANCED TRANSPARENCY ON INTERAGENCY CONTRACTING AND OTHER TRANSACTIONS

Pub. L. 110–417, [div. A], title VIII, §874(a), Oct. 14, 2008, 122 Stat. 4558, provided that: ''Not later than one year after the date of the enactment of this Act [Oct. 14, 2008], the Director of the Office of Management and Budget shall direct appropriate revisions to the Federal Procurement Data System or any successor system to facilitate the collection of complete, timely, and reliable data on interagency contracting actions and on transactions other than contracts, grants, and cooperative agreements issued pursuant to section 2371 of title 10, United States Code, or similar authorities. The Director shall ensure that data, consistent with what is collected for contract actions, is obtained on—

''(1) interagency contracting actions, including data at the task or delivery-order level; and

''(2) other transactions, including the initial award and any subsequent modifications awarded or orders issued (other than transactions that are reported through the Federal Assistance Awards Data System).''

PILOT PROGRAM TO INVENTORY COST AND SIZE OF SERVICE CONTRACTS

Pub. L. 110–161, div. D, title VII, §748, Dec. 26, 2007, 121 Stat. 2035, provided that: ''No later than 180 days after enactment of this Act [Dec. 26, 2007], the Office of Management and Budget shall establish a pilot program to develop and implement an inventory to track the cost and size (in contractor manpower equivalents) of service contracts, particularly with respect to contracts that have been performed poorly by a contractor because of excessive costs or inferior quality, as determined by a contracting officer within the last five years, involve inherently governmental functions, or were undertaken without competition. The pilot program shall be established in at least three Cabinet-level departments, based on varying levels of annual contracting for services, as reported by the Federal Procurement Data System's Federal Procurement Report for fiscal year 2005, including at least one Cabinet-level department that contracts out annually for $10,000,000,000 or more in services, at least one Cabinet-level department that contracts out annually for between $5,000,000,000 and $9,000,000,000 in services, and at least one Cabinet-level department that contracts out annually for under $5,000,000,000 in services.''

FEDERAL SUPPORT FOR ENHANCEMENT OF STATE AND LOCAL ANTI-TERRORISM RESPONSE CAPABILITIES

Pub. L. 108–136, div. A, title VIII, §803, Nov. 24, 2003, 117 Stat. 1541, provided that:

''(a) PROCUREMENTS OF ANTI-TERRORISM TECHNOLOGIES AND SERVICES BY STATE AND LOCAL GOVERNMENTS.—The Administrator for Federal Procurement Policy shall establish a program under which States and units of local government may procure through contracts entered into by the Department of Defense or the Department of Homeland Security anti-terrorism technologies or anti-terrorism services for the purpose of preventing, detecting, identifying, deterring, or recovering from acts of terrorism.

''(b) AUTHORITIES.—Under the program, the Secretary of Defense and the Secretary of Homeland Security may, but shall not be required to, award contracts using the procedures established by the Administrator of General Services for the multiple awards schedule program of the General Services Administration.

''(c) DEFINITION.—In this section, the term 'State or local government' has the meaning provided in section 502(c)(3) of title 40, United States Code.''

STATUTORY AND REGULATORY REVIEW

Pub. L. 108–136, div. A, title XIV, §1423, Nov. 24, 2003, 117 Stat. 1669, as amended by Pub. L. 109–163, div. A, title VIII, §843, Jan. 6, 2006, 119 Stat. 3389, provided that:

''(a) ESTABLISHMENT.—Not later than 90 days after the date of the enactment of this Act [Nov. 24, 2003], the Administrator for Federal Procurement Policy shall establish an advisory panel to review laws and regulations regarding the use of commercial practices, performance-based contracting, the performance of acquisition functions across agency lines of responsibility, and the use of Governmentwide contracts.

''(b) MEMBERSHIP.—The panel shall be composed of at least nine individuals who are recognized experts in acquisition law and Government acquisition policy. In making appointments to the panel, the Administrator shall—

''(1) consult with the Secretary of Defense, the Administrator of General Services, the Committees on Armed Services and Government Reform [now Oversight and Government Reform] of the House of Representatives, and the Committees on Armed Services and Governmental Affairs of the Senate; and

''(2) ensure that the members of the panel reflect the diverse experiences in both the public and private sectors, including academia.

''(c) DUTIES.—The panel shall—

''(1) review all Federal acquisition laws and regulations, and, to the extent practicable, government-wide acquisition policies, with a view toward ensuring effective and appropriate use of commercial practices and performance-based contracting; and

''(2) make any recommendations for the modification of such laws, regulations, or policies that are considered necessary as a result of such review—

''(A) to protect the best interests of the Federal Government;

''(B) to ensure the continuing financial and ethical integrity of acquisitions by the Federal Government; and

''(C) to amend or eliminate any provisions in such laws, regulations, or policies that are unnecessary for the effective, efficient, and fair award and administration of contracts for the acquisition by the Federal Government of goods and services.

''(d) REPORT.—Not later than 18 months after the establishment of the panel, the panel shall submit to the Administrator and to the Committees on Armed Services and Government Reform [now Oversight and Government Reform] of the House of Representatives and the Committees on Armed Services and Governmental Affairs of the Senate a report containing a detailed statement of the findings, conclusions, and recommendations of the panel.''

CENTER OF EXCELLENCE IN SERVICE CONTRACTING

Pub. L. 108–136, div. A, title XIV, § 1431(b), Nov. 24, 2003, 117 Stat. 1671, provided that: ''Not later than 180 days after the date of the enactment of this Act [Nov. 24, 2003], the Administrator for Federal Procurement Policy shall establish a center of excellence in contracting for services. The center of excellence shall assist the acquisition community by identifying, and serving as a clearinghouse for, best practices in contracting for services in the public and private sectors.''

REPORTING OF BUNDLED CONTRACT OPPORTUNITIES

Section 414 of title IV of Pub. L. 105–135 provided that:

''(a) DATA COLLECTION REQUIRED.—The Federal Procurement Data System described in section 6(d)(4)(A) of the Office of Federal Procurement Policy Act (41 U.S.C. 405(d)(4)(A)) shall be modified to collect data regarding bundling of contract requirements when the contracting officer anticipates that the resulting contract price, including all options, is expected to exceed $5,000,000. The data shall reflect a determination made by the contracting officer regarding whether a particular solicitation constitutes a contract bundling.

''(b) DEFINITIONS.—In this section, the term 'bundling of contract requirements' has the meaning given that term in section 3(*o*) of the Small Business Act (15 U.S.C. 632(*o*)) (as added by section 412 of this subtitle).''

CONGRESSIONAL FINDINGS REGARDING CONSIDERATION OF PAST CONTRACT PERFORMANCE

Section 1091(b)(1) of Pub. L. 103–355 provided that: ''Congress makes the following findings:

''(A) Past contract performance of an offeror is one of the relevant factors that a contracting official of an executive agency should consider in awarding a contract.

''(B) It is appropriate for a contracting official to consider past contract performance of an offeror as an indicator of the likelihood that the offeror will successfully perform a contract to be awarded by that official.''

RESULTS-ORIENTED ACQUISITION PROCESS

Section 5052 of Pub. L. 103–355 provided that:

''(a) DEVELOPMENT OF PROCESS REQUIRED.—The Administrator for Federal Procurement Policy, in consultation with the heads of appropriate Federal agencies, shall develop results-oriented acquisition process guidelines for implementation by agencies in acquisitions of property and services by the Federal agencies. The process guidelines shall include the identification of quantitative measures and standards for determining the extent to which an acquisition of items other than commercial items by a Federal agency satisfies the needs for which the items are being acquired.

''(b) INAPPLICABILITY OF PROCESS TO DEPARTMENT OF DEFENSE.—The process guidelines developed pursuant to subsection (a) may not be applied to the Department of Defense.''

DEVELOPMENT OF DEFINITIONS REGARDING CERTAIN SMALL BUSINESS CONCERNS

Pub. L. 103–355, title VII, § 7107, Oct. 13, 1994, 108 Stat. 3376, directed the Administrator for Federal Procurement Policy to conduct a comprehensive review of Federal laws in effect on Nov. 1, 1994, to identify and catalogue provisions defining small business concerns owned and controlled by socially and economically disadvantaged individuals, minority-owned small business concerns, and small business concerns owned and controlled by women, for purposes of authorizing the participation of such small business concerns as prime contractors or subcontractors in contracts awarded directly by the Federal Government or subcontracts awarded under such contracts, or contracts and subcontracts funded, in whole or in part, by Federal financial assistance under grants, cooperative agreements, or other forms of Federal assistance. The Administrator was to develop uniform definitions and agency certification standards and procedures for qualification as a small business concern, and submit to Congress, not later than May 1, 1996, a report on the results of the review, the actions taken, and the Administrator's recommendations.

DATA COLLECTION THROUGH FEDERAL PROCUREMENT DATA SYSTEM

Section 10004 of Pub. L. 103–355 provided that:

''(a) DATA COLLECTION REQUIRED.—The Federal Procurement Data System described in section 6(d)(4)(A) of the Office of Federal Procurement Policy Act (41 U.S.C. 405(d)(4)(A)) shall be modified to collect from contracts in excess of the simplified acquisition threshold data identifying the following matters:

''(1) Contract awards made pursuant to competitions conducted pursuant to section 2323 of title 10, United States Code, or section 7102 of the Federal Acquisition Streamlining Act of 1994 [Pub. L. 103–355, 15 U.S.C. 644 note].

''(2) Awards to business concerns owned and controlled by women.

''(3) Number of offers received in response to a solicitation.

''(4) Task order contracts.

''(5) Contracts for the acquisition of commercial items.

''(b) DEFINITION.—In this section, the term 'simplified acquisition threshold' has the meaning given such term in section 4(11) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(11)).''

PROFIT METHODOLOGY STUDY

Section 7 of Pub. L. 100–679 provided that:

''(a) IN GENERAL.—The Administrator shall conduct a study to develop a consistent methodology which executive agencies should use for measuring the profits earned by government contractors on procurements, other than procurements where the price is based on adequate price competition or on established catalog or market prices of commercial items sold in substantial quantities to the general public.

''(b) CONTRACTORS' FINANCIAL DATA.—The methodology developed under subsection (a) shall include adequate procedures for verifying and maintaining the confidentiality of contractors' financial data.''

§ 405a. Uniform Federal procurement regulations and procedures

The Administrator of the Office of Federal Procurement Policy is authorized and directed, pursuant to the authority conferred by Public Law 93–400 [41 U.S.C. 401 et seq.] and subject to the procedures set forth in such Public Law, to promulgate a single, simplified, uniform Federal procurement regulation and to establish procedures for insuring compliance with such provisions by all Federal agencies. In formulating such regulations and procedures the Administrator of the Office of Federal Procurement Policy shall, in consultation with the Small Business Administration, conduct analyses of the impact on small business concerns resulting from revised procurement regulations, and incorporate into revised procurement regulations simplified bidding, contract performance, and

contract administration procedures for small business concerns.

(Pub. L. 95–507, title II, § 222, Oct. 24, 1978, 92 Stat. 1771.)

REFERENCES IN TEXT

Public Law 93–400, referred to in text, is Pub. L. 93–400, Aug. 30, 1974, 88 Stat. 796, as amended, known as the Office of Federal Procurement Policy Act, which is classified principally to this chapter (§ 401 et seq.). For complete classification of this Act to the Code, see Short Title note set out under section 401 of this title and Tables.

CODIFICATION

Section was not enacted as part of the Office of Federal Procurement Policy Act which comprises this chapter.

SUPERSEDURE OF INCONSISTENT STATUTORY PROVISIONS

Pub. L. 96–83, § 11, Oct. 10, 1979, 93 Stat. 652, provided that: ''The provisions of the Act [Pub. L. 93–400, Aug. 30, 1974, 88 Stat. 796, see Short Title note set out under section 401 of this title] as amended by this Act [see Short Title of 1979 Amendment note set out under section 401 of this title] shall supersede the provisions of section 222 of the Act of October 24, 1978, entitled 'An Act to amend the Small Business Act and the Small Business Investment Act of 1958' (41 U.S.C. 405a) to the extent they are inconsistent therewith.''

DEFINITIONS

The definitions in section 637c of Title 15, Commerce and Trade, apply to this section.

§ 405b. Conflict of interest standards for individuals providing consulting services

(a) Issuance of policy and regulations

Not later than 90 days after October 1, 1988, the Administrator of the Office of Federal Procurement Policy shall issue a policy, and not later than 180 days thereafter Government-wide regulations shall be issued under the Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.) which set forth—

(1) conflict of interest standards for persons who provide consulting services described in subsection (b) of this section; and

(2) procedures, including such registration, certification, and enforcement requirements as may be appropriate, to promote compliance with such standards.

(b) Services subject to regulations

The regulations required by subsection (a) of this section shall apply to the following types of consulting services:

(1) advisory and assistance services provided to the Government to the extent necessary to identify and evaluate the potential for conflicts of interest that could be prejudicial to the interests of the United States;

(2) services related to support of the preparation or submission of bids and proposals for Federal contracts to the extent that inclusion of such services in such regulations is necessary to identify and evaluate the potential for conflicts of interest that could be prejudicial to the interests of the United States; and

(3) such other services related to Federal contracts as may be specified in the regulations prescribed under subsection (a) of this section to the extent necessary to identify and evaluate the potential for conflicts of interest that could be prejudicial to the interests of the United States.

(c) Report to Congress by Comptroller General on effectiveness of regulations

The Comptroller General shall report to Congress not later than one year after October 1, 1988, his assessment of the effectiveness of the regulations prescribed under this section.

(d) Intelligence activities exemption; annual report by Director of Central Intelligence

Intelligence activities as defined in section 3.4(e) of Executive order 12333 or a comparable definitional section in any successor order may be exempt from the regulations required by subsection (a) of this section: *Provided*, That the Director of Central Intelligence shall report to the Intelligence and Appropriations Committees of the Congress no later than January 1, 1990, and annually thereafter delineating those activities and organizations which have been exempted from the regulations required by subsection (a) of this section in accordance with the provisions of this subsection.

(e) Adverse effect determination by President prior to issuance of regulations; report to Congressional committees; voiding of regulations requirement

The President shall, before issuance of the regulations required by subsection (a) of this section, determine if the promulgation of such regulations would have a significantly adverse effect on the accomplishment of the mission of the Department of Defense or other Federal Government agencies: *Provided*, That if the President determines that the regulations required by subsection (a) of this section would have such an adverse effect, the President shall so report to the appropriate committees of the Senate and the House of Representatives, stating in full the reasons for such a determination: *Provided further*, That in the event of submission of a report to the committees containing an adverse effect determination, the requirement for the regulations prescribed by subsection (a) of this section shall be null and void.

(Pub. L. 100–463, title VIII, § 8141, Oct. 1, 1988, 102 Stat. 2270–47.)

REFERENCES IN TEXT

The Office of Federal Procurement Policy Act, referred to in subsec. (a), is Pub. L. 93–400, Aug. 30, 1974, 88 Stat. 796, as amended, which is classified principally to this chapter (§ 401 et seq.). For complete classification of this Act to the Code, see Short Title note set out under section 401 of this title.

Executive order 12333, referred to in subsec. (d), is set out as a note under section 401 of Title 50, War and National Defense.

CODIFICATION

Section was enacted as part of the Department of Defense Appropriations Act, 1989, and not as part of the Office of Federal Procurement Policy Act which comprises this chapter.

CHANGE OF NAME

Reference to the Director of Central Intelligence or the Director of the Central Intelligence Agency in the

Director's capacity as the head of the intelligence community deemed to be a reference to the Director of National Intelligence. Reference to the Director of Central Intelligence or the Director of the Central Intelligence Agency in the Director's capacity as the head of the Central Intelligence Agency deemed to be a reference to the Director of the Central Intelligence Agency. See section 1081(a), (b) of Pub. L. 108–458, set out as a note under section 401 of Title 50, War and National Defense.

TERMINATION OF REPORTING REQUIREMENTS

For termination, effective May 15, 2000, of provisions of law requiring submittal to Congress of any annual, semiannual, or other regular periodic report listed in House Document No. 103–7 (in which a report required under subsec. (d) of this section is listed on page 156), see section 3003 of Pub. L. 104–66, as amended, set out as a note under section 1113 of Title 31, Money and Finance.

§ 405c. Ethics safeguards related to contractor conflicts of interest

(a) Policy on personal conflicts of interest by employees of Federal Government contractors

Not later than 270 days after October 14, 2008, the Administrator for Federal Procurement Policy shall develop and issue a standard policy to prevent personal conflicts of interest by contractor employees performing acquisition functions closely associated with inherently governmental functions (including the development, award, and administration of Government contracts) for or on behalf of a Federal agency or department.

(1) Elements of policy

The policy required under subsection (a) shall—

(A) provide a definition of the term ''personal conflict of interest'' as it relates to contractor employees performing acquisition functions closely associated with inherently governmental functions; and

(B) require each contractor whose employees perform acquisition functions closely associated with inherently governmental functions to—

(i) identify and prevent personal conflicts of interest for employees of the contractor who are performing such functions;

(ii) prohibit contractor employees who have access to non-public government information obtained while performing such functions from using such information for personal gain;

(iii) report any personal conflict-of-interest violation by such an employee to the applicable contracting officer or contracting officer's representative as soon as it is identified;

(iv) maintain effective oversight to verify compliance with personal conflict-of-interest safeguards;

(v) have procedures in place to screen for potential conflicts of interest for all employees performing such functions; and

(vi) take appropriate disciplinary action in the case of employees who fail to comply with policies established pursuant to this section.

(2) Contract clause

(A) The Administrator shall develop a personal conflicts-of-interest clause or a set of clauses for inclusion in solicitations and contracts (and task or delivery orders) for the performance of acquisition functions closely associated with inherently governmental functions that sets forth the personal conflicts-of-interest policy developed under this subsection and that sets forth the contractor's responsibilities under such policy.

(B) Subparagraph (A) shall take effect 300 days after October 14, 2008, and shall apply to—

(i) contracts entered into on or after that effective date; and

(ii) task or delivery orders awarded on or after that effective date, regardless of whether the contracts pursuant to which such task or delivery orders are awarded are entered before, on, or after October 14, 2008.

(3) Applicability

(A) Except as provided in subparagraph (B), this subsection shall apply to any contract for an amount in excess of the simplified acquisition threshold (as defined in section 403(11) of this title) if the contract is for the performance of acquisition functions closely associated with inherently governmental functions.

(B) If only a portion of a contract described in subparagraph (A) is for the performance of acquisition functions described in that subparagraph, then this subsection applies only to that portion of the contract.

(b) Review of Federal acquisition regulation relating to conflicts of interest

(1) Review

Not later than 12 months after October 14, 2008, the Administrator for Federal Procurement Policy, in consultation with the Director of the Office of Government Ethics, shall review the Federal Acquisition Regulation to—

(A) identify contracting methods, types and services that raise heightened concerns for potential personal and organizational conflicts of interest; and

(B) determine whether revisions to the Federal Acquisition Regulation are necessary to—

(i) address personal conflicts of interest by contractor employees with respect to functions other than those described in subsection (a); or

(ii) achieve sufficiently rigorous, comprehensive, and uniform government-wide policies to prevent and mitigate organizational conflicts of interest in Federal contracting.

(2) Regulatory revisions

If the Administrator determines pursuant to the review under paragraph (1)(B) that revisions to the Federal Acquisition Regulation are necessary, the Administrator shall work with the Federal Acquisition Regulatory Council to prescribe appropriate revisions to the regulations, including the development of appropriate contract clauses.

(3) Report

Not later than March 1, 2010, the Administrator shall submit to the Committees on Armed Services of the Senate and House of

Representatives, the Committee on Homeland Security and Governmental Affairs in the Senate, and the Committee on Oversight and Government Reform of the House of Representatives a report setting forth such findings and determinations under subparagraphs (A) and (B) of paragraph (1), together with an assessment of any revisions to the Federal Acquisition Regulation that may be necessary.

(c) Best practices

The Administrator for Federal Procurement Policy shall, in consultation with the Director of the Office Government Ethics, develop and maintain a repository of best practices relating to the prevention and mitigation of organizational and personal conflicts of interest in Federal contracting.

(Pub. L. 110–417, [div. A], title VIII, § 841, Oct. 14, 2008, 122 Stat. 4537.)

CODIFICATION

Section was enacted as part of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, and not as part of the Office of Federal Procurement Policy Act which comprises this chapter.

§ 406. Administrative powers

Upon the request of the Administrator, each executive agency is directed to—

(1) make its services, personnel, and facilities available to the Office to the greatest practicable extent for the performance of functions under this chapter; and

(2) except when prohibited by law, furnish to the Administrator and give him access to all information and records in its possession which the Administrator may determine to be necessary for the performance of the functions of the Office.

(Pub. L. 93–400, § 7, Aug. 30, 1974, 88 Stat. 798.)

§ 407. Repealed. Pub. L. 104–106, div. D, title XLIII, § 4305(b), Feb. 10, 1996, 110 Stat. 665

Section, Pub. L. 93–400, § 8, Aug. 30, 1974, 88 Stat. 798; Pub. L. 96–83, § 5, Oct. 10, 1979, 93 Stat. 651; Pub. L. 98–191, § 8(a), Dec. 1, 1983, 97 Stat. 1331, related to responsiveness to Congress.

EFFECTIVE DATE OF REPEAL

For effective date and applicability of repeal, see section 4401 of Pub. L. 104–106, set out as an Effective Date of 1996 Amendment note under section 251 of this title.

§ 408. Applicability of existing laws

The authority of an executive agency under any other law to prescribe policies, regulations, procedures, and forms for procurement is subject to the authority conferred in section 405 of this title.

(Pub. L. 93–400, § 9, Aug. 30, 1974, 88 Stat. 799.)

§ 409. Repealed. Pub. L. 104–106, div. D, title XLIII, § 4305(c)(1), Feb. 10, 1996, 110 Stat. 665

Section, Pub. L. 93–400, § 10, Aug. 30, 1974, 88 Stat. 799; Pub. L. 96–83, § 6, Oct. 10, 1979, 93 Stat. 651; Pub. L. 98–191, § 8(b), Dec. 1, 1983, 97 Stat. 1331, related to continuation in effect of procurement policies, regulations, procedures, and forms in effect on Dec. 1, 1983.

EFFECTIVE DATE OF REPEAL

For effective date and applicability of repeal, see section 4401 of Pub. L. 104–106, set out as an Effective Date of 1996 Amendment note under section 251 of this title.

§ 410. Authorization of appropriations

There is authorized to be appropriated for the Office of Federal Procurement Policy each fiscal year such sums as may be necessary for carrying out the responsibilities of that office for such fiscal year.

(Pub. L. 93–400, § 11, Aug. 30, 1974, 88 Stat. 799; Pub. L. 96–83, § 7, Oct. 10, 1979, 93 Stat. 651; Pub. L. 98–191, § 6, Dec. 1, 1983, 97 Stat. 1329; Pub. L. 100–679, § 3(b), Nov. 17, 1988, 102 Stat. 4056; Pub. L. 104–106, div. D, title XLIII, § 4305(c)(2), Feb. 10, 1996, 110 Stat. 665.)

AMENDMENTS

1996—Pub. L. 104–106 amended section generally. Prior to amendment, section read as follows: ''There are authorized to be appropriated to carry out the provisions of this chapter, and for no other purpose, $4,500,000 for the fiscal year ending September 30, 1984, and such sums as may be necessary for each succeeding fiscal year.''

1988—Pub. L. 100–679 substituted ''such sums as may be necessary for each succeeding fiscal year'' for ''for each of the three succeeding fiscal years''.

1983—Pub. L. 98–191 amended section generally, substituting provisions authorizing appropriations of $4,500,000 for the fiscal year ending Sept. 30, 1984, and for each of the three succeeding fiscal years for provisions authorizing appropriations of $4,000,000 for the fiscal year ending Sept. 30, 1980, and for each of the three succeeding fiscal years and requiring that future authorization of appropriations to carry out the purposes of this chapter be referred to the Senate Committee on Governmental Affairs.

1979—Pub. L. 96–83 substituted provisions authorizing appropriations of $4,000,000 for the fiscal year ending Sept. 30, 1980, and for each of the three succeeding fiscal years, such funds not to be used for any other purpose, with one-third of the appropriations to be made available to the Federal Acquisition Institute, for provisions authorizing appropriations of not to exceed $2,000,000 for the fiscal year ending June 30, 1975, of which not to exceed $150,000 was to be available for the purposes of former section 405(d)(4) of this title, and such other sums as necessary for each of the four fiscal years thereafter, and substituted ''Governmental Affairs'' for ''Government Operations''.

EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104–106, see section 4401 of Pub. L. 104–106, set out as a note under section 251 of this title.

EFFECTIVE DATE OF 1979 AMENDMENT

Amendment by Pub. L. 96–83 effective Oct. 1, 1979, see section 12 of Pub. L. 96–83, set out as a note under section 401 of this title.

§ 411. Delegation of authority by Administrator

(a) The Administrator may delegate, and authorize successive redelegations of, any authority, function, or power of the Administrator under this chapter (other than the authority to provide overall direction of Federal procurement policy and to prescribe policies and regulations to carry out such policy), to any other executive agency with the consent of the head of such executive agency or at the direction of the President.

(b) The Administrator may make and authorize such delegations within the Office as he determines to be necessary to carry out the provisions of this chapter.

(Pub. L. 93–400, § 12, Aug. 30, 1974, 88 Stat. 799; Pub. L. 96–83, § 8, Oct. 10, 1979, 93 Stat. 652; Pub. L. 98–191, § 8(c), Dec. 1, 1983, 97 Stat. 1331.)

AMENDMENTS

1983—Subsec. (a). Pub. L. 98–191 substituted ''The Administrator may delegate, and authorize successive redelegations of, any authority, function, or power of the Administrator under this chapter (other than the authority to provide overall direction of Federal procurement policy and to prescribe policies and regulations to carry out such policy), to any other executive agency with the consent of the head of such executive agency or at the direction of the President'' for ''The Administrator may delegate, and authorize successive redelegations of, any authority, function, or power under this chapter, other than his basic authority to provide overall leadership in the development of Federal procurement policy, to any other executive agency with the consent of such agency or at the direction of the President''.

1979—Subsec. (a). Pub. L. 96–83 substituted provisions respecting delegation of the leadership role in the development of policy, for provisions respecting delegation of the direction of policy and the authority to prescribe rules and regulations to effectuate that policy.

EFFECTIVE DATE OF 1979 AMENDMENT

Amendment by Pub. L. 96–83 effective Oct. 1, 1979, see section 12 of Pub. L. 96–83, set out as a note under section 401 of this title.

§ 412. Comptroller General's access to information from Administrator; rule making procedure

(a) The Administrator and personnel in his Office shall furnish such information as the Comptroller General may require for the discharge of his responsibilities. For this purpose, the Comptroller General or his representatives shall have access to all books, documents, papers, and records of the Office.

(b) The Administrator shall, by regulation, require that formal meetings of the Office, as designated by him, for the purpose of developing procurement policies and regulations shall be open to the public, and that public notice of each such meeting shall be given not less than ten days prior thereto.

(Pub. L. 93–400, § 14, Aug. 30, 1974, 88 Stat. 800; Pub. L. 96–83, § 9, Oct. 10, 1979, 93 Stat. 652.)

AMENDMENTS

1979—Subsec. (b). Pub. L. 96–83 substituted ''developing'' for ''establishing''.

EFFECTIVE DATE OF 1979 AMENDMENT

Amendment by Pub. L. 96–83 effective Oct. 1, 1979, see section 12 of Pub. L. 96–83, set out as a note under section 401 of this title.

§ 413. Tests of innovative procurement methods and procedures

(a) The Administrator may develop innovative procurement methods and procedures to be tested by selected executive agencies. In developing any program to test innovative procurement methods and procedures under this subsection, the Administrator shall consult with the heads of executive agencies to—

(1) ascertain the need for and specify the objectives of such program;

(2) develop the guidelines and procedures for carrying out such program and the criteria to be used in measuring the success of such program;

(3) evaluate the potential costs and benefits which may be derived from the innovative procurement methods and procedures tested under such program;

(4) select the appropriate executive agencies or components of executive agencies to carry out such program;

(5) specify the categories and types of products or services to be procured under such program; and

(6) develop the methods to be used to analyze the results of such program.

A program to test innovative procurement methods and procedures may not be carried out unless approved by the heads of the executive agencies selected to carry out such program.

(b) If the Administrator determines that it is necessary to waive the application of any provision of law in order to carry out a proposed program to test innovative procurement methods and procedures under subsection (a) of this section, the Administrator shall transmit notice of the proposed program to the Committee on Government Operations of the House of Representatives and the Committee on Governmental Affairs of the Senate and request that such committees take such action as may be necessary to provide that such provision of law does not apply with respect to the proposed program. The notification to Congress shall include a description of the proposed program (including the scope and purpose of the proposed program), the procedures to be followed in carrying out the proposed program, the provisions of law affected and any provision of law the application of which must be waived in order to carry out the proposed program, and the executive agencies involved in carrying out the proposed program.

(Pub. L. 93–400, § 15, as added Pub. L. 98–191, § 7, Dec. 1, 1983, 97 Stat. 1329; amended Pub. L. 104–201, div. A, title X, § 1074(f)(2), Sept. 23, 1996, 110 Stat. 2661.)

PRIOR PROVISIONS

A prior section 15 of Pub. L. 93–400 amended sections 474, 481, and 487 of former Title 40, Public Buildings, Property, and Works.

AMENDMENTS

1996—Subsec. (a). Pub. L. 104–201 struck out after first sentence ''The innovative procurement methods and procedures tested under this subsection shall be consistent with the policies set forth in section 401 of this title.''

CHANGE OF NAME

Committee on Governmental Affairs of Senate changed to Committee on Homeland Security and Governmental Affairs of Senate, effective Jan. 4, 2005, by Senate Resolution No. 445, One Hundred Eighth Congress, Oct. 9, 2004.

Committee on Government Operations of House of Representatives treated as referring to Committee on Government Reform and Oversight of House of Representatives by section 1(a) of Pub. L. 104–14, set out as a note preceding section 21 of Title 2, The Congress.

Committee on Government Reform and Oversight of House of Representatives changed to Committee on Government Reform of House of Representatives by House Resolution No. 5, One Hundred Sixth Congress, Jan. 6, 1999. 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.

TEST PROGRAM FOR EXECUTIVE AGENCIES

Pub. L. 103–355, title V, §5061, Oct. 13, 1994, 108 Stat. 3352, as amended by Pub. L. 104–106, div. D, title XLIII, §4302(a), Feb. 10, 1996, 110 Stat. 658; Pub. L. 105–85, div. A, title VIII, §850(f)(1), Nov. 18, 1997, 111 Stat. 1849, provided that:

''(a) IN GENERAL.—The Administrator for Federal Procurement Policy (in this section referred to as the 'Administrator') may conduct a program of tests of alternative and innovative procurement procedures. To the extent consistent with this section, such program shall be conducted consistent with section 15 of the Office of Federal Procurement Policy Act (41 U.S.C. 413). No more than 6 such tests shall be conducted under the authority of this subsection, and not more than 1 such test shall be conducted under such authority in an agency.

''(b) DESIGNATION OF AGENCIES.—Each test conducted pursuant to subsection (a) shall be carried out in not more than 2 specific procuring activities in an agency designated by the Administrator. Each agency so designated shall select the procuring activities participating in the test with the approval of the Administrator and shall designate a procurement testing official who shall be responsible for the conduct and evaluation of tests within that agency.

''(c) TEST REQUIREMENTS AND LIMITATIONS.—(1) Each test conducted under subsection (a)—

''(A) shall be developed and structured by the Administrator or by the agency senior procurement executive designated pursuant to section 16(3) of the Office of Federal Procurement Policy Act ([former] 41 U.S.C. 414(3)) in close coordination with the Administrator; and

''(B) shall be limited to specific programs of agencies or specific acquisitions.

''(2) The total estimated life-cycle cost to the Federal Government for each test conducted under subsection (a) may not exceed $100,000,000.

''(3)(A) Except as provided in subparagraph (B), each contract awarded in conducting the tests under subsection (a) (including the cost of options if all options were to be exercised) may not exceed $5,000,000.

''(B) For one of the tests conducted under subsection (a), the amount of each contract awarded in conducting the test (including options) may exceed $5,000,000.

''(4) The program of tests conducted under subsection (a) shall include, either as a test or as part of a test, the use of the electronic commerce capability required by section 30 of the Office of Federal Procurement Policy Act [41 U.S.C. 426] for procurement actions in amounts greater than the simplified acquisition threshold.

''(d) LIMITATION ON TOTAL VALUE OF CONTRACTS UNDER PROGRAM.—(1) The Administrator shall ensure that the total amount obligated under contracts awarded pursuant to the program under this section does not exceed $600,000,000. In calculating such amount, the Administrator shall not include any contract awarded for the test conducted by the National Aeronautics and Space Administration pursuant to section 5062 of this Act [42 U.S.C. 2473 note].

''(2) The Administrator shall monitor the value of contracts awarded pursuant to the program under this section.

''(3) No contract may be awarded under the program under this section if the award of the contract would result in obligation of more than $600,000,000 under contracts awarded pursuant to the program under this section.

''(e) PROCEDURES AUTHORIZED.—Tests conducted under this section may include any of the following procedures:

''(1) Publication of agency needs before drafting of a solicitation.

''(2) Issuance of draft solicitations for comment.

''(3) Streamlined solicitations that specify as the evaluation factors the minimum factors necessary, require sources to submit the minimum information necessary, provide abbreviated periods for submission of offers, and specify page limitations for offers.

''(4) Limitation of source selection factors to—

''(A) cost to the Federal Government;

''(B) past experience and performance; and

''(C) quality of the content of the offer.

''(5) Evaluation of proposals by small teams of highly qualified people over a period not greater than 30 days.

''(6) Restriction of competitions to sources determined capable in a precompetition screening process, provided that the screening process affords all interested sources a fair opportunity to be considered.

''(7) Restriction of competitions to sources of preevaluated products, provided that the preevaluation process affords all interested sources a fair opportunity to be considered.

''(8) Alternative notice and publication requirements.

''(9) A process in which—

''(A) the competitive process is initiated by publication in the Commerce Business Daily of a notice that—

''(i) contains a synopsis of the functional and performance needs of the executive agency conducting the test, and, for purposes of guidance only, other specifications; and

''(ii) invites any interested source to submit information or samples showing the suitability of its product for meeting those needs, together with a price quotation, or, if appropriate, showing the source's technical capability, past performance, product supportability, or other qualifications (including, as appropriate, information regarding rates and other cost-related factors);

''(B) contracting officials develop a request for proposals (including appropriate specifications and evaluation criteria) after reviewing the submissions of interested sources and, if the officials determine necessary, after consultation with those sources; and

''(C) a contract is awarded after a streamlined competition that is limited to all sources that timely provided product information in response to the notice or, if appropriate, to those sources determined most capable based on the qualification-based factors included in an invitation to submit information pursuant to subparagraph (A).

''(f) MEASURABLE TEST CRITERIA.—The Administrator shall require each agency conducting a test pursuant to subsection (a) to establish, to the maximum extent practicable, measurable criteria for evaluation of the effects of the procedure or technique to be tested.

''(g) TEST PLAN.—At least 270 days before a test may be conducted under this section, the Administrator shall—

''(1) provide a detailed test plan, including lists of any regulations that are to be waived, and any written determination under subsection (h)(1)(B) to the Committee on Government Operations [now Committee on Oversight and Government Reform] of the House of Representatives and the Committee on Governmental Affairs [now Committee on Homeland Security and Governmental Affairs] of the Senate;

''(2) provide a copy of the plan to the appropriate authorization and appropriations committees of the House of Representatives and the Senate; and

''(3) publish the plan in the Federal Register and provide an opportunity for public comment.

''(h) WAIVER OF PROCUREMENT REGULATIONS.—(1) For purposes of a test conducted under subsection (a), the Administrator may waive—

''(A) any provision of the Federal Acquisition Regulation that is not required by statute; and

''(B) any provision of the Federal Acquisition Regulation that is required by a provision of law described in paragraph (2), the waiver of which the Administrator determines in writing to be necessary to conduct any test of any of the procedures described in subsection (e).

''(2) The provisions of law referred to in paragraph (1) are as follows:

''(A) The following provisions of title 10, United States Code:

''(i) Section 2304.

''(ii) Section 2305.

''(iii) Section 2319.

''(B) Subsections (e), (f), and (g) of section 8 of the Small Business Act (15 U.S.C. 637).

''(C) The following provisions of the Revised Statutes:

''(i) Section 3709 (41 U.S.C. 5).

''(ii) Section 3710 (41 U.S.C. 8).

''(iii) Section 3735 (41 U.S.C. 13).

''(D) The following provisions of the Federal Property and Administrative Services Act of 1949:

''(i) Section 303 (41 U.S.C. 253).

''(ii) Section 303A (41 U.S.C. 253a).

''(iii) Section 303B (41 U.S.C. 253b).

''(iv) Section 303C (41 U.S.C. 253c).

''(v) Section 310 (41 U.S.C. 260).

''(E) The following provisions of the Office of Federal Procurement Policy Act:

''(i) Section 4(6) (41 U.S.C. 403(6)).

''(ii) Section 18 (41 U.S.C. 416).

''(3) If the Administrator determines that the conduct of a test requires the waiver of a law not listed in paragraph (2) or requires approval of an estimated dollar amount not permitted under subsection (c)(4), the Administrator may propose legislation to authorize the waiver or grant the approval. Before proposing such legislation, the Administrator may provide and publish a test plan as described in subsection (g).

''(i) REPORT.—Not later than 6 months after completion of a test conducted under subsection (a), the Comptroller General shall submit to Congress a report for the test setting forth in detail the results of the test, including such recommendations as the Comptroller General considers appropriate.

''(j) COMMENCEMENT AND EXPIRATION OF AUTHORITY.—The authority to conduct a test under subsection (a) in an agency and to award contracts under such a test shall take effect on January 1, 1997, and shall expire on January 1, 2001. A contract entered into before such authority expires in an agency pursuant to a test shall remain in effect, in accordance with the terms of the contract, the notwithstanding of expiration the authority to conduct the test under this section.

''(k) RULE OF CONSTRUCTION.—Nothing in this section shall be construed as authorizing the appropriation or obligation of funds for the tests conducted pursuant to subsection (a).''

§ 414. Chief Acquisition Officers and senior procurement executives

(a) Establishment of agency Chief Acquisition Officers

(1)[1] The head of each executive agency described in section 901(b)(1) (other than the Department of Defense) or section 901(b)(2)(C) of title 31 with a Chief Financial Officer appointed or designated under section 901(a) of such title shall appoint or designate a non-career employee as Chief Acquisition Officer for the agency, who shall—

(A) have acquisition management as that official's primary duty; and

(B) advise and assist the head of the executive agency and other agency officials to ensure that the mission of the executive agency is achieved through the management of the agency's acquisition activities.

(b) Authority and functions of agency Chief Acquisition Officers

The functions of each Chief Acquisition Officer shall include—

(1) monitoring the performance of acquisition activities and acquisition programs of the executive agency, evaluating the performance of those programs on the basis of applicable performance measurements, and advising the head of the executive agency regarding the appropriate business strategy to achieve the mission of the executive agency;

(2) increasing the use of full and open competition in the acquisition of property and services by the executive agency by establishing policies, procedures, and practices that ensure that the executive agency receives a sufficient number of sealed bids or competitive proposals from responsible sources to fulfill the Government's requirements (including performance and delivery schedules) at the lowest cost or best value considering the nature of the property or service procured;

(3) increasing appropriate use of performance-based contracting and performance specifications;

(4) making acquisition decisions consistent with all applicable laws and establishing clear lines of authority, accountability, and responsibility for acquisition decisionmaking within the executive agency;

(5) managing the direction of acquisition policy for the executive agency, including implementation of the unique acquisition policies, regulations, and standards of the executive agency;

(6) developing and maintaining an acquisition career management program in the executive agency to ensure that there is an adequate professional workforce; and

(7) as part of the strategic planning and performance evaluation process required under section 306 of title 5 and sections 1105(a)(28), 1115, 1116, and 9703 of title 31—

(A) assessing the requirements established for agency personnel regarding knowledge and skill in acquisition resources management and the adequacy of such requirements for facilitating the achievement of the performance goals established for acquisition management;

(B) in order to rectify any deficiency in meeting such requirements, developing strategies and specific plans for hiring, training, and professional development; and

(C) reporting to the head of the executive agency on the progress made in improving acquisition management capability.

(c) Senior procurement executive

(1) The head of each executive agency shall designate a senior procurement executive who shall be responsible for management direction of the procurement system of the executive agency, including implementation of the unique procurement policies, regulations, and standards of the executive agency.

[1] So in original. No par. (2) has been enacted.

(2) In the case of an executive agency for which a Chief Acquisition Officer has been appointed or designated under subsection (a) of this section, the head of such executive agency shall either—

(A) designate the Chief Acquisition Officer as the senior procurement executive for the executive agency; or

(B) ensure that the senior procurement executive designated for the executive agency under paragraph (1) reports directly to the Chief Acquisition Officer without intervening authority.

(Pub. L. 93–400, § 16, as added Pub. L. 98–191, § 7, Dec. 1, 1983, 97 Stat. 1330; amended Pub. L. 98–369, div. B, title VII, § 2732(b)(2), July 18, 1984, 98 Stat. 1199; Pub. L. 108–136, div. A, title XIV, § 1421(a)(1), Nov. 24, 2003, 117 Stat. 1666.)

AMENDMENTS

2003—Pub. L. 108–136 amended section generally. Prior to amendment, section related to executive agency responsibilities.

1984—Par. (1). Pub. L. 98–369 substituted ''increase the use of full and open competition in the procurement of property or services by the executive agency by establishing policies, procedures, and practices that assure that the executive agency receives a sufficient number of sealed bids or competitive proposals from responsible sources to fulfill the Government's requirements (including performance and delivery schedules) at the lowest reasonable cost considering the nature of the property or service procured;'' for ''increase the use of effective competition in procurement by the executive agency;''.

§ 414a. Personnel evaluation

The head of each executive agency that is subject to the provisions of title III of the Federal Property and Administrative Services Act of 1949 [41 U.S.C. 251 et seq.] shall ensure, with respect to the employees of that agency whose primary duties and responsibilities pertain to the award of contracts subject to the provisions of this Act, that the performance appraisal system applicable to such employees affords appropriate recognition to, among other factors, efforts—

(1) to increase competition and achieve cost savings through the elimination of procedures that unnecessarily inhibit full and open competition;

(2) to further the purposes of the Small Business and Federal Procurement Competition Enhancement Act of 1984 and the Defense Procurement Reform Act of 1984; and

(3) to further such other objectives and purposes of the Federal acquisition system as may be authorized by law.

(Pub. L. 98–577, title V, § 502, Oct. 30, 1984, 98 Stat. 3085.)

REFERENCES IN TEXT

The Federal Property and Administrative Services Act of 1949, as amended, referred to in provision preceding par. (1), is act June 30, 1949, ch. 288, 63 Stat. 377, as amended. Title III of the Act is classified generally to subchapter IV (§ 251 et seq.) of chapter 4 of this title. For complete classification of this Act to the Code, see Tables.

This Act and the Small Business and Federal Procurement Competition Enhancement Act of 1984, referred to in provision preceding par. (1) and par. (2), is Pub. L. 98–577, Oct. 30, 1984, 98 Stat. 3066. For complete classification of this Act to the Code, see Short Title note set out under section 251 of this title and Tables.

The Defense Procurement Reform Act of 1984, referred to in par. (2), is Pub. L. 98–525, title XII, Oct. 19, 1984, 98 Stat. 2588. For complete classification of this Act to the Code, see Short Title of 1984 Amendment note set out under section 2302 of Title 10, Armed Forces, and Tables.

CODIFICATION

Section was enacted as part of the Small Business and Federal Procurement Competition Enhancement Act of 1984, and not as part of the Office of Federal Procurement Policy Act which comprises this chapter.

§ 414b. Chief Acquisition Officers Council

(a) Establishment

There is established in the executive branch a Chief Acquisition Officers Council.

(b) Membership

The members of the Council shall be as follows:

(1) The Deputy Director for Management of the Office of Management and Budget, who shall act as Chairman of the Council.

(2) The Administrator for Federal Procurement Policy.

(3) The Under Secretary of Defense for Acquisition, Technology, and Logistics.

(4) The chief acquisition officer of each executive agency that is required to have a chief acquisition officer under section 414 of this title and the senior procurement executive of each military department.

(5) Any other senior agency officer of each executive agency, appointed by the head of the agency in consultation with the Chairman, who can effectively assist the Council in performing the functions set forth in subsection (e) of this section and supporting the associated range of acquisition activities.

(c) Leadership; support

(1) The Administrator for Federal Procurement Policy shall lead the activities of the Council on behalf of the Deputy Director for Management.

(2)(A) The Vice Chairman of the Council shall be selected by the Council from among its members.

(B) The Vice Chairman shall serve a 1-year term, and may serve multiple terms.

(3) The Administrator of General Services shall provide administrative and other support for the Council.

(d) Principal forum

The Council is designated the principal interagency forum for monitoring and improving the Federal acquisition system.

(e) Functions

The Council shall perform functions that include the following:

(1) Develop recommendations for the Director of the Office of Management and Budget on Federal acquisition policies and requirements.

(2) Share experiences, ideas, best practices, and innovative approaches related to Federal acquisition.

(3) Assist the Administrator in the identification, development, and coordination of

multiagency projects and other innovative initiatives to improve Federal acquisition.

(4) Promote effective business practices that ensure the timely delivery of best value products to the Federal Government and achieve appropriate public policy objectives.

(5) Further integrity, fairness, competition, openness, and efficiency in the Federal acquisition system.

(6) Work with the Office of Personnel Management to assess and address the hiring, training, and professional development needs of the Federal Government related to acquisition.

(7) Work with the Administrator and the Federal Acquisition Regulatory Council to promote the business practices referred to in paragraph (4) and other results of the functions carried out under this subsection.

(Pub. L. 93–400, § 16A, as added Pub. L. 108–136, div. A, title XIV, § 1422(a), Nov. 24, 2003, 117 Stat. 1668.)

§ 415. Repealed. Pub. L. 103–355, title VI, § 6003, Oct. 13, 1994, 108 Stat. 3364

Section, Pub. L. 93–400, § 17, as added Pub. L. 98–191, § 7, Dec. 1, 1983, 97 Stat. 1330, directed Administrator to conduct studies and issue report by Apr. 1, 1984, to Congressional committees on extent of competition in award of subcontracts by Federal prime contractors.

EFFECTIVE DATE OF REPEAL

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

§ 416. Procurement notice

(a) Covered executive agency activities; publication of notice; time limitations

(1) Except as provided in subsection (c) of this section—

(A) an executive agency intending to—

(i) solicit bids or proposals for a contract for property or services for a price expected to exceed $25,000; or

(ii) place an order, expected to exceed $25,000, under a basic agreement, basic ordering agreement, or similar arrangement,

shall publish a notice of solicitation described in subsection (b) of this section;

(B) an executive agency intending to solicit bids or proposals for a contract for property or services for a price expected to exceed $10,000, but not to exceed $25,000, shall post, for a period of not less than ten days, in a public place at the contracting office issuing the solicitation a notice of solicitation described in subsection (b) of this section; and

(C) an executive agency awarding a contract for property or services for a price exceeding $25,000, or placing an order referred to in clause (A)(ii) exceeding $25,000, shall furnish for publication by the Secretary of Commerce a notice announcing the award or order if there is likely to be any subcontract under such contract or order.

(2)(A) A notice of solicitation required to be published under paragraph (1) may be published—

(i) by electronic means that meets the requirements for accessibility under paragraph (7); or

(ii) by the Secretary of Commerce in the Commerce Business Daily.

(B) The Secretary of Commerce shall promptly publish in the Commerce Business Daily each notice or announcement received under this subsection for publication by that means.

(3) Whenever an executive agency is required by paragraph (1)(A) to publish a notice of solicitation, such executive agency may not—

(A) issue the solicitation earlier than 15 days after the date on which the notice is published; or

(B) in the case of a contract or order expected to be greater than the simplified acquisition threshold, establish a deadline for the submission of all bids or proposals in response to the notice required by paragraph (1)(A) that—

(i) in the case of an order under a basic agreement, basic ordering agreement, or similar arrangement, is earlier than the date 30 days after the date the notice required by paragraph (1)(A)(ii) is published;

(ii) in the case of a solicitation for research and development, is earlier than the date 45 days after the date the notice required by paragraph (1)(A)(i) is published; or

(iii) in any other case, is earlier than the date 30 days after the date the solicitation is issued.

(4) An executive agency intending to solicit offers for a contract for which a notice of solicitation is required to be posted under paragraph (1)(B) shall ensure that contracting officers consider each responsive offer timely received from an offeror.

(5) An executive agency shall establish a deadline for the submission of all bids or proposals in response to a solicitation with respect to which no such deadline is provided by statute. Each deadline for the submission of offers shall afford potential offerors a reasonable opportunity to respond.

(6) The Administrator shall prescribe regulations defining limited circumstances in which flexible deadlines can be used under paragraph (3) for the issuance of solicitations and the submission of bids or proposals for the procurement of commercial items.

(7) A publication of a notice of solicitation by electronic means meets the requirements for accessibility under this paragraph if the notice is electronically accessible in a form that allows convenient and universal user access through the single Government-wide point of entry designated in the Federal Acquisition Regulation.

(b) Contents of notice

Each notice of solicitation required by subparagraph (A) or (B) of subsection (a)(1) shall include—

(1) an accurate description of the property or services to be contracted for, which description (A) shall not be unnecessarily restrictive of competition, and (B) shall include, as appropriate, the agency nomenclature, National Stock Number or other part number, and a

brief description of the item's form, fit, or function, physical dimensions, predominant material of manufacture, or similar information that will assist a prospective contractor to make an informed business judgment as to whether a copy of the solicitation should be requested;

(2) provisions that—

(A) state whether the technical data required to respond to the solicitation will not be furnished as part of such solicitation, and identify the source in the Government, if any, from which the technical data may be obtained; and

(B) state whether an offeror, its product, or service must meet a qualification requirement in order to be eligible for award, and, if so, identify the office from which the qualification requirement may be obtained;

(3) the name, business address, and telephone number of the contracting officer;

(4) a statement that all responsible sources may submit a bid, proposal, or quotation (as appropriate) which shall be considered by the agency;

(5) in the case of a procurement using procedures other than competitive procedures, a statement of the reason justifying the use of such procedures and the identity of the intended source; and

(6) in the case of a contract in an amount estimated to be greater than $25,000 but not greater than the simplified acquisition threshold, or a contract for the procurement of commercial items using special simplified procedures—

(A) a description of the procedures to be used in awarding the contract; and

(B) a statement specifying the periods for prospective offerors and the contracting officer to take the necessary preaward and award actions.

(c) Exempted, etc., activities of executive agency

(1) A notice is not required under subsection (a)(1) of this section if—

(A) the proposed procurement is for an amount not greater than the simplified acquisition threshold and is to be conducted by—

(i) using widespread electronic public notice of the solicitation in a form that allows convenient and universal user access through a single, Government-wide point of entry; and

(ii) permitting the public to respond to the solicitation electronically;

(B) the notice would disclose the executive agency's needs and the disclosure of such needs would compromise the national security;

(C) the proposed procurement would result from acceptance of—

(i) any unsolicited proposal that demonstrates a unique and innovative research concept and the publication of any notice of such unsolicited research proposal would disclose the originality of thought or innovativeness of the proposal or would disclose proprietary information associated with the proposal; or

(ii) a proposal submitted under section 638 of title 15;

(D) the procurement is made against an order placed under a requirements contract, a task order contract, or a delivery order contract;

(E) the procurement is made for perishable subsistence supplies;

(F) the procurement is for utility services, other than telecommunication services, and only one source is available;

(G) the procurement is for the services of an expert for use in any litigation or dispute (including any reasonably foreseeable litigation or dispute) involving the Federal Government in any trial, hearing, or proceeding before any court, administrative tribunal, or agency, or in any part of an alternative dispute resolution process, whether or not the expert is expected to testify; or

(H) the procurement is by the Secretary of Homeland Security pursuant to the special procedures provided in section 393(c) of title 6.

(2) The requirements of subsection (a)(1)(A) of this section do not apply to any procurement under conditions described in paragraph (2), (3), (4), (5), or (7) of section 253(c) of this title or paragraph (2), (3), (4), (5), or (7) of section 2304(c) of title 10.

(3) The requirements of subsection (a)(1)(A) of this section shall not apply in the case of any procurement for which the head of the executive agency makes a determination in writing, after consultation with the Administrator for Federal Procurement Policy and the Administrator of the Small Business Administration, that it is not appropriate or reasonable to publish a notice before issuing a solicitation.

(d) Availability of complete solicitation package; payment of fee

An executive agency shall make available to any business concern, or the authorized representative of such concern, the complete solicitation package for any on-going procurement announced pursuant to a notice of solicitation under subsection (a) of this section. An executive agency may require the payment of a fee, not exceeding the actual cost of duplication, for a copy of such package.

(Pub. L. 93–400, §18, as added Pub. L. 98–369, div. B, title VII, §2732(a), July 18, 1984, 98 Stat. 1195; amended Pub. L. 98–577, title III, §303(a), Oct. 30, 1984, 98 Stat. 3077; Pub. L. 99–500, §101(c) [title X, §922(b), (d)(2)], Oct. 18, 1986, 100 Stat. 1783–82, 1783–151, 1783–152, and Pub. L. 99–591, §101(c) [title X, §922(b), (d)(2)], Oct. 30, 1986, 100 Stat. 3341–82, 3341–151, 3341–152; Pub. L. 99–661, div. A, title IX, formerly title IV, §922(b), (d)(2), Nov. 14, 1986, 100 Stat. 3931, 3932; renumbered title IX, Pub. L. 100–26, §3(5), Apr. 21, 1987, 101 Stat. 273; Pub. L. 101–510, div. A, title VIII, §806(d), Nov. 5, 1990, 104 Stat. 1592; Pub. L. 103–355, title I, §1055(b)(1), title IV, §§4201(b), (c), 4202(a)–(c), title VIII, §8302, title IX, §9001(b), Oct. 13, 1994, 108 Stat. 3265, 3344, 3398, 3402; Pub. L. 104–106, div. D, title XLI, §4101(c), title XLII, §4202(d), title XLIII, §§4310, 4321(h)(3), Feb. 10, 1996, 110 Stat. 642, 654, 670, 675; Pub. L. 105–85, div. A, title VIII, §850(e)(2), Nov. 18, 1997, 111 Stat. 1849; Pub. L.

105–261, div. A, title X, § 1069(d)(1), Oct. 17, 1998, 112 Stat. 2136; Pub. L. 106–398, § 1 [[div. A], title VIII, § 810(a), (b)], Oct. 30, 2000, 114 Stat. 1654, 1654A–209; Pub. L. 107–296, title VIII, § 833(c)(2), Nov. 25, 2002, 116 Stat. 2226.)

CODIFICATION

Pub. L. 99–591 is a corrected version of Pub. L. 99–500.

AMENDMENTS

2002—Subsec. (c)(1)(H). Pub. L. 107–296 added subpar. (H).

2000—Subsec. (a)(1)(A). Pub. L. 106–398, § 1 [[div. A], title VIII, § 810(a)(1)], substituted ''publish'' for ''furnish for publication by the Secretary of Commerce'' in concluding provisions.

Subsec. (a)(2). Pub. L. 106–398, § 1 [[div. A], title VIII, § 810(a)(2)], added par. (2) and struck out former par. (2) which read as follows: ''The Secretary of Commerce shall publish promptly in the Commerce Business Daily each notice required by paragraph (1).''

Subsec. (a)(3). Pub. L. 106–398, § 1 [[div. A], title VIII, § 810(b)], substituted ''publish a notice of solicitation'' for ''furnish a notice to the Secretary of Commerce'' in introductory provisions and struck out ''by the Secretary of Commerce'' after ''notice is published'' in subpar. (A).

Subsec. (a)(7). Pub. L. 106–398, § 1 [[div. A], title VIII, § 810(a)(3)], added par. (7).

1998—Subsec. (c)(1)(A)(ii). Pub. L. 105–261 substituted a semicolon for period at end.

1997—Subsec. (c)(1). Pub. L. 105–85 added subpar. (A), redesignated subpars. (C) to (H) as (B) to (G), respectively, and struck out former subpars. (A) and (B) which read as follows:

''(A) the proposed procurement is for an amount not greater than the simplified acquisition threshold and is to be made through a system with interim FACNET capability certified pursuant to section 426a(a)(1) of this title or with full FACNET capability certified pursuant to section 426a(a)(2) of this title;

''(B)(i) the proposed procurement is for an amount not greater than $250,000 and is to be made through a system with full FACNET capability certified pursuant to section 426a(a)(2) of this title; and

''(ii) a certification has been made pursuant to section 426a(b) of this title that Government-wide FACNET capability has been implemented;''.

1996—Subsec. (a)(1)(B). Pub. L. 104–106, § 4101(c)(B), inserted ''for a price expected to exceed $10,000, but not to exceed $25,000,'' after ''property or services''.

Pub. L. 104–106, § 4101(c)(A), substituted ''subsection (b) of this section; and'' for ''subsection (f) of this section—'' and struck out cls. (i) and (ii) which read as follows:

''(i) in the case of an executive agency other than the Department of Defense, if the contract is for a price expected to exceed $10,000, but not to exceed $25,000; and

''(ii) in the case of the Department of Defense, if the contract is for a price expected to exceed $5,000, but not to exceed $25,000; and''.

Subsec. (a)(6). Pub. L. 104–106, § 4202(d)(1)(A), inserted ''issuance of solicitations and the'' after ''paragraph (3) for the''.

Subsec. (b)(5). Pub. L. 104–106, § 4321(h)(3), inserted ''and'' after ''source;''.

Subsec. (b)(6). Pub. L. 104–106, § 4202(d)(1)(B), substituted ''threshold, or a contract for the procurement of commercial items using special simplified procedures—'' for ''threshold—''.

Subsec. (c)(1)(E). Pub. L. 104–106, § 4310, inserted '', a task order contract, or a delivery order contract'' after ''requirements contract''.

1994—Subsec. (a)(1). Pub. L. 103–355, § 4202(a)(1), substituted ''$25,000'' for ''the small purchase threshold'' wherever appearing.

Subsec. (a)(1)(A). Pub. L. 103–355, § 9001(b)(1), substituted ''notice of solicitation'' for ''notice'' in concluding provisions.

Subsec. (a)(3)(B). Pub. L. 103–355, § 4202(a)(2), inserted ''in the case of a contract or order expected to be greater than the simplified acquisition threshold,'' before ''establish a deadline''.

Subsec. (a)(4), (5). Pub. L. 103–355, § 4201(b), (c), added pars. (4) and (5).

Subsec. (a)(6). Pub. L. 103–355, § 8302, added par. (6).

Subsec. (b)(6). Pub. L. 103–355, § 4202(b), added par. (6).

Subsec. (c)(1)(A) to (E). Pub. L. 103–355, § 4202(c), added subpars. (A) and (B) and redesignated former subpars. (A) to (C) as (C) to (E), respectively. Former subpars. (D) and (E) redesignated (F) and (G), respectively.

Subsec. (c)(1)(F). Pub. L. 103–355, § 4202(c)(1), redesignated subpar. (D) as (F). Former subpar. (F) redesignated (H).

Pub. L. 103–355, § 1055(b)(1), added subpar. (F).

Subsec. (c)(1)(G), (H). Pub. L. 103–355, § 4202(c)(1), redesignated subpars. (E) and (F) as (G) and (H), respectively.

Subsec. (d). Pub. L. 103–355, § 9001(b)(2), substituted ''a notice of solicitation under subsection (a)'' for ''a notice under subsection (e)'' in first sentence.

1990—Subsec. (a)(1)(A). Pub. L. 101–510 substituted ''the small purchase threshold; or'' for ''$25,000;'' in cl. (i), substituted ''the small purchase threshold'' for ''$25,000'' and a comma for ''; or'' in cl. (ii), and struck out cl. (iii) which read as follows: ''solicit bids or proposals for a contract for property or services for a price expected to exceed $10,000, if there is not a reasonable expectation that at least two offers will be received from responsive and responsible offerors,''.

Subsec. (a)(1)(B), (C). Pub. L. 101–510, § 806(d)(1), substituted ''the small purchase threshold'' for ''$25,000'' wherever appearing.

1986—Subsec. (a)(1)(A). Pub. L. 99–500 and Pub. L. 99–591, § 101(c) [title X, § 922(b)(1)], and Pub. L. 99–661, § 922(b)(1), amended subpar. (A) identically, substituting ''$25,000'' for ''$10,000'' in cls. (i) and (ii) and adding cl. (iii).

Subsec. (a)(1)(B), (C). Pub. L. 99–500 and Pub. L. 99–591, § 101(c) [title X, § 922(b)(2), (3)], and Pub. L. 99–661, § 922(b)(2), (3), amended par. (1) identically, adding subpar. (B) and redesignating former subpar. (B) as (C).

Subsec. (b). Pub. L. 99–500 and Pub. L. 99–591, § 101(c) [title X, § 922(d)(2)], and Pub. L. 99–661, § 922(d)(2), amended subsec. (b) identically, substituting ''subparagraph (A) or (B) of subsection (a)(1)'' for ''subsection (a)(1)(A)''.

1984—Subsec. (a)(1)(A). Pub. L. 98–577 designated existing provisions as cl. (i) and added cl. (ii).

Subsec. (a)(1)(B). Pub. L. 98–577 inserted '', or placing an order referred to in clause (A)(ii) exceeding $25,000,'' before ''shall furnish''.

Subsec. (a)(3)(B). Pub. L. 98–577 designated existing provisions as cl. (i), substituted provisions relating to an order under a basic agreement for former provisions which related to all bids, and added cls. (ii) and (iii).

Subsec. (b)(1). Pub. L. 98–577 designated existing provisions as subpar. (A) and added subpar. (B).

Subsec. (b)(2). Pub. L. 98–577 added par. (2). Former par. (2), which related to information about the officer or employee of the executive agency who may be contacted for purposes of obtaining a copy of the solicitation, was struck out.

Subsec. (c)(1)(B). Pub. L. 98–577 designated existing provisions as cl. (i) and added cl. (ii).

Subsec. (c)(1)(E). Pub. L. 98–577 added subpar. (E).

Subsec. (d). Pub. L. 98–577 added subsec. (d).

EFFECTIVE DATE OF 2002 AMENDMENT

Amendment by Pub. L. 107–296 effective 60 days after Nov. 25, 2002, see section 4 of Pub. L. 107–296, set out as an Effective Date note under section 101 of Title 6, Domestic Security.

EFFECTIVE DATE OF 2000 AMENDMENT

Amendment by Pub. L. 106–398 effective Oct. 1, 2000, and applicable with respect to solicitations issued on or after that date, see section 1 [[div. A], title VIII,

§ 810(e)] of Pub. L. 106–398, set out as a note under section 637 of Title 15, Commerce and Trade.

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 OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104–106, see section 4401 of Pub. L. 104–106, set out as a note under section 251 of this title.

EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103–355, see section 10001 of Pub. L. 103–355, set out as a note under section 251 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Section 303(b) of Pub. L. 98–577 provided that: ''The amendment made by subsection (a) [amending this section] shall take effect with respect to any solicitation issued after March 31, 1985.''

EFFECTIVE DATE

Section applicable to any solicitation for bids or proposals issued after Mar. 31, 1985, see section 2751 of Pub. L. 98–369, set out as an Effective Date of 1984 Amendment note under section 251 of this title.

IMPLEMENTATION OF AMENDMENT BY PUB. L. 105–85

Amendment by Pub. L. 105–85 to be implemented in a manner consistent with any applicable international agreements, see section 850(e)(3) of Pub. L. 105–85, set out as a note under section 637 of Title 15, Commerce and Trade.

APPLICABILITY TO TENNESSEE VALLEY AUTHORITY

Section 303(c) of Pub. L. 98–577 provided that: ''The provisions of the amendments made by subsection (a) of this section [amending this section] shall apply to the Tennessee Valley Authority only with respect to procurements to be paid from appropriated funds.''

§ 417. Record requirements

(a) Establishment and maintenance of computer file by executive agency; time period coverage

Each executive agency shall establish and maintain for a period of five years a computer file, by fiscal year, containing unclassified records of all procurements greater than the simplified acquisition threshold in such fiscal year.

(b) Contents

The record established under subsection (a) of this section shall include—

(1) with respect to each procurement carried out using competitive procedures—

(A) the date of contract award;

(B) information identifying the source to whom the contract was awarded;

(C) the property or services obtained by the Government under the procurement; and

(D) the total cost of the procurement;

(2) with respect to each procurement carried out using procedures other than competitive procedures—

(A) the information described in clauses (1)(A), (1)(B), (1)(C), and (1)(D);

(B) the reason under section 253(c) of this title or section 2304(c) of title 10, as the case may be, for the use of such procedures; and

(C) the identity of the organization or activity which conducted the procurement.

(c) Record categories

The information that is included in such record pursuant to subsection (b)(1) of this section and relates to procurements resulting in the submission of a bid or proposal by only one responsible source shall be separately categorized from the information relating to other procurements included in such record. The record of such information shall be designated ''noncompetitive procurements using competitive procedures''.

(d) Transmission and data entry of information

The head of each executive agency shall ensure the accuracy of the information included in the record established and maintained by such agency under subsection (a) and shall transmit in a timely manner such information to the General Services Administration for entry into the Federal Procurement Data System referred to in section 405(d)(4) of this title, or any successor system.

(Pub. L. 93–400, § 19, as added Pub. L. 98–369, div. B, title VII, § 2732(a), July 18, 1984, 98 Stat. 1197; amended Pub. L. 103–355, title IV, § 4403, Oct. 13, 1994, 108 Stat. 3349; Pub. L. 110–417, [div. A], title VIII, § 874(b), Oct. 14, 2008, 122 Stat. 4558.)

AMENDMENTS

2008—Subsec. (d). Pub. L. 110–417 amended subsec. (d) generally. Prior to amendment, text read as follows: ''The information included in the record established and maintained under subsection (a) of this section shall be transmitted to the General Services Administration and shall be entered in the Federal Procurement Data System referred to in section 405(d)(4) of this title.''

1994—Subsec. (a). Pub. L. 103–355 substituted ''procurements greater than the simplified acquisition threshold'' for ''procurements, other than small purchases,''.

EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103–355, see section 10001 of Pub. L. 103–355, set out as a note under section 251 of this title.

EFFECTIVE DATE

Section applicable to any solicitation for bids or proposals issued after Mar. 31, 1985, see section 2751 of Pub. L. 98–369, set out as an Effective Date of 1984 Amendment note under section 251 of this title.

§ 417a. Procurement data

(a) Reporting

Each Federal agency shall report to the Office of Federal Procurement Policy the number of qualified HUBZone small business concerns, the number of small businesses owned and controlled by women, and the number of small business concerns owned and controlled by socially and economically disadvantaged businesses, by gender, that are first time recipients of contracts from such agency. The Office of Federal Procurement Policy shall take such actions as may be appropriate to ascertain for each fiscal year the number of such small businesses that have newly entered the Federal market.

(b) Definitions

For purposes of this section the terms ''small business concern owned and controlled by

women'' and ''small business concerns owned and controlled by socially and economically disadvantaged individuals'' shall be given the same meaning as those terms are given under section 637(d) of title 15 and section 204 of this Act, and the term ''qualified HUBZone small business concern'' has the meaning given that term in section 632(p) of title 15..[1]

(Pub. L. 100–533, title V, § 502, Oct. 25, 1988, 102 Stat. 2697; Pub. L. 105–135, title VI, § 604(f)(2), Dec. 2, 1997, 111 Stat. 2634.)

REFERENCES IN TEXT

Section 204 of this Act, referred to in subsec. (b), is section 204 of Pub. L. 100–533, which is set out as a note under section 637 of Title 15, Commerce and Trade.

CODIFICATION

Section was enacted as part of the Women's Business Ownership Act of 1988, and not as part of the Office of Federal Procurement Policy Act which comprises this chapter.

AMENDMENTS

1997—Subsec. (a). Pub. L. 105–135, § 604(f)(2)(A), inserted ''the number of qualified HUBZone small business concerns,'' after ''report to the Office of Federal Procurement Policy'' and a comma after ''controlled by women''.

Subsec. (b). Pub. L. 105–135, § 604(f)(2)(B), inserted '', and the term 'qualified HUBZone small business concern' has the meaning given that term in section 632(p) of title 15.'' before period at end.

EFFECTIVE DATE OF 1997 AMENDMENT

Amendment by Pub. L. 105–135 effective Oct. 1, 1997, see section 3 of Pub. L. 105–135, set out as a note under section 631 of Title 15, Commerce and Trade.

§ 417b. Database for Federal agency contract and grant officers and suspension and debarment officials

(a) In general

Subject to the authority, direction, and control of the Director of the Office of Management and Budget, the Administrator of General Services shall establish, not later than one year after October 14, 2008, and maintain a database of information regarding the integrity and performance of certain persons awarded Federal agency contracts and grants for use by Federal agency officials having authority over contracts and grants.

(b) Persons covered

The database shall cover the following:

(1) Any person awarded a Federal agency contract or grant in excess of $500,000, if any information described in subsection (c) exists with respect to such person.

(2) Any person awarded such other category or categories of Federal agency contract as the Federal Acquisition Regulation may provide, if such information exists with respect to such person.

(c) Information included

With respect to a covered person the database shall include information (in the form of a brief description) for the most recent 5-year period regarding the following:

(1) Each civil or criminal proceeding, or any administrative proceeding, in connection with the award or performance of a contract or grant with the Federal Government with respect to the person during the period to the extent that such proceeding results in the following dispositions:

(A) In a criminal proceeding, a conviction.

(B) In a civil proceeding, a finding of fault and liability that results in the payment of a monetary fine, penalty, reimbursement, restitution, or damages of $5,000 or more.

(C) In an administrative proceeding, a finding of fault and liability that results in—

(i) the payment of a monetary fine or penalty of $5,000 or more; or

(ii) the payment of a reimbursement, restitution, or damages in excess of $100,000.

(D) To the maximum extent practicable and consistent with applicable laws and regulations, in a criminal, civil, or administrative proceeding, a disposition of the matter by consent or compromise with an acknowledgment of fault by the person if the proceeding could have led to any of the outcomes specified in subparagraph (A), (B), or (C).

(2) Each Federal contract and grant awarded to the person that was terminated in such period due to default.

(3) Each Federal suspension and debarment of the person in that period.

(4) Each Federal administrative agreement entered into by the person and the Federal Government in that period to resolve a suspension or debarment proceeding.

(5) Each final finding by a Federal official in that period that the person has been determined not to be a responsible source under subparagraph (C) or (D) of section 403(7) of this title.

(6) Such other information as shall be provided for purposes of this section in the Federal Acquisition Regulation.

(7) To the maximum extent practical, information similar to the information covered by paragraphs (1) through (4) in connection with the award or performance of a contract or grant with a State government.

(d) Requirements relating to information in database

(1) Direct input and update

The Administrator shall design and maintain the database in a manner that allows the appropriate Federal agency officials to directly input and update information in the database relating to actions such officials have taken with regard to contractors or grant recipients.

(2) Timeliness and accuracy

The Administrator shall develop policies to require—

(A) the timely and accurate input of information into the database;

(B) the timely notification of any covered person when information relevant to the person is entered into the database; and

[1] So in original.

(C) opportunities for any covered person to submit comments pertaining to information about such person for inclusion in the database.

(e) Use of database

(1) Availability to government officials

The Administrator shall ensure that the information in the database is available to appropriate acquisition officials of Federal agencies, to such other government officials as the Administrator determines appropriate, and, upon request, to the Chairman and Ranking Member of the committees of Congress having jurisdiction.

(2) Review and assessment of data

(A) In general

Before awarding a contract or grant in excess of the simplified acquisition threshold under section 403(11) of this title, the Federal agency official responsible for awarding the contract or grant shall review the database and shall consider all information in the database with regard to any offer or proposal, and, in the case of a contract, shall consider other past performance information available with respect to the offeror in making any responsibility determination or past performance evaluation for such offeror.

(B) Documentation in contract file

The contract file for each contract of a Federal agency in excess of the simplified acquisition threshold shall document the manner in which the material in the database was considered in any responsibility determination or past performance evaluation.

(f) Disclosure in applications

Not later than one year after October 14, 2008, the Federal Acquisition Regulation shall be amended to require that persons with Federal agency contracts and grants valued in total greater than $10,000,000 shall—

(1) submit to the Administrator, in a manner determined appropriate by the Administrator, the information subject to inclusion in the database as listed in subsection (c) current as of the date of submittal of such information under this subsection; and

(2) update such information on a semiannual basis.

(g) Rulemaking

The Administrator shall promulgate such regulations as may be necessary to carry out this section.

(Pub. L. 110–417, [div. A], title VIII, § 872, Oct. 14, 2008, 122 Stat. 4555.)

CODIFICATION

Section was enacted as part of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, and not as part of the Office of Federal Procurement Policy Act which comprises this chapter.

§ 418. Advocates for competition

(a) Establishment, designation, etc., in executive agency

(1) There is established in each executive agency an advocate for competition.

(2) The head of each executive agency shall—

(A) designate for the executive agency and for each procuring activity of the executive agency one officer or employee serving in a position authorized for such executive agency on July 18, 1984 (other than the senior procurement executive designated pursuant to section 414(3)[1] of this title) to serve as the advocate for competition;

(B) not assign such officers or employees any duties or responsibilities that are inconsistent with the duties and responsibilities of the advocates for competition; and

(C) provide such officers or employees with such staff or assistance as may be necessary to carry out the duties and responsibilities of the advocate for competition, such as persons who are specialists in engineering, technical operations, contract administration, financial management, supply management, and utilization of small and disadvantaged business concerns.

(b) Duties and functions

The advocate for competition of an executive agency shall—

(1) be responsible for challenging barriers to and promoting full and open competition in the procurement of property and services by the executive agency;

(2) review the procurement activities of the executive agency;

(3) identify and report to the senior procurement executive of the executive agency designated pursuant to section 414(3)[1] of this title—

(A) opportunities and actions taken to achieve full and open competition in the procurement activities of the executive agency; and

(B) any condition or action which has the effect of unnecessarily restricting competition in the procurement actions of the executive agency; and[2]

(4) prepare and transmit to such senior procurement executive an annual report describing—

(A) such advocate's activities under this section;

(B) new initiatives required to increase competition; and

(C) barriers to full and open competition that remain;

(5) recommend to the senior procurement executive of the executive agency goals and the plans for increasing competition on a fiscal year basis;

(6) recommend to the senior procurement executive of the executive agency a system of personal and organizational accountability for competition, which may include the use of recognition and awards to motivate program managers, contracting officers, and others in authority to promote competition in procurement programs; and

(7) describe other ways in which the executive agency has emphasized competition in

[1] See References in Text note below.

[2] So in original. The word ''and'' probably should not appear.

programs for procurement training and research.

(c) Responsibilities

The advocate for competition for each procuring activity shall be responsible for promoting full and open competition, promoting the acquisition of commercial items, and challenging barriers to such acquisition, including such barriers as unnecessarily restrictive statements of need, unnecessarily detailed specifications, and unnecessarily burdensome contract clauses.

(Pub. L. 93–400, § 20, as added Pub. L. 98–369, div. B, title VII, § 2732(a), July 18, 1984, 98 Stat. 1197; amended Pub. L. 103–355, title VIII, § 8303(a), Oct. 13, 1994, 108 Stat. 3398.)

REFERENCES IN TEXT

Section 414 of this title, referred to in subsecs. (a)(2)(A) and (b)(3), 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

1994—Subsec. (c). Pub. L. 103–355 amended subsec. (c) generally. Prior to amendment, subsec. (c) read as follows: ''The advocate for competition for each procuring activity shall be responsible for challenging barriers to and promoting full and open competition in the procuring activity, including unnecessarily detailed specifications and unnecessarily restrictive statements of need.''

EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103–355, see section 10001 of Pub. L. 103–355, set out as a note under section 251 of this title.

EFFECTIVE DATE

Section applicable to any solicitation for bids or proposals issued after Mar. 31, 1985, see section 2751 of Pub. L. 98–369, set out as an Effective Date of 1984 Amendment note under section 251 of this title.

§ 418a. Rights in technical data

(a) Regulations; legitimate proprietary interest of United States

The legitimate proprietary interest of the United States and of a contractor in technical or other data shall be defined in regulations prescribed as part of the single system of Government-wide procurement regulations as defined in section 403(4)[1] of this title. Such regulations may not impair any right of the United States or of any contractor with respect to patents or copyrights or any other right in technical data otherwise established by law. Such regulations shall provide, with respect to executive agencies that are subject to the provisions of title III of the Federal Property and Administrative Services Act of 1949 [41 U.S.C. 251 et seq.], that the United States may not require persons who have developed products or processes offered or to be offered for sale to the public as a condition for the procurement of such products or processes by the United States, to provide to the United States technical data relating to the design, development, or manufacture of such products or processes (except for such data as may be necessary for the United States to operate and maintain the product or use the process if obtained by the United States as an element of performance under the contract).

(b) Unlimited rights; technical data; developed with Federal funds; unrestricted, royalty-free right to use; rights under law

(1) Except as otherwise expressly provided by Federal statute, the regulations prescribed pursuant to subsection (a) of this section shall provide, with respect to executive agencies that are subject to the provisions of title III of the Federal Property and Administrative Services Act of 1949 [41 U.S.C. 251 et seq.], that the United States shall have unlimited rights in technical data developed exclusively with Federal funds if delivery of such data—

(A) was required as an element of performance under a contract; and

(B) is needed to ensure the competitive acquisition of supplies or services that will be required in substantial quantities in the future.

(2) Except as otherwise expressly provided by Federal statute, the regulations prescribed pursuant to subsection (a) of this section shall provide, with respect to executive agencies that are subject to the provisions of title III of the Federal Property and Administrative Services Act of 1949 [41 U.S.C. 251 et seq.], that the United States (and each agency thereof) shall have an unrestricted, royalty-free right to use, or to have its contractors use, for governmental purposes (excluding publication outside the Government) technical data developed exclusively with Federal funds.

(3) The requirements of paragraphs (1) and (2) shall be in addition to and not in lieu of any other rights that the United States may have pursuant to law.

(c) Factors; regulations

The following factors shall be considered in prescribing regulations pursuant to subsection (a) of this section:

(1) Whether the item or process to which the technical data pertains was developed—

(A) exclusively with Federal funds;

(B) exclusively at private expense; or

(C) in part with Federal funds and in part at private expense.

(2) The statement of congressional policy and objectives in section 200 of title 35, the statement of purposes in section 2(b) of the Small Business Innovation Development Act of 1982 (Public Law 97–219; 15 U.S.C. 638 note), and the declaration of policy in section 631 of title 15.

(3) The interest of the United States in increasing competition and lowering costs by developing and locating alternative sources of supply and manufacture.

(d) Provisions; contracts; regulations

Regulations prescribed under subsection (a) of this section shall require that a contract for property or services entered into by an executive agency contain appropriate provisions relating to technical data, including provisions—

(1) defining the respective rights of the United States and the contractor or sub-

[1] See References in Text note below.

contractor (at any tier) regarding any technical data to be delivered under the contract;

(2) specifying the technical data, if any, to be delivered under the contract and delivery schedules for such delivery;

(3) establishing or referencing procedures for determining the acceptability of technical data to be delivered under the contract;

(4) establishing separate contract line items for the technical data, if any, to be delivered under the contract;

(5) to the maximum practicable extent, identifying, in advance of delivery, technical data which is to be delivered with restrictions on the right of the United States to use such data;

(6) requiring the contractor to revise any technical data delivered under the contract to reflect engineering design changes made during the performance of the contract and affecting the form, fit, and function of the items specified in the contract and to deliver such revised technical data to an agency within a time specified in the contract;

(7) requiring the contractor to furnish written assurance at the time the technical data is delivered or is made available that the technical data is complete and accurate and satisfies the requirements of the contract concerning technical data;

(8) establishing remedies to be available to the United States when technical data required to be delivered or made available under the contract is found to be incomplete or inadequate or to not satisfy the requirements of the contract concerning technical data; and

(9) authorizing the head of the agency to withhold payments under the contract (or exercise such other remedies as the head of the agency considers appropriate) during any period if the contractor does not meet the requirements of the contract pertaining to the delivery of technical data.

(Pub. L. 93–400, §21, as added Pub. L. 98–577, title III, §301(a), Oct. 30, 1984, 98 Stat. 3074; amended Pub. L. 99–145, title IX, §961(d)(2), Nov. 8, 1985, 99 Stat. 704.)

REFERENCES IN TEXT

Section 403(4) of this title, referred to in subsec. (a), which defined ''single system of Government-wide procurement regulations'', was repealed, and par. (5) of section 403 of this title was redesignated as par. (4), by Pub. L. 100–679, §3(c), Nov. 17, 1988, 102 Stat. 4056.

The Federal Property and Administrative Services Act of 1949, as amended, referred to in subsecs. (a) and (b)(1), (2), is act June 30, 1949, ch. 288, 63 Stat. 377, as amended. Title III of the Act is classified generally to subchapter IV (§251 et seq.) of chapter 4 of this title. For complete classification of this Act to the Code, see Tables.

PRIOR PROVISIONS

A prior section 21 of Pub. L. 93–400, as added Pub. L. 98–369, div. B, title VII, §2732(a), July 18, 1984, 98 Stat. 1198, was renumbered section 23 by Pub. L. 98–577 and is classified to section 419 of this title.

AMENDMENTS

1985—Subsec. (c)(1). Pub. L. 99–145 substituted ''the item or process to which the technical data pertains'' for ''the technical data''.

EFFECTIVE DATE

Section 301(c) of Pub. L. 98–577, as amended Pub. L. 99–145, title IX, §961(d)(3), Nov. 8, 1985, 99 Stat. 704, provided that: ''The amendment made by subsection (a) [enacting this section] shall take effect on the date of enactment of this Act [Oct. 30, 1984]. The regulations required by such amendment shall be issued not later than October 19, 1985.''

§418b. Publication of proposed regulations

(a) Effective date; procurement policy, regulations, procedure or form; publication in Federal Register

Except as provided in subsection (d) of this section, no procurement policy, regulation, procedure, or form (including amendments or modifications thereto) relating to the expenditure of appropriated funds that has (1) a significant effect beyond the internal operating procedures of the agency issuing the procurement policy, regulation, procedure or form, or (2) a significant cost or administrative impact on contractors or offerors, may take effect until 60 days after the procurement policy, regulation, procedure, or form is published for public comment in the Federal Register pursuant to subsection (b) of this section. Notwithstanding the preceding sentence, such a policy, regulation, procedure, or form may take effect earlier than 60 days after the publication date when there are compelling circumstances for the earlier effective date, but in no event may that effective date be less than 30 days after the publication date.

(b) Publication in Federal Register

Subject to subsection (c) of this section, the head of the agency shall cause to be published in the Federal Register a notice of the proposed procurement policy, regulation, procedure, or form and provide for a public comment period for receiving and considering the views of all interested parties on such proposal. The length of such comment period may not be less than 30 days.

(c) Notice; proposed policy; contents

Any notice of a proposed procurement policy, regulation, procedure, or form prepared for publication in the Federal Register shall include—

(1) the text of the proposal or, if it is impracticable to publish the full text of the proposal, a summary of the proposal and a statement specifying the name, address, and telephone number of the officer or employee of the executive agency from whom the full text may be obtained; and

(2) a request for interested parties to submit comments on the proposal and shall include the name and address of the officer or employee of the Government designated to receive such comments.

(d) Waiver

(1) The requirements of subsections (a) and (b) of this section may be waived by the officer authorized to issue a procurement policy, regulation, procedure, or form if urgent and compelling circumstances make compliance with such requirements impracticable.

(2) A procurement policy, regulation, procedure, or form with respect to which the requirements of subsections (a) and (b) of this section

are waived under paragraph (1) shall be effective on a temporary basis if—

(A) a notice of such procurement policy, regulation, procedure, or form is published in the Federal Register and includes a statement that the procurement policy, regulation, procedure, or form is temporary; and

(B) provision is made for a public comment period of 30 days beginning on the date on which the notice is published.

(3) After considering the comments received, the head of the agency waiving the requirements of subsections (a) and (b) of this section under paragraph (1) may issue the final procurement policy, regulation, procedure, or form.

(Pub. L. 93–400, § 22, as added Pub. L. 98–577, title III, § 302(a), Oct. 30, 1984, 98 Stat. 3076; amended Pub. L. 103–355, title V, § 5092, Oct. 13, 1994, 108 Stat. 3362; Pub. L. 104–106, div. D, title XLIII, § 4321(a)(9), Feb. 10, 1996, 110 Stat. 671.)

AMENDMENTS

1996—Subsec. (d)(3). Pub. L. 104–106 made technical correction to directory language of Pub. L. 103–355, § 5092(b). See 1994 Amendment note below.

1994—Subsec. (a). Pub. L. 103–355, § 5092(a), substituted ''60 days'' for ''30 days'' and inserted at end ''Notwithstanding the preceding sentence, such a policy, regulation, procedure, or form may take effect earlier than 60 days after the publication date when there are compelling circumstances for the earlier effective date, but in no event may that effective date be less than 30 days after the publication date.''

Subsec. (d). Pub. L. 103–355, § 5092(b), as amended by Pub. L. 104–106, designated second sentence of subsec. (d)(2) as subsec. (d)(3).

EFFECTIVE DATE OF 1996 AMENDMENT

Section 4321(a) of Pub. L. 104–106 provided that the amendment made by that section is effective as of Oct. 13, 1994, and as if included in Pub. L. 103–355 as enacted.

EFFECTIVE DATE

Section 302(b) of Pub. L. 98–577 provided that: ''The procedures required by the amendment made by subsection (a) [enacting this section] shall apply with respect to procurement policies, regulations, procedures, or forms that an agency issues in final form on or after the date which is 30 days after the date of enactment of this Act [Oct. 30, 1984].''

§ 419. Contracting functions performed by Federal personnel

(a) Limitation on payment for advisory and assistance services

(1) No person who is not a person described in subsection (b) of this section may be paid by an executive agency for services to conduct evaluations or analyses of any aspect of a proposal submitted for an acquisition unless personnel described in subsection (b) of this section with adequate training and capabilities to perform such evaluations and analyses are not readily available within the agency or another Federal agency, as determined in accordance with standards and procedures prescribed in the Federal Acquisition Regulation.

(2) In the administration of this subsection, the head of each executive agency shall determine in accordance with the standards and procedures set forth in the Federal Acquisition Regulation whether—

(A) a sufficient number of personnel described in subsection (b) of this section within the agency or another Federal agency are readily available to perform a particular evaluation or analysis for the head of the executive agency making the determination; and

(B) the readily available personnel have the training and capabilities necessary to perform the evaluation or analysis.

(b) Covered personnel

For purposes of subsection (a) of this section, the personnel described in this subsection are as follows:

(1) An employee, as defined in section 2105 of title 5.

(2) A member of the Armed Forces of the United States.

(3) A person assigned to a Federal agency pursuant to subchapter VI of chapter 33 of title 5.

(c) Rule of construction

Nothing in this section is intended to affect the relationship between the Federal Government and a federally funded research and development center.

(Pub. L. 93–400, § 23, as added Pub. L. 103–355, title VI, § 6002(a), Oct. 13, 1994, 108 Stat. 3363.)

PRIOR PROVISIONS

A prior section 419, Pub. L. 93–400, § 23, formerly § 21, as added Pub. L. 98–369, div. B, title VII, § 2732(a), July 18, 1984, 98 Stat. 1198; renumbered § 23, Pub. L. 98–577, title III, § 301(a), Oct. 30, 1984, 98 Stat. 3074, related to annual report to be submitted to Congress by agency heads concerning actions taken to increase competition for contracts and reduce number and dollar value of noncompetitive contracts, prior to repeal by Pub. L. 103–355, title I, § 1092.

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.

REQUIREMENT FOR GUIDANCE AND REGULATIONS

Section 6002(b) of Pub. L. 103–355 provided that: ''The Federal Acquisition Regulatory Council established by section 25(a) of the Office of Federal Procurement Policy Act (41 U.S.C. 421(a)) shall—

''(1) review part 37 of title 48 of the Code of Federal Regulations as it relates to the use of advisory and assistance services; and

''(2) provide guidance and promulgate regulations regarding—

''(A) what actions Federal agencies are required to take to determine whether expertise is readily available within the Federal Government before contracting for advisory and technical services to conduct acquisitions; and

''(B) the manner in which personnel with expertise may be shared with agencies needing expertise for such acquisitions.''

§ 420. Repealed. Pub. L. 103–355, title II, § 2191, Oct. 13, 1994, 108 Stat. 3315

Section, Pub. L. 93–400, § 24, as added Pub. L. 99–234, title II, § 201, Jan. 2, 1986, 99 Stat. 1759; amended Pub. L. 100–679, § 12, Nov. 17, 1988, 102 Stat. 4070, related to limits on allowable travel expenses of Government contractors.

§ 421. Federal Acquisition Regulatory Council

(a) Establishment

There is established a Federal Acquisition Regulatory Council (hereinafter in this section referred to as the ''Council'') to assist in the direction and coordination of Government-wide procurement policy and Government-wide procurement regulatory activities in the Federal Government.

(b) Membership

(1) The Council shall consist of the Administrator for Federal Procurement Policy and—

(A) the Secretary of Defense,

(B) the Administrator of National Aeronautics and Space; and

(C) the Administrator of General Services.

(2) Notwithstanding section 121(d)(1) and (2) of title 40, the officials specified in subparagraphs (A), (B), and (C) of paragraph (1) may designate to serve on and attend meetings of the Council in place of that official (A) the official assigned by statute with the responsibility for acquisition policy in each of their respective agencies or, in the case of the Secretary of Defense, an official at an organizational level not lower than an Assistant Secretary of Defense within the Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics; or (B) if no official of such agency is assigned by statute with the responsibility for acquisition policy for that agency, the official designated pursuant to section 414(3)[1] of this title. No other official or employee may be designated to serve on the Council.

(c) Functions

(1) Subject to the provisions of section 405 of this title, the General Services Administration, the Department of Defense, and the National Aeronautics and Space Administration, pursuant to their respective authorities under title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251, et seq.), chapters 4 and 137 of title 10, and the National Aeronautics and Space Act of 1958 (42 U.S.C. 2451, et seq.), shall jointly issue and maintain in accordance with subsection (f) of this section a single Government-wide procurement regulation, to be known as the ''Federal Acquisition Regulation''.

(2) Any other regulations relating to procurement issued by an executive agency shall be limited to (A) regulations essential to implement Government-wide policies and procedures within the agency, and (B) additional policies and procedures required to satisfy the specific and unique needs of the agency.

(3) The Administrator, in consultation with the Council, shall ensure that procurement regulations promulgated by executive agencies are consistent with the Federal Acquisition Regulation and in accordance with any policies issued pursuant to section 405(a) of this title.

(4)(A) Under procedures established by the Administrator, a person may request the Administrator to review any regulation relating to procurement on the basis that such regulation is inconsistent with the Federal Acquisition Regulation.

(B) Unless the request is frivolous or does not, on its face, state a valid basis for such review, the Administrator shall complete such a review not later than 60 days after receiving the request. The time for completion of the review may be extended if the Administrator determines that an additional period of review is required. The Administrator shall advise the requester of the reasons for the extension and the date by which the review will be completed.

(5) If the Administrator determines that a regulation relating to procurement is inconsistent with the Federal Acquisition Regulation or that the regulation should otherwise be revised to remove an inconsistency with any policies issued under section 405(a) of this title, the Administrator shall rescind or deny the promulgation of the regulation or take such other action authorized under section 405 of this title as may be necessary to remove the inconsistency. If the Administrator determines that such a regulation, although not inconsistent with the Federal Acquisition Regulation or such policies, should be revised to improve compliance with such Regulation or policies, the Administrator shall take such action authorized under section 405 of this title as may be necessary and appropriate.

(6) The decisions of the Administrator shall be in writing and made publicly available. The Administrator shall provide a listing of such decisions in the annual report to Congress required by section 407[1] of this title.

(d) Additional responsibilities of membership

Subject to the authority, direction, and control of the head of the agency concerned, each official who represents an agency on the Council pursuant to subsection (b) of this section shall—

(1) approve or disapprove all regulations that are, after 60 days after November 17, 1988, proposed for public comment, promulgated in final form, or otherwise made effective by such agency relating to procurement before such regulation may be promulgated in final form, or otherwise made effective, except that such official may grant an interim approval, without review, for not more than 60 days for a procurement regulation in urgent and compelling circumstances;

(2) carry out the responsibilities of such agency set forth in chapter 35 of title 44 for each information collection request (as that term is defined in section 3502(11)[1] of title 44) that relates to procurement rules or regulations; and

(3) eliminate or reduce (A) any redundant or unnecessary levels of review and approval, in the procurement system of such agency, and (B) redundant or unnecessary procurement regulations which are unique to that agency.

The authority to review and approve or disapprove regulations under paragraph (1) of this subsection may not be delegated to any person outside the office of the official who represents the agency on the Council pursuant to subsection (b) of this section.

(e) Governing policies

All actions of the Council and of members of the Council shall be in accordance with and furtherance of the policies prescribed under section 405(a) of this title.

[1] See References in Text note below.

(f) General authority with respect to FAR

Subject to section 405(b) of this title, the Council shall manage, coordinate, control, and monitor the maintenance of, and issuance of and changes in, the Federal Acquisition Regulation.

(Pub. L. 93–400, § 25, as added Pub. L. 100–679, § 4, Nov. 17, 1988, 102 Stat. 4056; amended Pub. L. 101–510, div. A, title VIII, § 807, Nov. 5, 1990, 104 Stat. 1593; Pub. L. 104–106, div. D, title XLIII, § 4322(a)(2), Feb. 10, 1996, 110 Stat. 677; Pub. L. 104–201, div. A, title VIII, § 822, title X, § 1074(f)(3), Sept. 23, 1996, 110 Stat. 2609, 2661; Pub. L. 105–85, div. A, title VIII, § 841(d), Nov. 18, 1997, 111 Stat. 1843; Pub. L. 106–65, div. A, title IX, § 911(a)(1), Oct. 5, 1999, 113 Stat. 717.)

REFERENCES IN TEXT

Section 414 of this title, referred to in subsec. (b)(2), 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.

The Federal Property and Administrative Services Act of 1949, referred to in subsec. (c)(1), is act June 30, 1949, ch. 288, 63 Stat. 377, as amended. Title III of the Act is classified generally to subchapter IV (§ 251 et seq.) of chapter 4 of this title. For complete classification of this Act to the Code, see Tables.

The National Aeronautics and Space Act of 1958, referred to in subsec. (c)(1), is Pub. L. 85–568, July 29, 1958, 72 Stat. 426, as amended, which is classified principally to chapter 26 (§ 2451 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 2451 of Title 42 and Tables.

Section 407 of this title, referred to in subsec. (c)(6), was repealed by Pub. L. 104–106, div. D, title XLIII, § 4305(b), Feb. 10, 1996, 110 Stat. 665.

Section 3502 of title 44, referred to in subsec. (d)(2), which in par. (11) defined ''information collection request'', was omitted in the general amendment of chapter 35 of Title 44, Public Printing and Documents, by Pub. L. 104–13, § 2, May 22, 1995, 109 Stat. 163. Pub. L. 104–13 enacted a new section 3502 of Title 44 which does not define ''information collection request''.

CODIFICATION

''Section 121(d)(1) and (2) of title 40'' substituted in subsec. (b)(2) for ''section 205(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

1999—Subsec. (b)(2). Pub. L. 106–65 substituted ''Under Secretary of Defense for Acquisition, Technology, and Logistics'' for ''Under Secretary of Defense for Acquisition and Technology''.

1997—Subsec. (g). Pub. L. 105–85 struck out subsec. (g) which required the Administrator for Federal Procurement to publish an annual report relating to the development of procurement regulations.

1996—Subsec. (b)(2). Pub. L. 104–106 substituted ''Under Secretary of Defense for Acquisition and Technology'' for ''Under Secretary of Defense for Acquisition''.

Subsec. (c)(3). Pub. L. 104–201, § 1074(f)(3)(A)(i), struck out ''the policies set forth in section 401 of this title or'' after ''in accordance with''.

Subsec. (c)(5). Pub. L. 104–201, § 1074(f)(3)(A)(ii), struck out ''or the policies set forth in section 401 of this title'' after ''section 405(a) of this title''.

Subsec. (e). Pub. L. 104–201, § 1074(f)(3)(B), struck out ''the policies of section 401 of this title and'' after ''and furtherance of''.

Subsec. (g)(1). Pub. L. 104–201, § 822(1), substituted ''every 12 months'' for ''within 6 months after November 17, 1988, and every 6 months thereafter'' and inserted ''and'' after the semicolon at end.

Subsec. (g)(2)(H). Pub. L. 104–201, § 822(2), substituted a period for ''; and'' at end.

Subsec. (g)(3). Pub. L. 104–201, § 822(3), struck out par. (3) which read as follows: ''report to Congress within 180 days after November 17, 1988, in consultation with the Administrator of the Office of Information and Regulatory Affairs, regarding—

''(A) the extent of the paperwork burden created by the Federal procurement process, and

''(B) the extent to which the Federal procurement system can be streamlined to reduce unnecessary paperwork while at the same time maintaining recordkeeping and reporting requirements necessary to ensure the integrity and accountability of the system.''

1990—Subsec. (b)(2). Pub. L. 101–510 inserted before semicolon at end of cl. (A) ''or, in the case of the Secretary of Defense, an official at an organizational level not lower than an Assistant Secretary of Defense within the Office of the Under Secretary of Defense for Acquisition''.

EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104–106, see section 4401 of Pub. L. 104–106, set out as a note under section 251 of this title.

JUSTIFICATION AND APPROVAL OF SOLE-SOURCE CONTRACTS

Pub. L. 111–84, div. A, title VIII, § 811, Oct. 28, 2009, 123 Stat. 2405, provided that:

''(a) IN GENERAL.—Not later than 180 days after the date of the enactment of this Act [Oct. 28, 2009], the Federal Acquisition Regulation shall be revised to provide that the head of an agency may not award a sole-source contract in a covered procurement for an amount exceeding $20,000,000 unless—

''(1) the contracting officer for the contract justifies the use of a sole-source contract in writing;

''(2) the justification is approved by the appropriate official designated to approve contract awards for dollar amounts that are comparable to the amount of the sole-source contract; and

''(3) the justification and related information are made public as provided in sections 2304(f)(1)(C) and 2304(*l*) of title 10, United States Code, or sections 303(f)(1)(C) and 303(j) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253(f)(1)(C) and 253(j)), as applicable.

''(b) ELEMENTS OF JUSTIFICATION.—The justification of a sole-source contract required pursuant to subsection (a) shall include the following:

''(1) A description of the needs of the agency concerned for the matters covered by the contract.

''(2) A specification of the statutory provision providing the exception from the requirement to use competitive procedures in entering into the contract.

''(3) A determination that the use of a sole-source contract is in the best interest of the agency concerned.

''(4) A determination that the anticipated cost of the contract will be fair and reasonable.

''(5) Such other matters as the head of the agency concerned shall specify for purposes of this section.

''(c) DEFINITIONS.—In this section:

''(1) COVERED PROCUREMENT.—The term 'covered procurement' means either of the following:

''(A) A procurement described in section 2304(f)(2)(D)(ii) of title 10, United States Code.

''(B) A procurement described in section 303(f)(2)(D)(ii) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253(f)(2)(D)(ii)).

''(2) HEAD OF AN AGENCY.—The term 'head of an agency'—

''(A) in the case of a covered procurement as defined in paragraph (1)(A), has the meaning provided in section 2302(1) of title 10, United States Code; and

''(B) in the case of a covered procurement as defined in paragraph (1)(B), has the meaning provided the term 'agency head' in section 309(a) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 259(a)).

''(3) APPROPRIATE OFFICIAL.—The term 'appropriate official' means—

''(A) in the case of a covered procurement as defined in paragraph (1)(A), an official designated in section 2304(f)(1)(B) of title 10, United States Code; and

''(B) in the case of a covered procurement as defined in paragraph (1)(B), an official designated in section 303(f)(1)(B) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253(f)(1)(B)).''

STATUS OF DIRECTOR OF DEFENSE PROCUREMENT

Pub. L. 102–190, div. A, title VIII, § 809, Dec. 5, 1991, 105 Stat. 1423, as amended by Pub. L. 103–160, div. A, title IX, § 904(f), Nov. 30, 1993, 107 Stat. 1729; Pub. L. 106–65, div. A, title IX, § 911(a)(1), Oct. 5, 1999, 113 Stat. 717, provided that: ''For the purposes of the amendment made by section 807 of the National Defense Authorization Act for Fiscal Year 1991 (Public Law 101–510; 104 Stat. 1593) to section 25(b)(2) of the Office of Federal Procurement Policy Act (41 U.S.C. 421(b)(2)), the Director of Defense Procurement of the Department of Defense shall be considered to be an official at an organizational level of an Assistant Secretary of Defense within the Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics.''

§ 422. Cost Accounting Standards Board

(a) Establishment; membership; terms

(1) There is established within the Office of Federal Procurement Policy an independent board to be known as the ''Cost Accounting Standards Board'' (hereinafter referred to as the ''Board''). The Board shall consist of 5 members, including the Administrator, who shall serve as Chairman, and 4 members, all of whom shall have experience in Government contract cost accounting, and who shall be appointed as follows:

(A) two representatives of the Federal Government—

(i) one of whom shall be a representative of the Department of Defense and be appointed by the Secretary of Defense; and

(ii) one of whom shall be an officer or employee of the General Services Administration appointed by the Administrator of General Services; and

(B) two individuals from the private sector, each of whom shall be appointed by the Administrator and—

(i) one of whom shall be a representative of industry; and

(ii) one of whom shall be particularly knowledgeable about cost accounting problems and systems.

(2)(A) The term of office of each of the members of the Board, other than the Administrator for Federal Procurement Policy, shall be 4 years, except that—

(i) of the initial members, two shall be appointed for terms of two years, one shall be appointed for a term of three years, and one shall be appointed for a term of four years;

(ii) any member appointed to fill a vacancy in the Board shall serve for the remainder of the term for which his predecessor was appointed; and

(iii) no individual who is appointed under paragraph (1)(A) of this subsection shall continue to serve after ceasing to be an officer or employee of the agency from which he or she was appointed.

(B) A vacancy on the Board shall be filled in the same manner in which the original appointment was made.

(C) The initial members of the Board shall be appointed within 120 days after November 17, 1988.

(b) Senior staff

The Administrator, after consultation with the Board, may appoint an executive secretary and two additional staff members without regard to the provisions of title 5 governing appointments in the competitive service, and may pay such employees without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, except that no individual so appointed may receive pay in excess of the annual rate of basic pay payable for GS–18 of the General Schedule.

(c) Other staff

The Administrator may appoint, fix the compensation, and remove additional employees of the Board under the applicable provisions of title 5.

(d) Detailed and temporary personnel

(1) The Board may use, without reimbursement, any personnel of a Federal agency (with the consent of the head of the agency concerned) to serve on advisory committees and task forces to assist the Board in carrying out the functions and responsibilities of the Board under this section.

(2) The Administrator, after consultation with the Board, may procure temporary and intermittent services under section 3109(b) of title 5 of personnel for the purpose of serving on advisory committees and task forces to assist the Board in carrying out the functions and responsibilities of the Board under this section.

(e) Compensation

Except as otherwise provided in subsection (a) of this section, the members of the Board who are officers or employees of the Federal Government, and officers and employees of other agencies of the Federal Government who are used under subsection (d)(1) of this section, shall receive no additional compensation for services, but shall continue to be compensated by the employing Department or agency of such officer or employee. Each member of the Board appointed from private life shall receive compensation at a rate not to exceed the daily equivalent of the rate prescribed for level IV of the Executive Schedule for each day (including travel time) in which the member is engaged in the actual performance of duties vested in the Board. Individuals hired under subsection (d)(2) of this section may receive compensation at rates fixed by the Administrator, but not to exceed the daily equivalent of the rate prescribed for level V of the Federal Executive Salary Schedule under section 5316 of title 5 for each day (including travel time) in which such appointees are prop-

erly engaged in the actual performance of duties under this section. While serving away from homes or the regular place of business, Board members and other appointees serving on an intermittent basis under this section shall be allowed travel expenses in accordance with section 5703 of title 5.

(f) Cost accounting standards authority

(1) The Board shall have the exclusive authority to make, promulgate, amend, and rescind cost accounting standards and interpretations thereof designed to achieve uniformity and consistency in the cost accounting standards governing measurement, assignment, and allocation of costs to contracts with the United States.

(2)(A) Cost accounting standards promulgated under this section shall be mandatory for use by all executive agencies and by contractors and subcontractors in estimating, accumulating, and reporting costs in connection with pricing and administration of, and settlement of disputes concerning, all negotiated prime contract and subcontract procurements with the United States in excess of the amount set forth in section 2306a(a)(1)(A)(i) of title 10, as such amount is adjusted in accordance with applicable requirements of law.

(B) Subparagraph (A) does not apply to the following contracts or subcontracts:

(i) Contracts or subcontracts for the acquisition of commercial items.

(ii) Contracts or subcontracts where the price negotiated is based on prices set by law or regulation.

(iii) Firm, fixed-price contracts or subcontracts awarded on the basis of adequate price competition without submission of certified cost or pricing data.

(iv) A contract or subcontract with a value of less than $7,500,000 if, at the time the contract or subcontract is entered into, the segment of the contractor or subcontractor that will perform the work has not been awarded at least one contract or subcontract with a value of more than $7,500,000 that is covered by the cost accounting standards.

(C) In this paragraph, the term ''subcontract'' includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractor or subcontractor.

(3) The Administrator, after consultation with the Board, shall prescribe rules and procedures governing actions of the Board under this section. Such rules and procedures shall require that any cost accounting standard promulgated, amended, or rescinded (and interpretations thereof) shall be adopted by majority vote of the Board members.

(4) The Board is authorized—

(A) to exempt classes or categories of contractors and subcontractors from the requirements of this section; and

(B) to establish procedures for the waiver of the requirements of this section with respect to individual contracts and subcontracts.

(5)(A) The head of an executive agency may waive the applicability of the cost accounting standards for a contract or subcontract with a value less than $15,000,000 if that official determines in writing that the segment of the contractor or subcontractor that will perform the work—

(i) is primarily engaged in the sale of commercial items; and

(ii) would not otherwise be subject to the cost accounting standards under this section, as in effect on or after the effective date of this paragraph.

(B) The head of an executive agency may also waive the applicability of the cost accounting standards for a contract or subcontract under exceptional circumstances when necessary to meet the needs of the agency. A determination to waive the applicability of the cost accounting standards under this subparagraph shall be set forth in writing and shall include a statement of the circumstances justifying the waiver.

(C) The head of an executive agency may not delegate the authority under subparagraph (A) or (B) to any official in the executive agency below the senior policymaking level in the executive agency.

(D) The Federal Acquisition Regulation shall include the following:

(i) Criteria for selecting an official to be delegated authority to grant waivers under subparagraph (A) or (B).

(ii) The specific circumstances under which such a waiver may be granted.

(E) The head of each executive agency shall report the waivers granted under subparagraphs (A) and (B) for that agency to the Board on an annual basis.

(g) Requirements for standards

(1) Prior to the promulgation under this section of cost accounting standards and interpretations thereof, the Board shall—

(A) take into account, after consultation and discussions with the Comptroller General and professional accounting organizations, contractors, and other interested parties—

(i) the probable costs of implementation, including inflationary effects, if any, compared to the probable benefits;

(ii) the advantages, disadvantages, and improvements anticipated in the pricing and administration of, and settlement of disputes concerning, contracts; and

(iii) the scope of, and alternatives available to, the action proposed to be taken;

(B) prepare and publish a report in the Federal Register on the issues reviewed under paragraph (1)(A);

(C)(i) publish an advanced notice of proposed rulemaking in the Federal Register in order to solicit comments on the report prepared pursuant to subparagraph (B);

(ii) provide all parties affected a period of not less than 60 days after such publication to submit their views and comments; and

(iii) during this 60-day period, consult with the Comptroller General and consider any recommendation the Comptroller General may make; and

(D) publish a notice of such proposed rulemaking in the Federal Register and provide all parties affected a period of not less than 60 days after such publication to submit their views and comments.

(2) Rules, regulations, cost accounting standards, and modifications thereof promulgated or amended under this section shall have the full force and effect of law, and shall become effective within 120 days after publication in the Federal Register in final form, unless the Board determines a longer period is necessary. Implementation dates for contractors and subcontractors shall be determined by the Board, but in no event shall such dates be later than the beginning of the second fiscal year of the contractor or subcontractor after the standard becomes effective. Rules, regulations, cost accounting standards, and modifications thereof promulgated or amended under this section shall be accompanied by prefatory comments and by illustrations, if necessary.

(3) The functions exercised under this section are excluded from the operation of sections 551, 553 through 559, and 701 through 706 of title 5.

(h) Implementing regulations

(1) The Board shall promulgate rules and regulations for the implementation of cost accounting standards promulgated or interpreted under subsection (f) of this section. Such regulations shall be incorporated into the Federal Acquisition Regulation and shall require contractors and subcontractors as a condition of contracting with the United States to—

(A) disclose in writing their cost accounting practices, including methods of distinguishing direct costs from indirect costs and the basis used for allocating indirect costs; and

(B) agree to a contract price adjustment, with interest, for any increased costs paid to such contractor or subcontractor by the United States by reason of a change in the contractor's or subcontractor's cost accounting practices or by reason of a failure by the contractor or subcontractor to comply with applicable cost accounting standards.

(2) If the United States and a contractor or subcontractor fail to agree on a contract price adjustment, including whether the contractor or subcontractor has complied with the applicable cost accounting standards, the disagreement will constitute a dispute under the Contract Disputes Act [41 U.S.C. 601 et seq.].

(3) Any contract price adjustment undertaken pursuant to paragraph (1)(B) shall be made, where applicable, on relevant contracts between the United States and the contractor that are subject to the cost accounting standards so as to protect the United States from payment, in the aggregate, of increased costs (as defined by the Board). In no case shall the Government recover costs greater than the increased cost (as defined by the Board) to the Government, in the aggregate, on the relevant contracts subject to the price adjustment, unless the contractor made a change in its cost accounting practices of which it was aware or should have been aware at the time of the price negotiation and which it failed to disclose to the Government.

(4) The interest rate applicable to any contract price adjustment shall be the annual rate of interest established under section 6621 of title 26 for such period. Such interest shall accrue from the time payments of the increased costs were made to the contractor or subcontractor to the time the United States receives full compensation for the price adjustment.

(i) Omitted

(j) Effect on other standards and regulations

(1) All cost accounting standards, waivers, exemptions, interpretations, modifications, rules, and regulations promulgated by the Cost Accounting Standards Board under section 2168[1] of title 50, Appendix, shall remain in effect unless and until amended, superseded, or rescinded by the Board pursuant to this section.

(2) Existing cost accounting standards referred to in paragraph (1) shall be subject to the provisions of this chapter in the same manner as if promulgated by the Board under this chapter.

(3) The Administrator, under the authority set forth in section 405 of this title, shall ensure that no regulation or proposed regulation of an executive agency is inconsistent with a cost accounting standard promulgated or amended under this section by rescinding or denying the promulgation of any such inconsistent regulation or proposed regulation and taking such other action authorized under section 405 of this title as may be appropriate.

(4) Costs which are the subject of cost accounting standards promulgated under this section shall not be subject to regulations that are established by another executive agency that differ from such standards with respect to the measurement, assignment, and allocation of such costs.

(k) Examinations

For the purpose of determining whether a contractor or subcontractor has complied with cost accounting standards promulgated under this section and has followed consistently the contractor's or subcontractor's disclosed cost accounting practices, any authorized representative of the head of the agency concerned, of the offices of inspector general established pursuant to the Inspector General Act of 1978, or of the Comptroller General of the United States shall have the right to examine and make copies of any documents, papers, or records of such contractor or subcontractor relating to compliance with such cost accounting standards.

(*l*) Authorization of appropriations

There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this section.

(Pub. L. 93–400, § 26, as added Pub. L. 100–679, § 5(a), Nov. 17, 1988, 102 Stat. 4058; amended Pub. L. 103–355, title II, § 2453, title VIII, § 8301(d), Oct. 13, 1994, 108 Stat. 3326, 3397; Pub. L. 104–106, div. D, title XLII, § 4205, title XLIII, § 4321(h)(4), Feb. 10, 1996, 110 Stat. 656, 675; Pub. L. 106–65, div. A, title VIII, § 802(a), (b), Oct. 5, 1999, 113 Stat. 701; Pub. L. 109–163, div. A, title VIII, § 822, Jan. 6, 2006, 119 Stat. 3386.)

REFERENCES IN TEXT

The provisions of title 5 governing appointments in the competitive service, referred to in subsec. (b), are classified generally to section 3301 et seq. of Title 5, Government Organization and Employees.

[1] See References in Text note below.

Level IV of the Executive Schedule, referred to in subsec. (e), is set out in section 5315 of Title 5.

For the effective date of this paragraph, referred to in subsec. (f)(5)(A)(ii), as 180 days after Oct. 5, 1999, see section 802(i) of Pub. L. 106–65, set out as an Effective Date of 1999 Amendment; Regulations; Implementation; Construction note below.

The Contract Disputes Act, referred to in subsec. (h)(2), probably means the Contract Disputes Act of 1978, Pub. L. 95–563, Nov. 1, 1978, 92 Stat. 2383, as amended, which is classified principally to chapter 9 (§ 601 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 601 of this title and Tables.

Section 2168 of title 50, Appendix, referred to in subsec. (j)(1), was repealed by Pub. L. 100–679, § 5(b), Nov. 17, 1988, 102 Stat. 4063.

The Inspector General Act of 1978, referred to in subsec. (k), is Pub. L. 95–452, Oct. 12, 1978, 92 Stat. 1101, as amended, which is set out in the Appendix to Title 5, Government Organization and Employees.

CODIFICATION

Subsec. (i) of this section, which required the Board to submit an annual report to Congress on the activities and operations of the Board under this section, terminated, effective May 15, 2000, pursuant to section 3003 of Pub. L. 104–66, as amended, set out as a note under section 1113 of Title 31, Money and Finance. See, also, page 42 of House Document No. 103–7.

AMENDMENTS

2006—Subsec. (f)(2)(A). Pub. L. 109–163 substituted ''the amount set forth in section 2306a(a)(1)(A)(i) of title 10, as such amount is adjusted in accordance with applicable requirements of law'' for ''$500,000''.

1999—Subsec. (f)(2)(B)(iii), (iv). Pub. L. 106–65, § 802(a), added cls. (iii) and (iv).

Subsec. (f)(5). Pub. L. 106–65, § 802(b), added par. (5).

1996—Subsec. (f)(2)(B)(i). Pub. L. 104–106, § 4205(1), added cl. (i) and struck out former cl. (i) which read as follows: ''Contracts or subcontracts where the price negotiated is based on established catalog or market prices of commercial items sold in substantial quantities to the general public.''

Subsec. (f)(2)(B)(iii). Pub. L. 104–106, § 4205(2), struck out cl. (iii) which read as follows: ''Any other firm fixed-price contract or subcontract (without cost incentives) for commercial items.''

Subsec. (f)(3). Pub. L. 104–106, § 4321(h)(4), substituted ''The Administrator'' for ''Not later than 180 days after November 17, 1988, the Administrator''.

1994—Subsec. (f)(2). Pub. L. 103–355, § 8301(d), designated existing provisions as subpar. (A), substituted a period for '', other than contracts or subcontracts where the price negotiated is based on (A) established catalog or market prices of commercial items sold in substantial quantities to the general public, or (B) prices set by law or regulation'', and added subpars. (B) and (C).

Subsec. (f)(3). Pub. L. 103–355, § 2453, which directed substitution of ''The Administrator'' for ''Not later than 180 days after the date of the enactment of this section, the Administrator'', could not be executed because those words did not appear in the original.

EFFECTIVE DATE OF 1999 AMENDMENT; REGULATIONS; IMPLEMENTATION; CONSTRUCTION

Pub. L. 106–65, div. A, title VIII, § 802(c)–(e), (g)–(i), Oct. 5, 1999, 113 Stat. 701, 702, provided that:

''(c) REGULATION ON TYPES OF CAS COVERAGE.—(1) The Administrator for Federal Procurement Policy shall revise the rules and procedures prescribed pursuant to section 26(f) of the Office of Federal Procurement Policy Act (41 U.S.C. 422(f)) to the extent necessary to increase the thresholds established in section 9903.201–2 of title 48 of the Code of Federal Regulations from $25,000,000 to $50,000,000.

''(2) Paragraph (1) requires only a change of the statement of a threshold condition in the regulation referred to by section number in that paragraph, and shall not be construed as—

''(A) a ratification or expression of approval of—

''(i) any aspect of the regulation; or

''(ii) the manner in which section 26 of the Office of Federal Procurement Policy Act is administered through the regulation; or

''(B) a requirement to apply the regulation.

''(d) IMPLEMENTATION.—The Administrator for Federal Procurement Policy shall ensure that this section and the amendments made by this section [amending this section] are implemented in a manner that ensures that the Federal Government can recover costs, as appropriate, in a case in which noncompliance with cost accounting standards, or a change in the cost accounting system of a contractor segment or subcontractor segment that is not determined to be desirable by the Federal Government, results in a shift of costs from contracts that are not covered by the cost accounting standards to contracts that are covered by the cost accounting standards.

''(e) IMPLEMENTATION OF REQUIREMENTS FOR REVISION OF REGULATIONS.—(1) Final regulations required by subsection (c) shall be issued not later than 180 days after the date of the enactment of this Act [Oct. 5, 1999].

''(2) Subsection (c) shall cease to be effective one year after the date on which final regulations issued in accordance with that subsection take effect.

''(g) INAPPLICABILITY OF STANDARDS TO CERTAIN CONTRACTS.—The cost accounting standards issued pursuant to section 26(f) of the Office of Federal Procurement Policy Act (41 U.S.C. 422(f)), as amended by this section, shall not apply during fiscal year 2000 with respect to a contract entered into under the authority provided in chapter 89 of title 5, United States Code (relating to health benefits for Federal employees).

''(h) CONSTRUCTION REGARDING CERTAIN NOT-FOR-PROFIT ENTITIES.—The amendments made by subsections (a) and (b) [amending this section] shall not be construed as modifying or superseding, nor as intended to impair or restrict, the applicability of the cost accounting standards described in section 26(f) of the Office of Federal Procurement Policy Act (41 U.S.C. 422(f)) to—

''(1) any educational institution or federally funded research and development center that is associated with an educational institution in accordance with Office of Management and Budget Circular A–21, as in effect on January 1, 1999; or

''(2) any contract with a nonprofit entity that provides research and development and related products or services to the Department of Defense.

''(i) EFFECTIVE DATE.—The amendments made by subsections (a) and (b) [amending this section] shall take effect 180 days after the date of enactment of this Act [Oct. 5, 1999], and shall apply with respect to—

''(1) contracts that are entered into on or after such effective date; and

''(2) determinations made on or after such effective date regarding whether a segment of a contractor or subcontractor is subject to the cost accounting standards under section 26(f) of the Office of Federal Procurement Policy Act (41 U.S.C. 422(f)), regardless of whether the contracts on which such determinations are made were entered into before, on, or after such date.''

EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104–106, see section 4401 of Pub. L. 104–106, set out as a note under section 251 of this title.

EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103–355, see section 10001 of Pub. L. 103–355, set out as a note under section 251 of this title.

REFERENCES IN OTHER LAWS TO GS–16, 17, OR 18 PAY RATES

References in laws to the rates of pay for GS–16, 17, or 18, or to maximum rates of pay under the General

Schedule, to be considered references to rates payable under specified sections of Title 5, Government Organization and Employees, see section 529 [title I, § 101(c)(1)] of Pub. L. 101–509, set out in a note under section 5376 of Title 5.

§ 423. Restrictions on disclosing and obtaining contractor bid or proposal information or source selection information

(a) Prohibition on disclosing procurement information

(1) A person described in paragraph (2) shall not, other than as provided by law, knowingly disclose contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates. In the case of an employee of a private sector organization assigned to an agency under chapter 37 of title 5, in addition to the restriction in the preceding sentence, such employee shall not, other than as provided by law, knowingly disclose contractor bid or proposal information or source selection information during the three-year period after the end of the assignment of such employee.

(2) Paragraph (1) applies to any person who—

(A) is a present or former official of the United States, or a person who is acting or has acted for or on behalf of, or who is advising or has advised the United States with respect to, a Federal agency procurement; and

(B) by virtue of that office, employment, or relationship has or had access to contractor bid or proposal information or source selection information.

(b) Prohibition on obtaining procurement information

A person shall not, other than as provided by law, knowingly obtain contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates.

(c) Actions required of procurement officers when contacted by offerors regarding non-Federal employment

(1) If an agency official who is participating personally and substantially in a Federal agency procurement for a contract in excess of the simplified acquisition threshold contacts or is contacted by a person who is a bidder or offeror in that Federal agency procurement regarding possible non-Federal employment for that official, the official shall—

(A) promptly report the contact in writing to the official's supervisor and to the designated agency ethics official (or designee) of the agency in which the official is employed; and

(B)(i) reject the possibility of non-Federal employment; or

(ii) disqualify himself or herself from further personal and substantial participation in that Federal agency procurement until such time as the agency has authorized the official to resume participation in such procurement, in accordance with the requirements of section 208 of title 18 and applicable agency regulations on the grounds that—

(I) the person is no longer a bidder or offeror in that Federal agency procurement; or

(II) all discussions with the bidder or offeror regarding possible non-Federal employment have terminated without an agreement or arrangement for employment.

(2) Each report required by this subsection shall be retained by the agency for not less than two years following the submission of the report. All such reports shall be made available to the public upon request, except that any part of a report that is exempt from the disclosure requirements of section 552 of title 5 under subsection (b)(1) of such section may be withheld from disclosure to the public.

(3) An official who knowingly fails to comply with the requirements of this subsection shall be subject to the penalties and administrative actions set forth in subsection (e) of this section.

(4) A bidder or offeror who engages in employment discussions with an official who is subject to the restrictions of this subsection, knowing that the official has not complied with subparagraph (A) or (B) of paragraph (1), shall be subject to the penalties and administrative actions set forth in subsection (e) of this section.

(d) Prohibition on former official's acceptance of compensation from contractor

(1) A former official of a Federal agency may not accept compensation from a contractor as an employee, officer, director, or consultant of the contractor within a period of one year after such former official—

(A) served, at the time of selection of the contractor or the award of a contract to that contractor, as the procuring contracting officer, the source selection authority, a member of the source selection evaluation board, or the chief of a financial or technical evaluation team in a procurement in which that contractor was selected for award of a contract in excess of $10,000,000;

(B) served as the program manager, deputy program manager, or administrative contracting officer for a contract in excess of $10,000,000 awarded to that contractor; or

(C) personally made for the Federal agency—

(i) a decision to award a contract, subcontract, modification of a contract or subcontract, or a task order or delivery order in excess of $10,000,000 to that contractor;

(ii) a decision to establish overhead or other rates applicable to a contract or contracts for that contractor that are valued in excess of $10,000,000;

(iii) a decision to approve issuance of a contract payment or payments in excess of $10,000,000 to that contractor; or

(iv) a decision to pay or settle a claim in excess of $10,000,000 with that contractor.

(2) Nothing in paragraph (1) may be construed to prohibit a former official of a Federal agency from accepting compensation from any division or affiliate of a contractor that does not produce the same or similar products or services as the entity of the contractor that is responsible for the contract referred to in subparagraph (A), (B), or (C) of such paragraph.

(3) A former official who knowingly accepts compensation in violation of this subsection

shall be subject to penalties and administrative actions as set forth in subsection (e) of this section.

(4) A contractor who provides compensation to a former official knowing that such compensation is accepted by the former official in violation of this subsection shall be subject to penalties and administrative actions as set forth in subsection (e) of this section.

(5) Regulations implementing this subsection shall include procedures for an official or former official of a Federal agency to request advice from the appropriate designated agency ethics official regarding whether the official or former official is or would be precluded by this subsection from accepting compensation from a particular contractor.

(e) Penalties and administrative actions

(1) Criminal penalties

Whoever engages in conduct constituting a violation of subsection (a) or (b) of this section for the purpose of either—

(A) exchanging the information covered by such subsection for anything of value, or

(B) obtaining or giving anyone a competitive advantage in the award of a Federal agency procurement contract,

shall be imprisoned for not more than 5 years or fined as provided under title 18, or both.

(2) Civil penalties

The Attorney General may bring a civil action in an appropriate United States district court against any person who engages in conduct constituting a violation of subsection (a), (b), (c), or (d) of this section. Upon proof of such conduct by a preponderance of the evidence, the person is subject to a civil penalty. An individual who engages in such conduct is subject to a civil penalty of not more than $50,000 for each violation plus twice the amount of compensation which the individual received or offered for the prohibited conduct. An organization that engages in such conduct is subject to a civil penalty of not more than $500,000 for each violation plus twice the amount of compensation which the organization received or offered for the prohibited conduct.

(3) Administrative actions

(A) If a Federal agency receives information that a contractor or a person has engaged in conduct constituting a violation of subsection (a), (b), (c), or (d) of this section, the Federal agency shall consider taking one or more of the following actions, as appropriate:

(i) Cancellation of the Federal agency procurement, if a contract has not yet been awarded.

(ii) Rescission of a contract with respect to which—

(I) the contractor or someone acting for the contractor has been convicted for an offense punishable under paragraph (1), or

(II) the head of the agency that awarded the contract has determined, based upon a preponderance of the evidence, that the contractor or someone acting for the contractor has engaged in conduct constituting such an offense.

(iii) Initiation of suspension or debarment proceedings for the protection of the Government in accordance with procedures in the Federal Acquisition Regulation.

(iv) Initiation of adverse personnel action, pursuant to the procedures in chapter 75 of title 5 or other applicable law or regulation.

(B) If a Federal agency rescinds a contract pursuant to subparagraph (A)(ii), the United States is entitled to recover, in addition to any penalty prescribed by law, the amount expended under the contract.

(C) For purposes of any suspension or debarment proceedings initiated pursuant to subparagraph (A)(iii), engaging in conduct constituting an offense under subsection (a), (b), (c), or (d) of this section affects the present responsibility of a Government contractor or subcontractor.

(f) Definitions

As used in this section:

(1) The term ''contractor bid or proposal information'' means any of the following information submitted to a Federal agency as part of or in connection with a bid or proposal to enter into a Federal agency procurement contract, if that information has not been previously made available to the public or disclosed publicly:

(A) Cost or pricing data (as defined by section 2306a(h) of title 10, with respect to procurements subject to that section, and section 254b(h) of this title, with respect to procurements subject to that section).

(B) Indirect costs and direct labor rates.

(C) Proprietary information about manufacturing processes, operations, or techniques marked by the contractor in accordance with applicable law or regulation.

(D) Information marked by the contractor as ''contractor bid or proposal information'', in accordance with applicable law or regulation.

(2) The term ''source selection information'' means any of the following information prepared for use by a Federal agency for the purpose of evaluating a bid or proposal to enter into a Federal agency procurement contract, if that information has not been previously made available to the public or disclosed publicly:

(A) Bid prices submitted in response to a Federal agency solicitation for sealed bids, or lists of those bid prices before public bid opening.

(B) Proposed costs or prices submitted in response to a Federal agency solicitation, or lists of those proposed costs or prices.

(C) Source selection plans.

(D) Technical evaluation plans.

(E) Technical evaluations of proposals.

(F) Cost or price evaluations of proposals.

(G) Competitive range determinations that identify proposals that have a reasonable chance of being selected for award of a contract.

(H) Rankings of bids, proposals, or competitors.

(I) The reports and evaluations of source selection panels, boards, or advisory councils.

(J) Other information marked as ''source selection information'' based on a case-by-case determination by the head of the agency, his designee, or the contracting officer that its disclosure would jeopardize the integrity or successful completion of the Federal agency procurement to which the information relates.

(3) The term ''Federal agency'' has the meaning provided such term in section 102 of title 40.

(4) The term ''Federal agency procurement'' means the acquisition (by using competitive procedures and awarding a contract) of goods or services (including construction) from non-Federal sources by a Federal agency using appropriated funds.

(5) The term ''contracting officer'' means a person who, by appointment in accordance with applicable regulations, has the authority to enter into a Federal agency procurement contract on behalf of the Government and to make determinations and findings with respect to such a contract.

(6) The term ''protest'' means a written objection by an interested party to the award or proposed award of a Federal agency procurement contract, pursuant to subchapter V of chapter 35 of title 31.

(7) The term ''official'' means the following:

(A) An officer, as defined in section 2104 of title 5.

(B) An employee, as defined in section 2105 of title 5.

(C) A member of the uniformed services, as defined in section 2101(3) of title 5.

(g) Limitation on protests

No person may file a protest against the award or proposed award of a Federal agency procurement contract alleging a violation of subsection (a), (b), (c), or (d) of this section, nor may the Comptroller General of the United States consider such an allegation in deciding a protest, unless that person reported to the Federal agency responsible for the procurement, no later than 14 days after the person first discovered the possible violation, the information that the person believed constitutes evidence of the offense.

(h) Savings provisions

This section does not—

(1) restrict the disclosure of information to, or its receipt by, any person or class of persons authorized, in accordance with applicable agency regulations or procedures, to receive that information;

(2) restrict a contractor from disclosing its own bid or proposal information or the recipient from receiving that information;

(3) restrict the disclosure or receipt of information relating to a Federal agency procurement after it has been canceled by the Federal agency before contract award unless the Federal agency plans to resume the procurement;

(4) prohibit individual meetings between a Federal agency official and an offeror or potential offeror for, or a recipient of, a contract or subcontract under a Federal agency procurement, provided that unauthorized disclosure or receipt of contractor bid or proposal information or source selection information does not occur;

(5) authorize the withholding of information from, nor restrict its receipt by, Congress, a committee or subcommittee of Congress, the Comptroller General, a Federal agency, or an inspector general of a Federal agency;

(6) authorize the withholding of information from, nor restrict its receipt by, the Comptroller General of the United States in the course of a protest against the award or proposed award of a Federal agency procurement contract; or

(7) limit the applicability of any requirements, sanctions, contract penalties, and remedies established under any other law or regulation.

(Pub. L. 93–400, § 27, as added Pub. L. 100–679, § 6(a), Nov. 17, 1988, 102 Stat. 4063; amended Pub. L. 101–189, div. A, title VIII, § 814(a)–(d)(1), Nov. 29, 1989, 103 Stat. 1495–1498; Pub. L. 101–510, div. A, title XIV, § 1484(*l*)(6), Nov. 5, 1990, 104 Stat. 1720; Pub. L. 102–25, title VII, § 705(i), Apr. 6, 1991, 105 Stat. 121; Pub. L. 103–355, title VIII, § 8301(e), Oct. 13, 1994, 108 Stat. 3397; Pub. L. 104–106, div. D, title XLIII, § 4304(a), Feb. 10, 1996, 110 Stat. 659; Pub. L. 107–347, title II, § 209(d)(4), Dec. 17, 2002, 116 Stat. 2930.)

CODIFICATION

''Section 102 of title 40'' substituted in subsec. (f)(3) for ''section 3 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 472)'' 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

2002—Subsec. (a)(1). Pub. L. 107–347 inserted at end ''In the case of an employee of a private sector organization assigned to an agency under chapter 37 of title 5, in addition to the restriction in the preceding sentence, such employee shall not, other than as provided by law, knowingly disclose contractor bid or proposal information or source selection information during the three-year period after the end of the assignment of such employee.''

1996—Pub. L. 104–106 amended section generally, substituting subsecs. (a) to (h) relating to restrictions on disclosing and obtaining contractor bid or proposal information and source selection information for former subsecs. (a) to (p) relating to procurement integrity.

1994—Subsec. (e)(1)(B). Pub. L. 103–355 inserted '', except in the case of a contract for the procurement of commercial items,'' after ''certifies in writing to such contracting officer'' in introductory provisions.

1991—Subsec. (p)(8). Pub. L. 102–25 substituted ''has the meaning given such term by section 109(3) of the Ethics in Government Act of 1978 (5 U.S.C. App.).'' for ''has the same meaning as the term 'designated agency official' in section 209(10) of the Ethics in Government Act of 1978 (92 Stat. 1850; 5 U.S.C. App.).''

1990—Subsec. (f)(3)(D), (F). Pub. L. 101–510 redesignated subpar. (D), defining term ''civil service'', as (F).

1989—Subsecs. (a)(1), (b)(1). Pub. L. 101–189, § 814(a)(1)(A), inserted '', except as provided in subsection (c) of this section'' before semicolon at end.

Subsec. (c). Pub. L. 101–189, § 814(a)(1)(C), added subsec. (c). Former subsec. (c) redesignated (d).

Subsec. (d). Pub. L. 101–189, § 814(a)(1)(B)(ii), redesignated subsec. (c) as (d). Former subsec. (d) redesignated (e).

Subsec. (e). Pub. L. 101–189, § 814(a)(1)(B)(ii), redesignated subsec. (d) as (e). Former subsec. (e) redesignated (f).

Subsec. (e)(1)(A)(i), (B)(ii), (2)(A), (3)(A). Pub. L. 101–189, § 814(c)(1)(A)–(D), substituted ''(d), or (f)'' for ''(c), or (e)''.

Subsec. (e)(7)(B)(ii). Pub. L. 101–189, § 814(c)(1)(E), substituted ''subsection (*o*)'' for ''subsection (m)''.

Subsec. (f). Pub. L. 101–189, § 814(a)(2)(B), substituted ''Restrictions resulting from procurement activities of procurement officials'' for ''Restrictions on Government officials and employees'' as heading, and ''(1) No individual who, while serving as an officer or employee of the Government or member of the Armed Forces, was a procurement official with respect to a particular procurement may knowingly—'' for ''No Government official or employee, civilian, or military, who has participated personally and substantially in the conduct of any Federal agency procurement or who has personally reviewed and approved the award, modification, or extension of any contract for such procurement shall—''.

Pub. L. 101–189, § 814(a)(2)(A), redesignated pars. (1) and (2) as subpars. (A) and (B), respectively.

Pub. L. 101–189, § 814(a)(1)(B)(ii), redesignated subsec. (e) as (f). Former subsec. (f) redesignated (g).

Subsec. (f)(2). Pub. L. 101–189, § 814(a)(2)(C), added par. (2).

Subsec. (f)(3). Pub. L. 101–189, § 814(d)(1), added par. (3).

Subsec. (g). Pub. L. 101–189, § 814(a)(1)(B)(ii), redesignated subsec. (f) as (g). Former subsec. (g) redesignated (h).

Subsec. (g)(1). Pub. L. 101–189, § 814(c)(2), substituted ''subsection (*o*)'' for ''subsection (m)''.

Subsec. (h). Pub. L. 101–189, § 814(a)(1)(B)(ii), redesignated subsec. (g) as (h). Former subsec. (h) redesignated (i).

Subsec. (h)(1). Pub. L. 101–189, § 814(c)(3)(A), substituted ''subsection (e)'' for ''subsection (d)''.

Subsec. (h)(2). Pub. L. 101–189, § 814(c)(3)(B), substituted ''(b) or (d)'' for ''(b) or (c)''.

Subsec. (h)(3). Pub. L. 101–189, § 814(c)(3)(C), substituted ''(i) and (j)'' for ''(h) and (i)''.

Subsec. (i). Pub. L. 101–189, § 814(c)(4), substituted ''(d), or (f)'' for ''(c), or (e)''.

Pub. L. 101–189, § 814(a)(1)(B)(ii), redesignated subsec. (h) as (i). Former subsec. (i) redesignated (j).

Subsec. (j). Pub. L. 101–189, § 814(a)(1)(B)(ii), redesignated subsec. (i) as (j). Former subsec. (j) redesignated (*l*).

Subsec. (j)(1). Pub. L. 101–189, § 814(c)(5), substituted ''subsection (p)'' for ''subsection (n)'' and ''subsection (*o*)'' for ''subsection (m)''.

Subsec. (k). Pub. L. 101–189, § 814(a)(3), added subsec. (k). Former subsec. (k) redesignated (m).

Subsec. (*l*). Pub. L. 101–189, § 814(a)(1)(B)(i), redesignated subsec. (j) as (*l*). Former subsec. (*l*) redesignated (n).

Subsec. (*l*)(1). Pub. L. 101–189, § 814(c)(6)(A), substituted ''subsections (b), (c), and (e)'' for ''subsection (b)''.

Subsec. (*l*)(2). Pub. L. 101–189, § 814(c)(6)(B), substituted ''subsections (b), (c), and (e)'' for ''subsection (b)'' and ''(d), or (f)'' for ''(c), or (e)''.

Subsecs. (m), (n). Pub. L. 101–189, § 814(a)(1)(B)(i), redesignated subsecs. (k) and (*l*) as (m) and (n), respectively. Former subsecs. (m) and (n) redesignated (*o*) and (p), respectively.

Subsec. (*o*). Pub. L. 101–189, § 814(a)(4), amended subsec. (*o*) generally. Prior to amendment, subsec. (*o*) read as follows: ''Government-wide regulations and guidelines deemed appropriate to carry out this section shall be issued in the Federal Acquisition Regulation within 180 days after November 17, 1988.''

Pub. L. 101–189, § 814(a)(1)(B)(i), redesignated subsec. (m) as (*o*).

Subsec. (p). Pub. L. 101–189, § 814(a)(1)(B)(i), redesignated subsec. (n) as (p).

Subsec. (p)(1). Pub. L. 101–189, § 814(b)(1), substituted ''on the earliest specific date, as determined under implementing regulations, on which an authorized official orders or requests an action described in clauses (i)–(viii) of paragraph (3)(A),'' for ''with the development, preparation, and issuance of a procurement solicitation,''.

Subsec. (p)(3)(A). Pub. L. 101–189, § 814(b)(2), added subpar. (A) and struck out former subpar. (A) which read as follows: ''The term 'procurement official' means any civilian or military official or employee of an agency who has participated personally and substantially in the conduct of the agency procurement concerned, including all officials and employees who are responsible for reviewing or approving the procurement, as further defined by applicable implementing regulations.''

Subsec. (p)(8). Pub. L. 101–189, § 814(b)(3), added par. (8).

EFFECTIVE DATE OF 2002 AMENDMENT

Amendment by Pub. L. 107–347 effective 120 days after Dec. 17, 2002, see section 402(a) of Pub. L. 107–347, set out as an Effective Date note under section 3601 of Title 44, Public Printing and Documents.

EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104–106, see section 4401 of Pub. L. 104–106, set out as a note under section 251 of this title.

EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103–355, see section 10001 of Pub. L. 103–355, set out as a note under section 251 of this title.

EFFECTIVE DATE

Section 6(b) of Pub. L. 100–679, as amended by Pub. L. 101–28, § 1, May 15, 1989, 103 Stat. 57, provided that: ''The amendment made by subsection (a) [enacting this section] shall take effect July 16, 1989.''

REGULATIONS

Section 814(e) of Pub. L. 101–189 provided that: ''Not later than 90 days after the date of the enactment of this section [Nov. 29, 1989], regulations implementing the amendments made by this section to the provisions of section 27 of the Office of Federal Procurement Policy Act (41 U.S.C. 423) shall be issued in accordance with sections 6 and 25 of such Act (41 U.S.C. 405, 421), after coordination with the Director of the Office of Government Ethics.''

CLARIFICATION OF FREQUENCY OF CERTIFICATION BY EMPLOYEES AND CONTRACTORS

Section 815(b) of Pub. L. 101–510 provided that: ''Not later than 30 days after the date of the enactment of this Act [Nov. 5, 1990], the regulations implementing section 27(e)(1)(B) of the Office of Federal Procurement Policy Act (41 U.S.C. 423(e)(1)(B)) shall be revised to ensure that a contractor is required to obtain from each officer, employee, agent, representative, and consultant of the contractor only one certification (as described in clauses (i) and (ii) of that section) during the person's employment or association with the contractor and that such certification shall be made at the earliest possible date after the person begins his or her employment or association with the contractor.''

SUSPENSION OF EFFECT OF SECTION

Section 815(a)(1) of Pub. L. 101–510 provided that subsection (f) of this section shall have no force or effect during the period beginning on Dec. 1, 1990, and ending on May 31, 1991.

Pub. L. 101–194, title V, § 507(1), Nov. 30, 1989, 103 Stat. 1759, provided that the provisions of this section shall have no force or effect during the period beginning Dec. 1, 1989, and ending one year after such date.

§ 424. Repealed. Pub. L. 103–355, title VIII, § 8303(b), Oct. 13, 1994, 108 Stat. 3398

Section, Pub. L. 93–400, § 28, as added Pub. L. 100–679, § 9, Nov. 17, 1988, 102 Stat. 4069, related to establishment

and duties of Advocate for the Acquisition of Commercial Products.

EFFECTIVE DATE OF REPEAL

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

§ 425. Contract clauses and certifications

(a) Nonstandard contract clauses

The Federal Acquisition Regulatory Council shall promulgate regulations to discourage the use of a nonstandard contract clause on a repetitive basis. The regulations shall include provisions that—

(1) clearly define what types of contract clauses are to be treated as nonstandard clauses; and

(2) require prior approval for the use of a nonstandard clause on a repetitive basis by an official at a level of responsibility above the contracting officer.

(b) Construction of certification requirements

A provision of law may not be construed as requiring a certification by a contractor or offeror in a procurement made or to be made by the Federal Government unless that provision of law specifically provides that such a certification shall be required.

(c) Prohibition on certification requirements

(1) A requirement for a certification by a contractor or offeror may not be included in the Federal Acquisition Regulation unless—

(A) the certification requirement is specifically imposed by statute; or

(B) written justification for such certification requirement is provided to the Administrator for Federal Procurement Policy by the Federal Acquisition Regulatory Council, and the Administrator approves in writing the inclusion of such certification requirement.

(2)(A) A requirement for a certification by a contractor or offeror may not be included in a procurement regulation of an executive agency unless—

(i) the certification requirement is specifically imposed by statute; or

(ii) written justification for such certification requirement is provided to the head of the executive agency by the senior procurement executive of the agency, and the head of the executive agency approves in writing the inclusion of such certification requirement.

(B) For purposes of subparagraph (A), the term ''head of the executive agency'' with respect to a military department means the Secretary of Defense.

(Pub. L. 93–400, § 29, as added Pub. L. 103–355, title I, § 1093, Oct. 13, 1994, 108 Stat. 3273; amended Pub. L. 104–106, div. D, title XLIII, § 4301(b)(2)(A), (c), Feb. 10, 1996, 110 Stat. 657, 658.)

AMENDMENTS

1996—Pub. L. 104–106 substituted ''Contract clauses and certifications'' for ''Nonstandard contract clauses'' in section catchline, designated existing provisions as subsec. (a) and inserted heading, and added subsecs. (b) and (c).

EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104–106, see section 4401 of Pub. L. 104–106, set out as a note under section 251 of this title.

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.

CURRENT CERTIFICATION REQUIREMENTS

Section 4301(b)(1) of Pub. L. 104–106 provided that:

''(A) Not later than 210 days after the date of the enactment of this Act [Feb. 10, 1996], the Administrator for Federal Procurement Policy shall issue for public comment a proposal to amend the Federal Acquisition Regulation to remove from the Federal Acquisition Regulation certification requirements for contractors and offerors that are not specifically imposed by statute. The Administrator may omit such a certification requirement from the proposal only if—

''(i) the Federal Acquisition Regulatory Council provides the Administrator with a written justification for the requirement and a determination that there is no less burdensome means for administering and enforcing the particular regulation that contains the certification requirement; and

''(ii) the Administrator approves in writing the retention of the certification requirement.

''(B)(i) Not later than 210 days after the date of the enactment of this Act, the head of each executive agency that has agency procurement regulations containing one or more certification requirements for contractors and offerors that are not specifically imposed by statute shall issue for public comment a proposal to amend the regulations to remove the certification requirements. The head of the executive agency may omit such a certification requirement from the proposal only if—

''(I) the senior procurement executive for the executive agency provides the head of the executive agency with a written justification for the requirement and a determination that there is no less burdensome means for administering and enforcing the particular regulation that contains the certification requirement; and

''(II) the head of the executive agency approves in writing the retention of such certification requirement.

''(ii) For purposes of clause (i), the term 'head of the executive agency' with respect to a military department means the Secretary of Defense.''

§ 426. Use of electronic commerce in Federal procurement

(a) In general

The head of each executive agency, after consulting with the Administrator, shall establish, maintain, and use, to the maximum extent that is practicable and cost-effective, procedures and processes that employ electronic commerce in the conduct and administration of its procurement system.

(b) Applicable standards

In conducting electronic commerce, the head of an agency shall apply nationally and internationally recognized standards that broaden interoperability and ease the electronic interchange of information.

(c) Agency procedures

The head of each executive agency shall ensure that systems, technologies, procedures, and processes established pursuant to this section—

(1) are implemented with uniformity throughout the agency, to the extent practicable;

(2) are implemented only after granting due consideration to the use or partial use, as appropriate, of existing electronic commerce and electronic data interchange systems and infrastructures such[1] the Federal acquisition computer network architecture known as FACNET;

(3) facilitate access to Federal Government procurement opportunities, including opportunities for small business concerns, socially and economically disadvantaged small business concerns, and business concerns owned predominantly by women; and

(4) ensure that any notice of agency requirements or agency solicitation for contract opportunities is provided in a form that allows convenient and universal user access through a single, Government-wide point of entry.

(d) Implementation

The Administrator shall, in carrying out the requirements of this section—

(1) issue policies to promote, to the maximum extent practicable, uniform implementation of this section by executive agencies, with due regard for differences in program requirements among agencies that may require departures from uniform procedures and processes in appropriate cases, when warranted because of the agency mission;

(2) ensure that the head of each executive agency complies with the requirements of subsection (c) of this section with respect to the agency systems, technologies, procedures, and processes established pursuant to this section; and

(3) consult with the heads of appropriate Federal agencies with applicable technical and functional expertise, including the Office of Information and Regulatory Affairs, the National Institute of Standards and Technology, the General Services Administration, and the Department of Defense.

(e) Report

Not later than March 1 of each even-numbered year through 2004, the Administrator shall submit to Congress a report setting forth in detail the progress made in implementing the requirements of this section. The report shall include the following:

(1) A strategic plan for the implementation of a Government-wide electronic commerce capability.

(2) An agency-by-agency summary of implementation of the requirements of subsection (c) of this section, including timetables, as appropriate, addressing when individual agencies will come into full compliance.

(3) A specific assessment of compliance with the requirement in subsection (c) of this section to provide universal public access through a single, Government-wide point of entry.

(4) An agency-by-agency summary of the volume and dollar value of transactions that were conducted using electronic commerce methods during the previous two fiscal years.

(5) A discussion of possible incremental changes to the electronic commerce capability referred to in subsection (c)(4) of this section to increase the level of government contract information available to the private sector, including an assessment of the advisability of including contract award information in the electronic commerce functional standard.

(f) "Electronic commerce" defined

For the purposes of this section, the term ''electronic commerce'' means electronic techniques for accomplishing business transactions, including electronic mail or messaging, World Wide Web technology, electronic bulletin boards, purchase cards, electronic funds transfers, and electronic data interchange.

(Pub. L. 93–400, § 30, as added Pub. L. 103–355, title IX, § 9001(a), Oct. 13, 1994, 108 Stat. 3399; Pub. L. 105–85, div. A, title VIII, § 850(a), Nov. 18, 1997, 111 Stat. 1847; Pub. L. 106–398, § 1 [[div. A], title VIII, § 810(d)], Oct. 30, 2000, 114 Stat. 1654, 1654A–210.)

AMENDMENTS

2000—Subsec. (e). Pub. L. 106–398, § 1 [[div. A], title VIII, § 810(d)(1)], substituted ''Not later than March 1 of each even-numbered year through 2004'' for ''Not later than March 1, 1998, and every year afterward through 2003'' in introductory provisions.

Subsec. (e)(4). Pub. L. 106–398, § 1 [[div. A], title VIII, § 810(d)(2)], substituted ''An'' for ''Beginning with the report submitted on March 1, 1999, an'' and ''two fiscal years'' for ''calendar year''.

1997—Pub. L. 105–85 amended section catchline and text generally. Prior to amendment, section consisted of subsecs. (a) to (d) requiring the Administrator to establish a program for development and implementation of a Federal acquisition computer network architecture to be known as FACNET.

EFFECTIVE DATE OF 2000 AMENDMENT

Amendment by Pub. L. 106–398 effective Oct. 1, 2000, see section 1 [[div. A], title VIII, § 810(e)] of Pub. L. 106–398, set out as a note under section 637 of Title 15, Commerce and Trade.

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.

§ 426a. Repealed. Pub. L. 105–85, div. A, title VIII, § 850(b), Nov. 18, 1997, 111 Stat. 1848

Section, Pub. L. 93–400, § 30A, as added Pub. L. 103–355, title IX, § 9001(a), Oct. 13, 1994, 108 Stat. 3400, related to Federal acquisition computer network implementation.

EFFECTIVE DATE OF REPEAL

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

GAO DETERMINATION OF ELIGIBLE AGENCY CONTRACTS

Section 9004 of Pub. L. 103–355 required Comptroller General to submit to Administrator for Federal Procurement Policy and congressional committees, not

[1] So in original. Probably should be followed by ''as''.

later than 3 years after Oct. 13, 1994, a report on classes of contracts in amounts greater than micro-purchase threshold and not greater than simplified acquisition threshold that are not suitable for acquisition through a system with full FACNET capability, and authorized Federal Acquisition Regulatory Council, not earlier than 3 years after Oct. 13, 1994, to make determination that such class or classes of contracts were not suitable for acquisition through such a system, prior to repeal by Pub. L. 105–85, div. A, title VIII, § 850(c), Nov. 18, 1997, 111 Stat. 1848.

§ 427. Simplified acquisition procedures

(a) Requirement

In order to promote efficiency and economy in contracting and to avoid unnecessary burdens for agencies and contractors, the Federal Acquisition Regulation shall provide for—

(1) special simplified procedures for purchases of property and services for amounts not greater than the simplified acquisition threshold; and

(2) special simplified procedures for purchases of property and services for amounts greater than the simplified acquisition threshold but not greater than $5,000,000 with respect to which the contracting officer reasonably expects, based on the nature of the property or services sought and on market research, that offers will include only commercial items.

(b) Prohibition on dividing purchases

A proposed purchase or contract for an amount above the simplified acquisition threshold may not be divided into several purchases or contracts for lesser amounts in order to use the simplified acquisition procedures required by subsection (a) of this section.

(c) Promotion of competition required

In using simplified acquisition procedures, the head of an executive agency shall promote competition to the maximum extent practicable.

(d) Consideration of offers timely received

The simplified acquisition procedures contained in the Federal Acquisition Regulation shall include a requirement that a contracting officer consider each responsive offer timely received from an eligible offeror.

(e) Interim reporting rule

Until October 1, 2004, procuring activities shall continue to report under section 417(d) of this title procurement awards with a dollar value of at least $25,000, but less than $100,000, in conformity with the procedures for the reporting of a contract award greater than $25,000 that were in effect on October 1, 1992.

(f) Special rules for commercial items

The Federal Acquisition Regulation shall provide that, in the case of a purchase of commercial items using special simplified procedures, an executive agency—

(1) shall publish a notice in accordance with section 416 of this title and, as provided in subsection (b)(4) of such section, permit all responsible sources to submit a bid, proposal, or quotation (as appropriate) which shall be considered by the agency;

(2) may not conduct the purchase on a sole source basis unless the need to do so is justified in writing and approved in accordance with section 2304 of title 10 or section 253 of this title, as applicable; and

(3) shall include in the contract file a written description of the procedures used in awarding the contract and the number of offers received.

(Pub. L. 93–400, § 31, as added Pub. L. 103–355, title IV, § 4201(a), Oct. 13, 1994, 108 Stat. 3342; amended Pub. L. 104–106, div. D, title XLII, § 4202(c), title XLIII, § 4302(b), Feb. 10, 1996, 110 Stat. 653, 658; Pub. L. 104–201, div. A, title X, § 1074(b)(6), Sept. 23, 1996, 110 Stat. 2660; Pub. L. 105–85, div. A, title VIII, § 850(d), Nov. 18, 1997, 111 Stat. 1848; Pub. L. 106–65, div. A, title VIII, § 818, Oct. 5, 1999, 113 Stat. 712.)

AMENDMENTS

1999—Subsec. (e). Pub. L. 106–65 substituted ''October 1, 2004'' for ''October 1, 1999''.

1997—Subsecs. (e) to (g). Pub. L. 105–85 redesignated subsecs. (f) and (g) as (e) and (f), respectively, and struck out heading and text of subsec. (e). Text read as follows: ''The simplified acquisition procedures provided in the Federal Acquisition Regulation pursuant to section 2304(g)(1)(A) of title 10, section 253(g)(1)(A) of this title, and subsection (a)(1) of this section may not be used by an agency after December 31, 1999, for contracts in amounts greater than $50,000 and not greater than the simplified acquisition threshold until a certification has been made pursuant to section 426a(a)(2) of this title that the agency has implemented a full FACNET capability.''

1996—Subsec. (a). Pub. L. 104–106, § 4202(c)(1), as amended by Pub. L. 104–201, substituted ''shall provide for—'' and pars. (1) and (2) for ''shall provide for special simplified procedures for contracts for acquisition of property and services that are not greater than the simplified acquisition threshold.''

Subsec. (e). Pub. L. 104–106, § 4302(b)(2), substituted ''pursuant to section 2304(g)(1)(A) of title 10, section 253(g)(1)(A) of this title, and subsection (a)(1) of this section'' for ''pursuant to this section''.

Pub. L. 104–106, § 4302(b)(1), designated subsec. (e)(2)(B) as entire subsec. and struck out former pars. (1) and (2)(A) which read as follows:

''(1) EFFECT OF INTERIM FACNET CAPABILITY.—The simplified acquisition procedures provided in the Federal Acquisition Regulation pursuant to this section may not be used by a procuring activity of an agency for contracts in amounts greater than $50,000 and not greater than the simplified acquisition threshold until a certification has been made pursuant to section 426a(a)(1) of this title that the procuring activity has implemented an interim FACNET capability.

''(2) EFFECT OF FULL FACNET CAPABILITY.—(A)(i) In the case of a procuring activity described in clause (ii), the simplified acquisition procedures provided in the Federal Acquisition Regulation pursuant to this section may be used by the activity for contracts in amounts greater than $50,000 and not greater than the simplified acquisition threshold.

''(ii) Clause (i) applies to any procuring activity—

''(I) that has not certified, pursuant to section 426a(a)(1) of this title, that it has implemented interim FACNET capability; and

''(II) that is in an agency that has excluded the procuring activity from the agency's full FACNET certification under section 426a(a)(2) of this title on the basis that implementation of full FACNET capability would not be cost effective or practicable in that activity.''

Subsec. (g). Pub. L. 104–106, § 4202(c)(2), added subsec. (g).

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 OF 1996 AMENDMENTS

Section 1074(b)(6) of Pub. L. 104–201 provided that the amendment made by that section is effective Feb. 10, 1996.

For effective date and applicability of amendment by Pub. L. 104–106, see section 4401 of Pub. L. 104–106, set out as a note under section 251 of this title.

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.

TERMINATION OF AUTHORITY TO ISSUE SOLICITATIONS FOR PURCHASES OF COMMERCIAL ITEMS IN EXCESS OF SIMPLIFIED ACQUISITION THRESHOLD

Authority to issue solicitations for purchases of commercial items in excess of simplified acquisition threshold pursuant to special simplified procedures authorized by subsec. (a) of this section to expire three years after date certain amendments by section 4202 of Pub. L. 104–106 take effect pursuant to section 4401(b) of Pub. L. 104–106, set out as a note under section 251 of this title, see section 4202(e) of Pub. L. 104–106, set out as a note under section 2304 of Title 10, Armed Forces.

§ 428. Procedures applicable to purchases below micro-purchase threshold

(a) Requirements

(1) The head of each executive agency shall ensure that procuring activities of that agency, in awarding a contract with a price exceeding the micro-purchase threshold, comply with the requirements of section 637(a) of title 15, section 2323 of title 10, and section 7102 of the Federal Acquisition Streamlining Act of 1994.

(2) The authority under part 13.106(a)(1) of the Federal Acquisition Regulation (48 C.F.R. 13.106(a)(1)), as in effect on November 18, 1993, to make purchases without securing competitive quotations does not apply to any purchases with a price exceeding the micro-purchase threshold.

(b) Exclusion for micro-purchases

A purchase by an executive agency with an anticipated value of the micro-purchase threshold or less is not subject to section 644(j) of title 15 and the Buy American Act (41 U.S.C. 10a–10c).

(c) Purchases without competitive quotations

A purchase not greater than $2,500 may be made without obtaining competitive quotations if an employee of an executive agency or a member of the Armed Forces of the United States authorized to do so determines that the price for the purchase is reasonable.

(d) Equitable distribution

Purchases not greater than $2,500 shall be distributed equitably among qualified suppliers.

(e) Implementation through FAR

This section shall be implemented through the Federal Acquisition Regulation.

(f) Micro-purchase threshold defined

For purposes of this section, the micro-purchase threshold is the amount of $2,500.

(Pub. L. 93–400, § 32, as added Pub. L. 103–355, title IV, § 4301(a), Oct. 13, 1994, 108 Stat. 3346; amended Pub. L. 104–106, div. D, title XLIII, §§ 4304(b)(4), (c)(3), 4311, Feb. 10, 1996, 110 Stat. 664, 671.)

REFERENCES IN TEXT

Section 7102 of the Federal Acquisition Streamlining Act of 1994, referred to in subsec. (a)(1), is section 7102 of Pub. L. 103–355, which is set out as a note under section 644 of Title 15, Commerce and Trade.

The Buy American Act, referred to in subsec. (b), is title III of act Mar. 3, 1933, ch. 212, 47 Stat. 1520, as amended, which is classified generally to sections 10a, 10b, and 10c of this title. For complete classification of this Act to the Code, see Short Title note set out under section 10a of this title and Tables.

AMENDMENTS

1996—Subsec. (c). Pub. L. 104–106, § 4311, substituted "an employee of an executive agency or a member of the Armed Forces of the United States authorized to do so" for "the contracting officer".

Pub. L. 104–106, § 4304(b)(4), (c)(3), redesignated subsec. (d) as (c) and struck out heading and text of former subsec. (c). Text read as follows: "For purposes of section 423 of this title, an officer or employee of an executive agency, or a member of the Armed Forces of the United States, shall not be considered a procurement official if—

"(1) the contracting authority of the officer, employee, or member does not exceed $2,500; and

"(2) the head of the contracting activity concerned (or a designee of the head of the contracting activity concerned) determines that the duties of the position of that officer, employee, or member are such that is it unlikely that the officer, employee, or member will be required to conduct procurements in a total amount greater than $20,000 in any 12-month period."

Subsecs. (d) to (g). Pub. L. 104–106, § 4304(c)(3), redesignated subsecs. (e) to (g) as (d) to (f), respectively. Former subsec. (d) redesignated (c).

EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104–106, see section 4401 of Pub. L. 104–106, set out as a note under section 251 of this title.

EFFECTIVE DATE

Section effective Oct. 13, 1994, and to be implemented in Federal Acquisition Regulation not later than 60 days after Oct. 13, 1994, see section 4301(c) of Pub. L. 103–355, set out as an Effective Date of 1994 Amendment note under section 10a of this title.

§ 428a. Special emergency procurement authority

(a) Applicability

The authorities provided in this section apply with respect to any procurement of property or services by or for an executive agency that, as determined by the head of such executive agency, are to be used—

(1) in support of a contingency operation; or

(2) to facilitate the defense against or recovery from nuclear, biological, chemical, or radiological attack against the United States.

(b) Increased thresholds

For a procurement to which this section applies under subsection (a) of this section—

(1) the amount specified in subsections (c), (d), and (f) of section 428 of this title shall be deemed to be—

(A) $15,000 in the case of any contract to be awarded and performed, or purchase to be made, inside the United States; and

(B) $25,000 in the case of any contract to be awarded and performed, or purchase to be made, outside the United States; and

(2) the term "simplified acquisition threshold" means—

(A) $250,000 in the case of any contract to be awarded and performed, or purchase to be made, inside the United States; and

(B) $1,000,000 in the case of any contract to be awarded and performed, or purchase to be made, outside the United States.

(c) Increased limitation on use of simplified acquisition procedures

For a procurement to which this section applies under subsection (a) of this section, the $5,000,000 limitation in the following provisions of law shall be deemed to be $10,000,000:

(1) Section 427(a)(2) of this title.

(2) Section 2304(g)(1)(B) of title 10.

(3) Section 253(g)(1)(B) of this title.

(d) Commercial items authority

(1) The head of an executive agency carrying out a procurement of property or a service to which this section applies under subsection (a)(2) of this section may treat such property or service as a commercial item for the purpose of carrying out such procurement.

(2) A contract in an amount greater than $15,000,000 that is awarded on a sole source basis for an item or service treated as a commercial item under paragraph (1) shall not be exempt from—

(A) cost accounting standards promulgated pursuant to section 422 of this title; or

(B) cost or pricing data requirements (commonly referred to as truth in negotiating) under section 2306a of title 10 and section 254b of this title.

(e) Contingency operation defined

In this section, the term ''contingency operation'' has the meaning given such term in section 101(a)(13) of title 10.

(Pub. L. 93–400, § 32A, as added Pub. L. 108–136, div. A, title XIV, § 1443(a)(1), Nov. 24, 2003, 117 Stat. 1675; amended Pub. L. 108–375, div. A, title VIII, § 822, Oct. 28, 2004, 118 Stat. 2016.)

AMENDMENTS

2004—Subsec. (b)(1). Pub. L. 108–375, § 822(1), added par. (1) and struck out former par. (1) which read as follows: ''the amount specified in subsections (c), (d), and (f) of section 428 of this title shall be deemed to be $15,000; and''.

Subsec. (b)(2)(B). Pub. L. 108–375, § 822(2), substituted ''$1,000,000'' for ''$500,000''.

AUTHORITY TO ENTER INTO CERTAIN TRANSACTIONS FOR DEFENSE AGAINST OR RECOVERY FROM TERRORISM OR NUCLEAR, BIOLOGICAL, CHEMICAL, OR RADIOLOGICAL ATTACK

Pub. L. 108–136, div. A, title XIV, § 1441, Nov. 24, 2003, 117 Stat. 1673, provided that:

''(a) AUTHORITY.—

''(1) IN GENERAL.—The head of an executive agency who engages in basic research, applied research, advanced research, and development projects that—

''(A) are necessary to the responsibilities of such official's executive agency in the field of research and development, and

''(B) have the potential to facilitate defense against or recovery from terrorism or nuclear, biological, chemical, or radiological attack,

may exercise the same authority (subject to the same restrictions and conditions) with respect to such research and projects as the Secretary of Defense may exercise under section 2371 of title 10, United States Code, except for subsections (b) and (f) of such section 2371.

''(2) PROTOTYPE PROJECTS.—The head of an executive agency may, under the authority of paragraph (1), carry out prototype projects that meet the requirements of subparagraphs (A) and (B) of paragraph (1) in accordance with the requirements and conditions provided for carrying out prototype projects under section 845 of the National Defense Authorization Act for Fiscal Year 1994 (Public Law 103–160; 10 U.S.C. 2371 note), including that, to the maximum extent practicable, competitive procedures shall be used when entering into agreements to carry out projects under subsection (a) of that section and that the period of authority to carry out projects under such subsection (a) terminates as provided in subsection (g) [now (i)] of that section.

''(3) APPLICATION OF REQUIREMENTS AND CONDITIONS.—In applying the requirements and conditions of section 845 of the National Defense Authorization Act for Fiscal Year 1994 under this subsection—

''(A) subsection (c) of that section shall apply with respect to prototype projects carried out under this paragraph; and

''(B) the Director of the Office of Management and Budget shall perform the functions of the Secretary of Defense under subsection (d) of that section.

''(4) APPLICABILITY TO SELECTED EXECUTIVE AGENCIES.—

''(A) OMB AUTHORIZATION REQUIRED.—The head of an executive agency may exercise authority under this subsection for a project only if authorized by the Director of the Office of Management and Budget to use the authority for such project.

''(B) RELATIONSHIP TO AUTHORITY OF DEPARTMENT OF HOMELAND SECURITY.—The authority under this subsection shall not apply to the Secretary of Homeland Security while section 831 of the Homeland Security Act of 2002 (Public Law 107–296; 116 Stat. 2224) [6 U.S.C. 391] is in effect.

''(b) ANNUAL REPORT.—The annual report of the head of an executive agency that is required under subsection (h) of section 2371 of title 10, United States Code, as applied to the head of the executive agency by subsection (a), shall be submitted to the Committee on Governmental Affairs of the Senate and the Committee on Government Reform [now Committee on Oversight and Government Reform] of the House of Representatives.

''(c) REGULATIONS.—The Director of the Office of Management and Budget shall prescribe regulations to carry out this section. No transaction may be conducted under the authority of this section before the date on which such regulations take effect.

''(d) TERMINATION OF AUTHORITY.—The authority to carry out transactions under subsection (a) shall terminate on September 30, 2008.''

§ 429. List of laws inapplicable to contracts not greater than simplified acquisition threshold in Federal Acquisition Regulation

(a) List of inapplicable provisions of law

(1) The Federal Acquisition Regulation shall include a list of provisions of law that are inapplicable to contracts or subcontracts in amounts not greater than the simplified acquisition threshold. A provision of law that is properly included on the list pursuant to paragraph (2) may not be construed as applicable to such contracts or subcontracts (as the case may be) by an executive agency. Nothing in this section shall be construed to render inapplicable to contracts and subcontracts in amounts not greater than the simplified acquisition threshold any provision of law that is not included on such list.

(2) A provision of law described in subsection (b) of this section that is enacted after October

13, 1994, shall be included on the list of inapplicable provisions of law required by paragraph (1), unless the Federal Acquisition Regulatory Council makes a written determination that it would not be in the best interest of the Federal Government to exempt contracts or subcontracts in amounts not greater than the simplified acquisition threshold from the applicability of the provision.

(b) Covered law

A provision of law referred to in subsection (a)(2) of this section is any provision of law that, as determined by the Federal Acquisition Regulatory Council, sets forth policies, procedures, requirements, or restrictions for the procurement of property or services by the Federal Government, except for a provision of law that—

(1) provides for criminal or civil penalties; or

(2) specifically refers to this section and provides that, notwithstanding this section, it shall be applicable to contracts or subcontracts in amounts not greater than the simplified acquisition threshold.

(c) Petition

In the event that a provision of law described in subsection (b) of this section is not included on the list of inapplicable provisions of law as required by subsection (a) of this section, and no written determination has been made by the Federal Acquisition Regulatory Council pursuant to subsection (a)(2) of this section, a person may petition the Administrator for Federal Procurement Policy to take appropriate action. The Administrator shall revise the Federal Acquisition Regulation to include the provision on the list of inapplicable provisions of law unless the Federal Acquisition Regulatory Council makes a determination pursuant to subsection (a)(2) of this section within 60 days after the date on which the petition is received.

(Pub. L. 93–400, § 33, as added Pub. L. 103–355, title IV, § 4101, Oct. 13, 1994, 108 Stat. 3339.)

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.

§ 430. List of laws inapplicable to procurements of commercial items in Federal Acquisition Regulation

(a) List of inapplicable provisions of law

(1) The Federal Acquisition Regulation shall include a list of provisions of law that are inapplicable to contracts for the procurement of commercial items. A provision of law that is properly included on the list pursuant to paragraph (2) may not be construed as applicable to purchases of commercial items by an executive agency. Nothing in this section shall be construed to render inapplicable to contracts for the procurement of commercial items any provision of law that is not included on such list.

(2) A provision of law described in subsection (c) of this section that is enacted after October 13, 1994, shall be included on the list of inapplicable provisions of law required by paragraph (1), unless the Federal Acquisition Regulatory Council makes a written determination that it would not be in the best interest of the Federal Government to exempt contracts for the procurement of commercial items from the applicability of the provision.

(b) Subcontracts

(1) The Federal Acquisition Regulation shall include a list of provisions of law that are inapplicable to subcontracts under either a contract for the procurement of commercial items or a subcontract for the procurement of commercial items. A provision of law that is properly included on the list pursuant to paragraph (2) may not be construed as applicable to such subcontracts. Nothing in this section shall be construed to render inapplicable to subcontracts under a contract for the procurement of commercial items any provision of law that is not included on such list.

(2) A provision of law described in subsection (c) of this section shall be included on the list of inapplicable provisions of law required by paragraph (1) unless the Federal Acquisition Regulatory Council makes a written determination that it would not be in the best interest of the Federal Government to exempt subcontracts under a contract for the procurement of commercial items from the applicability of the provision.

(3) Nothing in this subsection shall be construed to authorize the waiver of the applicability of any provision of law with respect to any subcontract under a contract with a prime contractor reselling or distributing commercial items of another contractor without adding value.

(4) In this subsection, the term ''subcontract'' includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractor or subcontractor.

(c) Covered law

A provision of law referred to in subsections (a)(2) and (b) of this section is any provision of law that, as determined by the Federal Acquisition Regulatory Council, sets forth policies, procedures, requirements, or restrictions for the procurement of property or services by the Federal Government, except for a provision of law that—

(1) provides for criminal or civil penalties; or

(2) specifically refers to this section and provides that, notwithstanding this section, it shall be applicable to contracts for the procurement of commercial items.

(d) Petition

In the event that a provision of law described in subsection (c) of this section is not included on the list of inapplicable provisions of law as required by subsection (a) or (b) of this section, and no written determination has been made by the Federal Acquisition Regulatory Council pursuant to subsection (a)(2) or (b)(2) of this section, a person may petition the Administrator for Federal Procurement Policy to take appropriate action. The Administrator shall revise the Federal Acquisition Regulation to include the provision on the list of inapplicable provisions of law unless the Federal Acquisition Regulatory Council makes a determination pursu-

ant to subsection (a)(2) or (b)(2) of this section within 60 days after the date on which the petition is received.

(Pub. L. 93–400, § 34, as added Pub. L. 103–355, title VIII, § 8003(a), Oct. 13, 1994, 108 Stat. 3388.)

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.

Section 8003(b) of Pub. L. 103–355 provided that: ''No petition may be filed under section 34(d) of the Office of Federal Procurement Policy Act [41 U.S.C. 430(d)], as added by subsection (a), until after the date occurring 6 months after the date of the enactment of this Act [Oct. 13, 1994].''

§ 431. Commercially available off-the-shelf item acquisitions: lists of inapplicable laws in Federal Acquisition Regulation

(a) Lists of inapplicable provisions of law

(1) The Federal Acquisition Regulation shall include a list of provisions of law that are inapplicable to contracts for the procurement of commercially available off-the-shelf items.

(2) A provision of law that, pursuant to paragraph (3), is properly included on a list referred to in paragraph (1) may not be construed as being applicable to contracts referred to in paragraph (1). Nothing in this section shall be construed to render inapplicable to such contracts any provision of law that is not included on such list.

(3) A provision of law described in subsection (b) of this section shall be included on the list of inapplicable provisions of law required by paragraph (1) unless the Administrator for Federal Procurement Policy makes a written determination that it would not be in the best interest of the United States to exempt such contracts from the applicability of that provision of law. Nothing in this section shall be construed as modifying or superseding, or as being intended to impair or restrict authorities or responsibilities under—

(A) section 644 of title 15; or

(B) bid protest procedures developed under the authority of subchapter V of chapter 35 of title 31; subsections (e) and (f) of section 2305 of title 10; or subsections (h) and (i) of section 253b of this title.

(b) Covered law

Except as provided in subsection (a)(3) of this section, the list referred to in subsection (a)(1) of this section shall include each provision of law that, as determined by the Administrator, imposes on persons who have been awarded contracts by the Federal Government for the procurement of commercially available off-the-shelf items Government-unique policies, procedures, requirements, or restrictions for the procurement of property or services, except the following:

(1) A provision of law that provides for criminal or civil penalties.

(2) A provision of law that specifically refers to this section and provides that, notwithstanding this section, such provision of law shall be applicable to contracts for the procurement of commercially available off-the-shelf items.

(c) "Commercially available off-the-shelf item" defined

(1) As used in this section, the term ''commercially available off-the-shelf item'' means, except as provided in paragraph (2), an item that—

(A) is a commercial item (as described in section 403(12)(A) of this title);

(B) is sold in substantial quantities in the commercial marketplace; and

(C) is offered to the Government, without modification, in the same form in which it is sold in the commercial marketplace.

(2) The term ''commercially available off-the-shelf item'' does not include bulk cargo, as defined in section 40102(4) of title 46, such as agricultural products and petroleum products.

(Pub. L. 93–400, § 35, as added Pub. L. 104–106, div. D, title XLII, § 4203(a), Feb. 10, 1996, 110 Stat. 654; amended Pub. L. 105–85, div. A, title X, § 1073(g)(2)(C), Nov. 18, 1997, 111 Stat. 1906.)

CODIFICATION

In subsec. (c)(2), ''section 40102(4) of title 46'' substituted for ''section 3 of the Shipping Act of 1984 (46 U.S.C. App. 1702)'' on authority of Pub. L. 109–304, § 18(c), Oct. 6, 2006, 120 Stat. 1709, which Act enacted section 40102 of Title 46, Shipping.

Another section 35 of Pub. L. 93–400 was renumbered § 38 and is classified to section 434 of this title.

AMENDMENTS

1997—Subsec. (b)(2). Pub. L. 105–85 substituted ''commercially available'' for ''commercial''.

EFFECTIVE DATE

For effective date and applicability of section, see section 4401 of Pub. L. 104–106, set out as an Effective Date of 1996 Amendment note under section 251 of this title.

§ 431a. Inflation adjustment of acquisition-related dollar thresholds

(a) Requirement for periodic adjustment

(1) On October 1 of each year that is evenly divisible by five, the Federal Acquisition Regulatory Council shall adjust each acquisition-related dollar threshold provided by law, as described in subsection (c) of this section, to the baseline constant dollar value of that threshold.

(2) For the purposes of paragraph (1), the baseline constant dollar value—

(A) for a dollar threshold in effect on October 1, 2000, that was first specified in a law that took effect on or before such date shall be the October 1, 2000, constant dollar value of that dollar threshold; and

(B) for a dollar threshold specified in a law that takes effect after October 1, 2000, shall be the constant dollar value of that threshold as of the effective date of that dollar threshold pursuant to such law.

(b) Adjustments effective upon publication

The Federal Acquisition Regulatory Council shall publish a notice of the adjusted dollar thresholds under this section in the Federal Register. The adjusted dollar thresholds shall take effect on the date of publication.

(c) Acquisition-related dollar thresholds

Except as provided in subsection (d) of this section, the requirement for adjustment under

subsection (a) of this section applies to a dollar threshold that is specified in law as a factor in defining the scope of the applicability of a policy, procedure, requirement, or restriction provided in that law to the procurement of property or services by an executive agency, as determined by the Federal Acquisition Regulatory Council.

(d) Excluded thresholds

Subsection (a) of this section does not apply to—

(1) dollar thresholds in sections 3141 through 3144, 3146, and 3147 of title 40;

(2) dollar thresholds in the Service Contract Act of 1965 (41 U.S.C. 351, et seq.); or

(3) dollar thresholds established by the United States Trade Representative pursuant to title III of the Trade Agreements Act of 1979 (19 U.S.C. 2511 et seq.).

(e) Calculation of adjustments

An adjustment under this section shall—

(1) be calculated on the basis of changes in the Consumer Price Index for all-urban consumers published monthly by the Department of Labor; and

(2) be rounded—

(A) in the case of a dollar threshold that (as in effect on the day before the adjustment) is less than $10,000, to the nearest $500;

(B) in the case of a dollar threshold that (as in effect on the day before the adjustment) is not less than $10,000, but is less than $100,000, to the nearest $5,000;

(C) in the case of a dollar threshold that (as in effect on the day before the adjustment) is not less than $100,000, but is less than $1,000,000, to the nearest $50,000; and

(D) in the case of a dollar threshold that (as in effect on the day before the adjustment) is $1,000,000 or more, to the nearest $500,000.

(f) Petition for inclusion of omitted threshold

(1) If a dollar threshold adjustable under this section is not included in a notice of adjustment published under subsection (b) of this section, any person may request adjustment of that dollar threshold by submitting a petition for adjustment to the Administrator for Federal Procurement Policy.

(2) Upon receipt of a petition for adjustment of a dollar threshold under paragraph (1), the Administrator shall—

(A) determine, in writing, whether that dollar threshold is required to be adjusted under this section; and

(B) if so, shall publish in the Federal Register a revised notice of the adjusted dollar thresholds under this section that includes the adjustment of the dollar threshold covered by the petition.

(3) The adjustment of a dollar threshold pursuant to a petition under this subsection shall take effect on the date of the publication of the revised notice adding the adjustment of that dollar threshold under paragraph (2)(B).

(Pub. L. 93–400, § 35A, as added Pub. L. 108–375, div. A, title VIII, § 807(a)(1), Oct. 28, 2004, 118 Stat. 2010.)

REFERENCES IN TEXT

The Service Contract Act of 1965, referred to in subsec. (d)(2), is Pub. L. 89–286, Oct. 22, 1965, 79 Stat. 1034, as amended, which is classified generally to chapter 6 (§ 351 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 351 of this title and Tables.

The Trade Agreements Act of 1979, referred to in subsec. (d)(3), is Pub. L. 96–39, July 26, 1979, 93 Stat. 144, as amended. Title III of the Act is classified generally to subchapter I (§ 2511 et seq.) of chapter 13 of Title 19, Customs Duties. For complete classification of this Act to the Code, see References in Text note set out under section 2501 of Title 19 and Tables.

RELATIONSHIP TO OTHER INFLATION ADJUSTMENT AUTHORITIES

Pub. L. 108–375, div. A, title VIII, § 807(c), Oct. 28, 2004, 118 Stat. 2011, provided that:

''(1) Section 35A of the Office of Federal Procurement Policy Act [41 U.S.C. 431a], as added by subsection (a), supersedes the applicability of any other provision of law that provides for the adjustment of a dollar threshold that is adjustable under such section.

''(2) After the date of the enactment of this Act [Oct. 28, 2004], a dollar threshold adjustable under section 35A of the Office of Federal Procurement Policy Act, as added by subsection (a), shall be adjusted only as provided under that section.''

§ 432. Value engineering

(a) In general

Each executive agency shall establish and maintain cost-effective value engineering procedures and processes.

(b) "Value engineering" defined

As used in this section, the term ''value engineering'' means an analysis of the functions of a program, project, system, product, item of equipment, building, facility, service, or supply of an executive agency, performed by qualified agency or contractor personnel, directed at improving performance, reliability, quality, safety, and life cycle costs.

(Pub. L. 93–400, § 36, as added Pub. L. 104–106, div. D, title XLIII, § 4306(a), Feb. 10, 1996, 110 Stat. 665.)

EFFECTIVE DATE

For effective date and applicability of section, see section 4401 of Pub. L. 104–106, set out as an Effective Date of 1996 Amendment note under section 251 of this title.

§ 433. Acquisition workforce

(a) Applicability

Except as provided in subsection (h)(3) of this section, this section does not apply to an executive agency that is subject to chapter 87 of title 10.

(b) Management policies

(1) Policies and procedures

The head of each executive agency, after consultation with the Administrator for Federal Procurement Policy, shall establish policies and procedures for the effective management (including accession, education, training, career development, and performance incentives) of the acquisition workforce of the agency. The development of acquisition workforce policies under this section shall be car-

ried out consistent with the merit system principles set forth in section 2301(b) of title 5.

(2) Uniform implementation

The head of each executive agency shall ensure that, to the maximum extent practicable, acquisition workforce policies and procedures established are uniform in their implementation throughout the agency.

(3) Government-wide policies and evaluation

The Administrator shall issue policies to promote uniform implementation of this section by executive agencies, with due regard for differences in program requirements among agencies that may be appropriate and warranted in view of the agency mission. The Administrator shall coordinate with the Deputy Director for Management of the Office of Management and Budget to ensure that such policies are consistent with the policies and procedures established and enhanced system of incentives provided pursuant to section 5051(c) of the Federal Acquisition Streamlining Act of 1994 (41 U.S.C. 263 note). The Administrator shall evaluate the implementation of the provisions of this section by executive agencies.

(c) Senior procurement executive authorities and responsibilities

Subject to the authority, direction, and control of the head of an executive agency, the senior procurement executive of the agency shall carry out all powers, functions, and duties of the head of the agency with respect to implementation of this section. The senior procurement executive shall ensure that the policies of the head of the executive agency established in accordance with this section are implemented throughout the agency.

(d) Management information systems

The Administrator shall ensure that the heads of executive agencies collect and maintain standardized information on the acquisition workforce related to implementation of this section. To the maximum extent practicable, such data requirements shall conform to standards established by the Office of Personnel Management for the Central Personnel Data File.

(e) Applicability to acquisition workforce

The programs established by this section shall apply to the acquisition workforce of each executive agency. For purposes of this section, the acquisition workforce of an agency consists of all employees serving in acquisition positions listed in subsection (g)(1)(A) of this section.

(f) Career development

(1) Career paths

The head of each executive agency shall ensure that appropriate career paths for personnel who desire to pursue careers in acquisition are identified in terms of the education, training, experience, and assignments necessary for career progression to the most senior acquisition positions. The head of each executive agency shall make information available on such career paths.

(2) Critical duties and tasks

For each career path, the head of each executive agency shall identify the critical acquisition-related duties and tasks in which, at minimum, employees of the agency in the career path shall be competent to perform at full performance grade levels. For this purpose, the head of the executive agency shall provide appropriate coverage of the critical duties and tasks identified by the Director of the Federal Acquisition Institute.

(3) Mandatory training and education

For each career path, the head of each executive agency shall establish requirements for the completion of course work and related on-the-job training in the critical acquisition-related duties and tasks of the career path. The head of each executive agency shall also encourage employees to maintain the currency of their acquisition knowledge and generally enhance their knowledge of related acquisition management disciplines through academic programs and other self-developmental activities.

(4) Performance incentives

The head of each executive agency shall provide for an enhanced system of incentives for the encouragement of excellence in the acquisition workforce which rewards performance of employees that contribute to achieving the agency's performance goals. The system of incentives shall include provisions that—

(A) relate pay to performance (including the extent to which the performance of personnel in such workforce contributes to achieving the cost goals, schedule goals, and performance goals established for acquisition programs pursuant to section 263(b) of this title); and

(B) provide for consideration, in personnel evaluations and promotion decisions, of the extent to which the performance of personnel in such workforce contributes to achieving such cost goals, schedule goals, and performance goals.

(g) Qualification requirements

(1) In general

(A) Subject to paragraph (2), the Administrator shall establish qualification requirements, including education requirements, for the following positions:

(i) Entry-level positions in the General Schedule Contracting series (GS–1102).

(ii) Senior positions in the General Schedule Contracting series (GS–1102).

(iii) All positions in the General Schedule Purchasing series (GS–1105).

(iv) Positions in other General Schedule series in which significant acquisition-related functions are performed.

(B) Subject to paragraph (2), the Administrator shall prescribe the manner and extent to which such qualification requirements shall apply to any person serving in a position described in subparagraph (A) at the time such requirements are established.

(2) Relationship to requirements applicable to defense acquisition workforce

The Administrator shall establish qualification requirements and make prescriptions under paragraph (1) that are comparable to

those established for the same or equivalent positions pursuant to chapter 87 of title 10 with appropriate modifications.

(3) Approval of requirements

The Administrator shall submit any requirement established or prescription made under paragraph (1) to the Director of the Office of Personnel Management for approval. If the Director does not disapprove a requirement or prescription within 30 days after the date on which the Director receives it, the requirement or prescription is deemed to be approved by the Director.

(h) Education and training

(1) Funding levels

(A) The head of an executive agency shall set forth separately the funding levels requested for education and training of the acquisition workforce in the budget justification documents submitted in support of the President's budget submitted to Congress under section 1105 of title 31.

(B) Funds appropriated for education and training under this section may not be obligated for any other purpose.

(2) Tuition assistance

The head of an executive agency may provide tuition reimbursement in education (including a full-time course of study leading to a degree) in accordance with section 4107 of title 5 for personnel serving in acquisition positions in the agency.

(3) Acquisition workforce training fund

(A) The Administrator of General Services shall establish an acquisition workforce training fund. The Administrator shall manage the fund through the Federal Acquisition Institute to support the training of the acquisition workforce of the executive agencies, except as provided in subparagraph (D). The Administrator shall consult with the Administrator for Federal Procurement Policy in managing the fund.

(B) There shall be credited to the acquisition workforce training fund 5 percent of the fees collected by executive agencies (other than the Department of Defense) under the following contracts:

(i) Governmentwide task and delivery-order contracts entered into under sections 253h and 253i of this title.

(ii) Governmentwide contracts for the acquisition of information technology as defined in section 11101 of title 40 and multiagency acquisition contracts for such technology authorized by section 11314 of such title.

(iii) Multiple-award schedule contracts entered into by the Administrator of General Services.

(C) The head of an executive agency that administers a contract described in subparagraph (B) shall remit to the General Services Administration the amount required to be credited to the fund with respect to such contract at the end of each quarter of the fiscal year.

(D) The Administrator of General Services shall transfer to the Secretary of Defense fees collected from the Department of Defense pursuant to subparagraph (B), to be used by the Defense Acquisition University for purposes of acquisition workforce training.

(E) The Administrator of General Services, through the Office of Federal Acquisition Policy, shall ensure that funds collected for training under this section are not used for any purpose other than the purpose specified in subparagraph (A).

(F) Amounts credited to the fund shall be in addition to funds requested and appropriated for education and training referred to in paragraph (1).

(G) Amounts credited to the fund shall remain available to be expended only in the fiscal year for which credited and the two succeeding fiscal years.

(i) Provisions relating to reemployment

(1) Policies and procedures

The head of each executive agency, after consultation with the Administrator and the Director of the Office of Personnel Management, shall establish policies and procedures under which the agency head may reemploy in an acquisition-related position (as described in subsection (g)(1)(A)) an individual receiving an annuity from the Civil Service Retirement and Disability Fund, on the basis of such individual's service, without discontinuing such annuity. The head of each executive agency shall keep the Administrator informed of the agency's use of this authority.

(2) Service not subject to CSRS or FERS

An individual so reemployed shall not be considered an employee for the purposes of chapter 83 or 84 of title 5.

(3) Criteria for exercise of authority

Polices[1] and procedures established pursuant to this subsection shall authorize the head of the executive agency, on a case-by-case basis, to continue an annuity if—

(A) the unusually high or unique qualifications of an individual receiving an annuity from the Civil Service Retirement and Disability Fund on the basis of such individual's service,

(B) the exceptional difficulty in recruiting or retaining a qualified employee, or

(C) a temporary emergency hiring need,

makes the reemployment of an individual essential.

(4) Reporting requirement

The Administrator shall submit annually to the Committee on Government Reform of the House of Representatives and the Committee on Homeland Security and Governmental Affairs of the Senate a report on the use of the authority under this subsection, including the number of employees reemployed under authority of this subsection.

(5) Sunset provision

The authority under this subsection shall expire on December 31, 2011.

(Pub. L. 93–400, § 37, as added Pub. L. 104–106, div. D, title XLIII, § 4307(a)(1), Feb. 10, 1996, 110 Stat.

[1] So in original. Probably should be ''Policies''.

666; amended Pub. L. 108–136, div. A, title XIV, § 1412(b), Nov. 24, 2003, 117 Stat. 1664; Pub. L. 109–163, div. A, title VIII, § 821(a), (b)(1), Jan. 6, 2006, 119 Stat. 3386; Pub. L. 109–313, § 4, Oct. 6, 2006, 120 Stat. 1737; Pub. L. 110–181, div. A, title VIII, § 854, Jan. 28, 2008, 122 Stat. 251.)

REFERENCES IN TEXT

Section 5051(c) of the Federal Acquisition Streamlining Act of 1994, referred to in subsec. (b)(3), is section 5051(c) of Pub. L. 103–355, which is set out as a note under section 263 of this title.

AMENDMENTS

2008—Subsec. (h)(3)(H). Pub. L. 110–181 struck out subpar. (H) which read as follows: ''This paragraph shall cease to be effective five years after November 24, 2003.''

2006—Subsec. (a). Pub. L. 109–163, § 821(b)(1), substituted ''Except as provided in subsection (h)(3) of this section, this section'' for ''This section''.

Subsec. (h)(3)(A). Pub. L. 109–163, § 821(a)(1), substituted '', except as provided in subparagraph (D)'' for ''other than the Department of Defense''.

Subsec. (h)(3)(D) to (H). Pub. L. 109–163, § 821(a)(2), added subpar. (D) and redesignated former subpars. (D) to (G) as (E) to (H), respectively.

Subsec. (i). Pub. L. 109–313 added subsec. (i).

2003—Subsec. (h)(3). Pub. L. 108–136 added par. (3).

EFFECTIVE DATE OF 2006 AMENDMENT

Amendment by Pub. L. 109–313 effective 60 days after Oct. 6, 2006, see section 6 of Pub. L. 109–313, set out as a note under section 5316 of Title 5, Government Organization and Employees.

Pub. L. 109–163, div. A, title VIII, § 821(d), Jan. 6, 2006, 119 Stat. 3386, provided that: ''The amendments made by this section [amending this section and repealing provisions set out as a note under this section] shall apply with respect to fees collected under contracts described in section 37(h)(3)(B) of the Office of Federal Procurement Policy Act (41 U.S.C. 433(h)(3)(B)) after the date of the enactment of this Act [Jan. 6, 2006].''

EFFECTIVE DATE

For effective date and applicability of section, see section 4401 of Pub. L. 104–106, set out as an Effective Date of 1996 Amendment note under section 251 of this title.

DEFENSE ACQUISITION UNIVERSITY FUNDING

Pub. L. 109–163, div. A, title VIII, § 821(c), Jan. 6, 2006, 119 Stat. 3386, provided that: ''Amounts transferred under section 37(h)(3)(D) of the Office of Federal Procurement Policy Act [41 U.S.C. 433(h)(3)(D)] (as amended by subsection (a)) for use by the Defense Acquisition University shall be in addition to other amounts authorized for the University.''

PURPOSES OF 2003 AMENDMENT

Pub. L. 108–136, div. A, title XIV, § 1412(a), Nov. 24, 2003, 117 Stat. 1664, provided that: ''The purposes of this section [amending this section and enacting provisions set out as notes under this section] are to ensure that the Federal acquisition workforce—

''(1) adapts to fundamental changes in the nature of Federal Government acquisition of property and services associated with the changing roles of the Federal Government; and

''(2) acquires new skills and a new perspective to enable it to contribute effectively in the changing environment of the 21st century.''

INAPPLICABILITY OF SUBSECTION (h)(3) TO DEPARTMENT OF DEFENSE ACQUISITION WORKFORCE

Pub. L. 108–136, div. A, title XIV, § 1412(c), Nov. 24, 2003, 117 Stat. 1665, which provided that section 1412 of Pub. L. 108–136 was inapplicable to the acquisition workforce of the Department of Defense and that fees covered by subsec. (h)(3) of this section were to be reduced by 5 percent to reflect the Department's nonparticipation in the acquisition workforce training fund, was repealed by Pub. L. 109–163, div. A, title VIII, § 821(b)(2), Jan. 6, 2006, 119 Stat. 3386.

ACQUISITION WORKFORCE RECRUITMENT PROGRAM

Pub. L. 108–136, div. A, title XIV, § 1413, Nov. 24, 2003, 117 Stat. 1665, as amended by Pub. L. 110–181, div. A, title VIII, § 853, title X, § 1063(g)(2), Jan. 28, 2008, 122 Stat. 250, 323, provided that:

''(a) DETERMINATION OF SHORTAGE CATEGORY POSITIONS.—For purposes of sections 3304, 5333, and 5753 of title 5, United States Code, the head of a department or agency of the United States (other than the Secretary of Defense) may determine, under regulations prescribed by the Office of Personnel Management, that certain Federal acquisition positions (as described in section 37(g)(1)(A) of the Office of Federal Procurement Policy Act (41 U.S.C. 433(g)(1)(A))) are shortage category positions in order to use the authorities in those sections to recruit and appoint highly qualified persons directly to such positions in the department or agency.

''(b) TERMINATION OF AUTHORITY.—The head of a department or agency may not appoint a person to a position of employment under this section after September 30, 2012.

''(c) REPORT.—Not later than March 31, 2007, the Director of the Office of Personnel Management, in consultation with the Administrator for Federal Procurement Policy, shall submit to Congress a report on the implementation of this section. The report shall include—

''(1) a list of the departments and agencies that exercised the authority provided in this section, and whether the exercise of the authority was carried out in accordance with the regulations prescribed by the Office of Personnel Management;

''(2) the Director's assessment of the efficacy of the exercise of the authority provided in this section in attracting employees with unusually high qualifications to the acquisition workforce; and

''(3) any recommendations considered appropriate by the Director on whether the authority to carry out the program should be extended.''

ARCHITECTURAL AND ENGINEERING ACQUISITION WORKFORCE

Pub. L. 108–136, div. A, title XIV, § 1414, Nov. 24, 2003, 117 Stat. 1666, provided that: ''The Administrator for Federal Procurement Policy, in consultation with the Secretary of Defense, the Administrator of General Services, and the Director of the Office of Personnel Management, shall develop and implement a plan to ensure that the Federal Government maintains the necessary capability with respect to the acquisition of architectural and engineering services to—

''(1) ensure that Federal Government employees have the expertise to determine agency requirements for such services;

''(2) establish priorities and programs (including acquisition plans);

''(3) establish professional standards;

''(4) develop scopes of work; and

''(5) award and administer contracts for such services.''

§ 433a. Federal acquisition workforce improvements

(a) Associate Administrator for Acquisition Workforce Programs

The Administrator for Federal Procurement Policy shall designate a member of the Senior Executive Service as the Associate Administrator for Acquisition Workforce Programs. The

Associate Administrator for Acquisition Workforce Programs shall be located in the Federal Acquisition Institute (or its successor). The Associate Administrator shall be responsible for—

(1) supervising the acquisition workforce training fund established under section 433(h)(3) of this title;

(2) developing, in coordination with Chief Acquisition Officers and Chief Human Capital Officers, a strategic human capital plan for the acquisition workforce of the Federal Government;

(3) reviewing and providing input to individual agency acquisition workforce succession plans;

(4) recommending to the Administrator and other senior government officials appropriate programs, policies, and practices to increase the quantity and quality of the Federal acquisition workforce; and

(5) carrying out such other functions as the Administrator may assign.

(b) Acquisition and contracting training programs within executive agencies

(1) Requirement

The head of each executive agency, after consultation with the Associate Administrator for Acquisition Workforce Programs, shall establish and operate acquisition and contracting training programs. Such programs shall—

(A) have curricula covering a broad range of acquisition and contracting disciplines corresponding to the specific acquisition and contracting needs of the agency involved;

(B) be developed and applied according to rigorous standards; and

(C) be designed to maximize efficiency, through the use of self-paced courses, online courses, on-the-job training, and the use of remote instructors, wherever such features can be applied without reducing the effectiveness of the training or negatively affecting academic standards.

(2) Chief Acquisition Officer authorities and responsibilities

Subject to the authority, direction, and control of the head of an executive agency, the Chief Acquisition Officer for such agency shall carry out all powers, functions, and duties of the head of the agency with respect to implementation of this subsection. The Chief Acquisition Officer shall ensure that the policies established by the head of the agency in accordance with this subsection are implemented throughout the agency.

(c) Government-wide policies and evaluation

The Administrator for Federal Procurement Policy shall issue policies to promote the development of performance standards for training and uniform implementation of this section by executive agencies, with due regard for differences in program requirements among agencies that may be appropriate and warranted in view of the agency mission. The Administrator shall evaluate the implementation of the provisions of subsection (b) by executive agencies.

(d) Acquisition and contracting training reporting

The Administrator for Federal Procurement Policy shall ensure that the heads of executive agencies collect and maintain standardized information on the acquisition and contracting workforce related to the implementation of subsection (b).

(e) Acquisition workforce human capital succession plan

(1) In general

Not later than 1 year after January 28, 2008, each Chief Acquisition Officer for an executive agency shall develop, in consultation with the Chief Human Capital Officer for the agency and the Associate Administrator for Acquisition Workforce Programs, a succession plan consistent with the agency's strategic human capital plan for the recruitment, development, and retention of the agency's acquisition workforce, with a particular focus on warranted contracting officers and program managers of the agency.

(2) Content of plan

The acquisition workforce succession plan shall address—

(A) recruitment goals for personnel from procurement intern programs;

(B) the agency's acquisition workforce training needs;

(C) actions to retain high performing acquisition professionals who possess critical relevant skills;

(D) recruitment goals for personnel from the Federal Career Intern Program; and

(E) recruitment goals for personnel from the Presidential Management Fellows Program.

(f) Training in the acquisition of architect and engineering services

The Administrator for Federal Procurement Policy shall ensure that a sufficient number of Federal employees are trained in the acquisition of architect and engineering services.

(g) Utilization of recruitment and retention authorities

The Administrator for Federal Procurement Policy, in coordination with the Director of the Office of Personnel Management, shall encourage executive agencies to utilize existing authorities, including direct hire authority and tuition assistance programs, to recruit and retain acquisition personnel and consider recruiting acquisition personnel who may be retiring from the private sector, consistent with existing laws and regulations.

(h) Definitions

In this section:

(1) Executive agency

The term ''executive agency'' has the meaning provided in section 403(1) of this title.

(2) Chief acquisition Officer

The term ''Chief Acquisition Officer'' means a Chief Acquisition Officer for an executive agency appointed pursuant to section 414 of this title.

(Pub. L. 110–181, div. A, title VIII, § 855, Jan. 28, 2008, 122 Stat. 251.)

CODIFICATION

Section was enacted as part of the Acquisition Improvement and Accountability Act of 2007, and also as

part of the National Defense Authorization Act for Fiscal Year 2008, and not as part of the Office of Federal Procurement Policy Act which comprises this chapter.

ACQUISITION WORKFORCE DEVELOPMENT STRATEGIC PLAN

Pub. L. 110–417, [div. A], title VIII, § 869, Oct. 14, 2008, 122 Stat. 4553, provided that:

''(a) PURPOSE.—The purpose of this section is to authorize the preparation and completion of a plan (to be known as the 'Acquisition Workforce Development Strategic Plan') for Federal agencies other than the Department of Defense to develop a specific and actionable 5-year plan to increase the size of the acquisition workforce, and to operate a government-wide acquisition intern program, for such Federal agencies.

''(b) ESTABLISHMENT OF PLAN.—The Associate Administrator for Acquisition Workforce Programs designated under section 855(a) of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110–181; 122 Stat. 251; 41 U.S.C. 433(a) [433a(a)]) shall be responsible for the management, oversight, and administration of the Acquisition Workforce Development Strategic Plan in cooperation and consultation with the Office of Federal Procurement Policy and the assistance of the Federal Acquisition Institute.

''(c) CRITERIA.—The Acquisition Workforce Development Strategic Plan shall include, at a minimum, an examination of the following matters:

''(1) The variety and complexity of acquisitions conducted by each Federal agency covered by the plan, and the workforce needed to effectively carry out such acquisitions.

''(2) The development of a sustainable funding model to support efforts to hire, retain, and train an acquisition workforce of appropriate size and skill to effectively carry out the acquisition programs of the Federal agencies covered by the plan, including an examination of interagency funding methods and a discussion of how the model of the Defense Acquisition Workforce Development Fund could be applied to civilian agencies.

''(3) Any strategic human capital planning necessary to hire, retain, and train an acquisition workforce of appropriate size and skill at each Federal agency covered by the plan.

''(4) Methodologies that Federal agencies covered by the plan can use to project future acquisition workforce personnel hiring requirements, including an appropriate distribution of such personnel across each category of positions designated as acquisition workforce personnel under section 37(j) [probably should be 37(g)] of the Office of Federal Procurement Policy Act (41 U.S.C. 433(j) [433(g)]).

''(5) Government-wide training standards and certification requirements necessary to enhance the mobility and career opportunities of the Federal acquisition workforce within the Federal agencies covered by the plan.

''(6) If the Associate Administrator recommends as part of the plan a growth in the acquisition workforce of the Federal agencies covered by the plan below 25 percent over the next 5 years, an examination of each of the matters specified in paragraphs (1) through (5) in the context of a 5-year plan that increases the size of such acquisition workforce by not less than 25 percent, or an explanation why such a level of growth would not be in the best interest of the Federal Government.

''(d) DEADLINE FOR COMPLETION.—The Acquisition Workforce Development Strategic Plan shall be completed not later than one year after the date of the enactment of this Act [Oct. 14, 2008] and in a fashion that allows for immediate implementation of its recommendations and guidelines.

''(e) FUNDS.—The Acquisition Workforce Development Strategic Plan shall be funded from the Acquisition Workforce Training Fund under section 37(h)(3) of the Office of Federal Procurement Policy Act (41 U.S.C. 433(h)(3)).''

§ 434. Modular contracting for information technology

(a) In general

The head of an executive agency should, to the maximum extent practicable, use modular contracting for an acquisition of a major system of information technology.

(b) Modular contracting described

Under modular contracting, an executive agency's need for a system is satisfied in successive acquisitions of interoperable increments. Each increment complies with common or commercially accepted standards applicable to information technology so that the increments are compatible with other increments of information technology comprising the system.

(c) Implementation

The Federal Acquisition Regulation shall provide that—

(1) under the modular contracting process, an acquisition of a major system of information technology may be divided into several smaller acquisition increments that—

(A) are easier to manage individually than would be one comprehensive acquisition;

(B) address complex information technology objectives incrementally in order to enhance the likelihood of achieving workable solutions for attainment of those objectives;

(C) provide for delivery, implementation, and testing of workable systems or solutions in discrete increments each of which comprises a system or solution that is not dependent on any subsequent increment in order to perform its principal functions; and

(D) provide an opportunity for subsequent increments of the acquisition to take advantage of any evolution in technology or needs that occur during conduct of the earlier increments;

(2) a contract for an increment of an information technology acquisition should, to the maximum extent practicable, be awarded within 180 days after the date on which the solicitation is issued and, if the contract for that increment cannot be awarded within such period, the increment should be considered for cancellation; and

(3) the information technology provided for in a contract for acquisition of information technology should be delivered within 18 months after the date on which the solicitation resulting in award of the contract was issued.

(Pub. L. 93–400, § 38, formerly § 35, as added Pub. L. 104–106, div. E, title LII, § 5202(a), Feb. 10, 1996, 110 Stat. 690; renumbered § 38, Pub. L. 104–201, div. A, title X, § 1074(d)(1), Sept. 23, 1996, 110 Stat. 2660.)

EFFECTIVE DATE

Section effective 180 days after Feb. 10, 1996, see section 5701 of Pub. L. 104–106, Feb. 10, 1996, 110 Stat. 702.

§ 435. Levels of compensation of certain contractor personnel not allowable as costs under certain contracts

(a) Determination required

For purposes of section 2324(e)(1)(P) of title 10 and section 256(e)(1)(P) of this title, the Administrator shall review commercially available surveys of executive compensation and, on the basis of the results of the review, determine a benchmark compensation amount to apply for each fiscal year. In making determinations under this subsection the Administrator shall consult with the Director of the Defense Contract Audit Agency and such other officials of executive agencies as the Administrator considers appropriate.

(b) Benchmark compensation amount

The benchmark compensation amount applicable for a fiscal year is the median amount of the compensation provided for all senior executives of all benchmark corporations for the most recent year for which data is available at the time the determination under subsection (a) of this section is made.

(c) Definitions

In this section:

(1) The term ''compensation'', for a fiscal year, means the total amount of wages, salary, bonuses and deferred compensation for the fiscal year, whether paid, earned, or otherwise accruing, as recorded in an employer's cost accounting records for the fiscal year.

(2) The term ''senior executives'', with respect to a contractor, means the five most highly compensated employees in management positions at each home office and each segment of the contractor.

(3) The term ''benchmark corporation'', with respect to a fiscal year, means a publicly-owned United States corporation that has annual sales in excess of $50,000,000 for the fiscal year.

(4) The term ''publicly-owned United States corporation'' means a corporation organized under the laws of a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a possession of the United States the voting stock of which is publicly traded.

(5) The term ''fiscal year'' means a fiscal year established by a contractor for accounting purposes.

(Pub. L. 93–400, § 39, as added Pub. L. 105–85, div. A, title VIII, § 808(c)(1), Nov. 18, 1997, 111 Stat. 1837; amended Pub. L. 105–261, div. A, title VIII, § 804(c)(1), Oct. 17, 1998, 112 Stat. 2083.)

CODIFICATION

Another section 39 of Pub. L. 93–400 was renumbered section 40 and is classified to section 436 of this title.

AMENDMENTS

1998—Subsec. (c)(2). Pub. L. 105–261 amended par. (2) generally. Prior to amendment, par. (2) read as follows: ''The term 'senior executive', with respect to a corporation, means—

''(A) the chief executive officer of the corporation or any individual acting in a similar capacity for the corporation;

''(B) the four most highly compensated employees in management positions of the corporation other than the chief executive officer; and

''(C) in the case of a corporation that has components which report directly to the corporate headquarters, the five most highly compensated individuals in management positions at each such component.''

EFFECTIVE DATE OF 1998 AMENDMENT

Amendment by Pub. L. 105–261 applicable with respect to costs of compensation of senior executives incurred after Jan. 1, 1999, under covered contracts entered into before, on, or after Oct. 17, 1998, see section 804(d) of Pub. L. 105–261, set out as a note under section 2324 of Title 10, Armed Forces.

EFFECTIVE DATE

Section 808(e) of Pub. L. 105–85 provided that: ''The amendments made by this section [enacting this section and amending section 256 of this title and section 2324 of Title 10, Armed Forces] shall—

''(1) take effect on the date that is 90 days after the date of the enactment of this Act [Nov. 18, 1997]; and

''(2) apply with respect to costs of compensation incurred after January 1, 1998, under covered contracts entered into before, on, or after the date of the enactment of this Act.''

REGULATIONS

Section 808(d) of Pub. L. 105–85 provided that: ''Regulations implementing the amendments made by this section [see Effective Date note set out above] shall be published in the Federal Register not later than the effective date of the amendments under subsection (e) [see Effective Date note set out above].''

EXCLUSIVE APPLICABILITY OF PROVISIONS LIMITING ALLOWABILITY OF COMPENSATION FOR CERTAIN CONTRACTOR PERSONNEL

Section 808(f) of Pub. L. 105–85 provided that: ''Notwithstanding any other provision of law, no other limitation in law on the allowability of costs of compensation of senior executives under covered contracts shall apply to such costs of compensation incurred after January 1, 1998.''

DEFINITIONS FOR PURPOSES OF SECTION 808 OF PUB. L. 105–85

Section 808(g) of Pub. L. 105–85, as amended by Pub. L. 105–261, div. A, title VIII, § 804(c)(2), Oct. 17, 1998, 112 Stat. 2083, provided that: ''In this section [enacting this section, amending section 256 of this title and section 2324 of Title 10, Armed Forces, and enacting provisions set out as notes under this section]:

''(1) The term 'covered contract' has the meaning given such term in section 2324(*l*) of title 10, United States Code, and section 306(*l*) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 256(*l*)).

''(2) The terms 'compensation' and 'senior executives' have the meanings given such terms in section 2324(*l*) of title 10, United States Code, and section 306(m) of the Federal Property and Administrative Services Act of 1949.''

§ 436. Protection of constitutional rights of contractors

(a) Prohibition

A contractor may not be required, as a condition for entering into a contract with the Federal Government, to waive any right under the Constitution for any purpose related to Chemical Weapons Convention Implementation Act of 1997 [22 U.S.C. 6701 et seq.] or the Chemical Weapons Convention (as defined in section 3 of such Act [22 U.S.C. 6701]).

(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-

tion under section 7111 of title 5, consultation with representatives of that labor organization shall satisfy the consultation requirement in paragraph (1).

(B) In the case of employees other than employees referred to in subparagraph (A), consultation with appropriate representatives of those employees shall satisfy the consultation requirement in paragraph (1).

(C) The head of each executive agency shall prescribe regulations to carry out this subsection. The regulations shall include provisions for the selection or designation of appropriate representatives of employees referred to in paragraph (2)(B) for purposes of consultation required by paragraph (1).

(c) Congressional notification

(1) Before commencing a public-private competition under subsection (a), the head of an executive agency shall submit to Congress a report containing the following:

(A) The function for which such public-private competition is to be conducted.

(B) The location at which the function is performed by agency civilian employees.

(C) The number of agency civilian employee positions potentially affected.

(D) The anticipated length and cost of the public-private competition, and a specific identification of the budgetary line item from which funds will be used to cover the cost of the public-private competition.

(E) A certification that a proposed performance of the function by a contractor is not a result of a decision by an official of an executive agency to impose predetermined constraints or limitations on such employees in terms of man years, end strengths, full-time equivalent positions, or maximum number of employees.

(2) The report required under paragraph (1) shall include an examination of the potential economic effect of performance of the function by a contractor on—

(A) agency civilian employees who would be affected by such a conversion in performance; and

(B) the local community and the Government, if more than 50 agency civilian employees perform the function.

(3)(A) A representative individual or entity at a facility where a public-private competition is conducted may submit to the head of the executive agency an objection to the public-private competition on the grounds that the report required by paragraph (1) has not been submitted or that the certification required by paragraph (1)(E) is not included in the report submitted as a condition for the public-private competition. The objection shall be in writing and shall be submitted within 90 days after the following date:

(i) In the case of a failure to submit the report when required, the date on which the representative individual or an official of the representative entity authorized to pose the objection first knew or should have known of that failure.

(ii) In the case of a failure to include the certification in a submitted report, the date on which the report was submitted to Congress.

(B) If the head of the executive agency determines that the report required by paragraph (1) was not submitted or that the required certification was not included in the submitted report, the function for which the public-private competition was conducted for which the objection was submitted may not be the subject of a solicitation of offers for, or award of, a contract until, respectively, the report is submitted or a report containing the certification in full compliance with the certification requirement is submitted.

(d) Exemption for the purchase of products and services of the blind and other severely handicapped persons

This section shall not apply to a commercial or industrial type function of an executive agency that—

(1) is included on the procurement list established pursuant to section 2 of the Javits-Wagner-O'Day Act (41 U.S.C. 47); or

(2) is planned to be changed to performance by a qualified nonprofit agency for the blind or by a qualified nonprofit agency for other severely handicapped persons in accordance with that Act [41 U.S.C. 46 et seq.].

(e) Inapplicability during war or emergency

The provisions of this section shall not apply during war or during a period of national emergency declared by the President or Congress.

(Pub. L. 93–400, § 43, as added Pub. L. 110–181, div. A, title III, § 327(a), Jan. 28, 2008, 122 Stat. 63.)

REFERENCES IN TEXT

That Act, referred to in subsec. (d)(2), meaning the Javits-Wagner-O'Day Act, is act June 25, 1938, ch. 697, 52 Stat. 1196, which is classified to sections 46 to 48c of this title. For complete classification of this Act to the Code, see Short Title note set out under section 46 of this title and Tables.

§ 440. Contingency Contracting Corps

(a) Establishment

The Administrator of General Services, pursuant to policies established by the Office of Management and Budget, and in consultation with the Secretary of Defense and the Secretary of Homeland Security, shall establish a Governmentwide Contingency Contracting Corps (in this section referred to as the ''Corps''). The members of the Corps shall be available for deployment in responding to an emergency or major disaster, or a contingency operation, both within or outside the continental United States.

(b) Applicability

The authorities provided in this section apply with respect to any procurement of property or services by or for an executive agency that, as determined by the head of such executive agency, are to be used—

(1) in support of a contingency operation as defined in section 101(a)(13) of title 10; or

(2) to respond to an emergency or major disaster as defined in section 5122 of title 42.

(c) Membership

Membership in the Corps shall be voluntary and open to all Federal employees and members of the Armed Forces who are members of the Federal acquisition workforce.

(d) Education and training

The Administrator may, in consultation with the Director of the Federal Acquisition Institute and the Chief Acquisition Officers Council, establish educational and training requirements for members of the Corps. Education and training carried out pursuant to such requirements shall be paid for from funds available in the acquisition workforce training fund established pursuant to section 433(h)(3) of this title.

(e) Salary

The salary for a member of the Corps shall be paid—

(1) in the case of a member of the Armed Forces, out of funds available to the Armed Force concerned; and

(2) in the case of a Federal employee, out of funds available to the employing agency.

(f) Authority to deploy the Corps

(1) The Director of the Office of Management and Budget shall have the authority, upon request by an executive agency, to determine when members of the Corps shall be deployed, with the concurrence of the head of the agency or agencies employing the members to be deployed.

(2) Nothing in this section shall preclude the Secretary of Defense or the Secretary's designee from deploying members of the Armed Forces or civilian personnel of the Department of Defense in support of a contingency operation as defined in section 101(a)(13) of title 10.

(g) Annual report

(1) In general

The Administrator of General Services shall provide to the Committee on Homeland Security and Governmental Affairs and the Committee on Armed Services of the Senate and the Committee on Oversight and Government Reform and the Committee on Armed Services of the House of Representatives an annual report on the status of the Contingency Contracting Corps as of September 30 of each fiscal year.

(2) Content

At a minimum, each report under paragraph (1) shall include the number of members of the Contingency Contracting Corps, the total cost of operating the program, the number of deployments of members of the program, and the performance of members of the program in deployment.

(Pub. L. 93–400, § 44, as added Pub. L. 110–417, [div. A], title VIII, § 870(a), Oct. 14, 2008, 122 Stat. 4554.)

CHAPTER 8—FEDERAL GRANTS AND COOPERATIVE AGREEMENTS

§§ 501 to 509. Repealed. Pub. L. 97–258, § 5(b), Sept. 13, 1982, 96 Stat. 1083

Section 501, Pub. L. 95–224, § 2, Feb. 3, 1978, 92 Stat. 3, set out the Congressional findings and statement of purposes in enacting the Federal Grant and Cooperative Agreement Act of 1977 [this chapter]. Sections 1 and 10(b) of Pub. L. 95–224, setting out the short title provisions and savings provisions respectively of that Act, were set out as notes under this section, and were repealed by Pub. L. 97–258, § 5(b), Sept. 13, 1982, 96 Stat. 1083. Section 10(d) of Pub. L. 95–224, as amended by Pub. L. 97–162, Apr. 1, 1982, 96 Stat. 23, setting out the excepted transactions provisions of that Act was set out as a note under this section, and was repealed by Pub. L. 97–258, § 5(b), Sept. 13, 1982, 96 Stat. 1083. See sections 6301 and 6307(2) of Title 31, Money and Finance.

Section 502, Pub. L. 95–224, § 3, Feb. 3, 1978, 92 Stat. 4, defined ''State government'', ''local government'', ''other recipient'', ''executive agency'', and ''grant or cooperative agreement''. See section 6302 of Title 31.

Section 503, Pub. L. 95–224, § 4, Feb. 3, 1978, 92 Stat. 4, provided for use of procurement contracts by executive agencies. See section 6303 of Title 31.

Section 504, Pub. L. 95–224, § 5, Feb. 3, 1978, 92 Stat. 4, provided for use of grant agreements by executive agencies. See section 6304 of Title 31.

Section 505, Pub. L. 95–224, § 6, Feb. 3, 1978, 92 Stat. 5, provided for use of cooperative agreements by executive agencies. See section 6305 of Title 31.

Section 506, Pub. L. 95–224, § 7, Feb. 3, 1978, 92 Stat. 5, pertained to required and discretionary authorities. See section 6306 of Title 31.

Section 507, Pub. L. 95–224, § 8, Feb. 3, 1978, 92 Stat. 5, directed Director of Office of Management and Budget to undertake a study to develop a better understanding of alternate means of implementing Federal assistance programs.

Section 508, Pub. L. 95–224, § 9, Feb. 3, 1978, 92 Stat. 6, authorized Director of Office of Management and Budget to issue supplemental interpretive guidelines to promote consistent and efficient use of contracts, grant agreements, and cooperative agreements. See section 6307(1) of Title 31.

Section 509, Pub. L. 95–224, § 10(c), Feb. 3, 1978, 92 Stat. 6, related to use of multiple relationships for different components of jointly funded projects. See section 6308 of Title 31.

CHAPTER 9—CONTRACT DISPUTES

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§ 601. Definitions

As used in this chapter—

(1) the term ''agency head'' means the head and any assistant head of an executive agency, and may ''upon the designation by'' the head of an executive agency include the chief official of any principal division of the agency;

(2) the term ''executive agency'' means an executive department as defined in section 101 of title 5, an independent establishment as defined by section 104 of title 5 (except that it shall not include the Government Accountability Office), a military department as defined by section 102 of title 5, and a wholly owned Government corporation as defined by section 9101(3) of title 31;

(3) the term ''contracting officer'' means any person who, by appointment in accordance with applicable regulations, has the authority to enter into and administer contracts and

make determinations and findings with respect thereto. The term also includes the authorized representative of the contracting officer, acting within the limits of his authority;

(4) the term ''contractor'' means a party to a Government contract other than the Government;

(5) the term ''Administrator'' means the Administrator for Federal Procurement Policy appointed pursuant to the Office of Federal Procurement Policy Act [41 U.S.C. 401 et seq.];

(6) the terms ''agency board'' or ''agency board of contract appeals'' mean—

(A) the Armed Services Board of Contract Appeals established under section 607(a)(1) of this title;

(B) the Civilian Board of Contract Appeals established under section 42 of the Office of Federal Procurement Policy Act [41 U.S.C. 438];

(C) the board of contract appeals of the Tennessee Valley Authority; or

(D) the Postal Service Board of Contract Appeals established under section 607(c) of this title;

(7) the term ''Armed Services Board'' means the Armed Services Board of Contract Appeals established under section 607(a)(1) of this title;

(8) the term ''Civilian Board'' means the Civilian Board of Contract Appeals established under section 42 of the Office of Federal Procurement Policy Act [41 U.S.C. 438]; and

(9) the term ''misrepresentation of fact'' means a false statement of substantive fact, or any conduct which leads to a belief of a substantive fact material to proper understanding of the matter in hand, made with intent to deceive or mislead.

(Pub. L. 95–563, § 2, Nov. 1, 1978, 92 Stat. 2383; Pub. L. 104–106, div. D, title XLIII, § 4322(b)(5), Feb. 10, 1996, 110 Stat. 677; Pub. L. 108–271, § 8(b), July 7, 2004, 118 Stat. 814; Pub. L. 109–163, div. A, title VIII, § 847(d)(1), Jan. 6, 2006, 119 Stat. 3393.)

REFERENCES IN TEXT

This chapter, referred to in text, was in the original ''this Act'', meaning Pub. L. 95–563, which enacted this chapter, amended section 5108 of Title 5, Government Organization and Employees, section 1346, 1491, 2401, 2414, 2510, and 2517 of Title 28, Judiciary and Judicial Procedure, and section 724a of former Title 31, Money and Finance, and enacted provisions set out as notes under this section. For complete classification of this Act to the Code, see Short Title note below and Tables.

The Office of Federal Procurement Policy Act, referred to in par. (5), is Pub. L. 93–400, Aug. 30, 1974, 88 Stat. 796, as amended, which is classified principally to chapter 7 (§ 401 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 401 of this title and Tables.

CODIFICATION

In par. (2), ''section 9101(3) of title 31'' substituted for ''section 846 of title 31, United States Code'' on authority of Pub. L. 97–258, § 4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

AMENDMENTS

2006—Par. (2). Pub. L. 109–163, § 847(d)(1)(A), struck out '', the United States Postal Service, and the Postal Rate Commission'' before semicolon at end.

Par. (6). Pub. L. 109–163, § 847(d)(1)(C), amended par. (6) generally. Prior to amendment, par. (6) read as follows: ''the term 'agency board' means an agency board of contract appeals established under section 607 of this title; and''.

Pars. (7) to (9). Pub. L. 109–163, § 847(d)(1)(B), (D), added pars. (7) and (8) and redesignated former par. (7) as (9).

2004—Par. (2). Pub. L. 108–271 substituted ''Government Accountability Office'' for ''General Accounting Office''.

1996—Pars. (3), (5) to (7). Pub. L. 104–106 substituted ''the term'' for ''The term''.

EFFECTIVE DATE OF 2006 AMENDMENT

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

EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104–106, see section 4401 of Pub. L. 104–106, set out as a note under section 251 of this title.

EFFECTIVE DATE

Section 16 of Pub. L. 95–563 provided that: ''This Act [see Short Title note below] shall apply to contracts entered into one hundred twenty days after the date of enactment [Nov. 1, 1978]. Notwithstanding any provision in a contract made before the effective date of this Act, the contractor may elect to proceed under this Act with respect to any claim pending then before the contracting officer or initiated thereafter.''

SHORT TITLE

Section 1 of Pub. L. 95–563 provided: ''That this Act [enacting this chapter, amending section 5108 of Title 5, Government Organization and Employees, sections 1346, 1491, 2401, 2414, 2510, and 2517 of Title 28, Judiciary and Judicial Procedure, and section 724a of former Title 31, Money and Finance, and enacting provisions set out above] may be cited as the 'Contract Disputes Act of 1978'.''

§ 602. Applicability of law

(a) Executive agency contracts

Unless otherwise specifically provided herein, this chapter applies to any express or implied contract (including those of the nonappropriated fund activities described in sections 1346 and 1491 of title 28) entered into by an executive agency for—

(1) the procurement of property, other than real property in being;

(2) the procurement of services;

(3) the procurement of construction, alteration, repair or maintenance of real property; or,

(4) the disposal of personal property.

(b) Tennessee Valley Authority contracts

With respect to contracts of the Tennessee Valley Authority, the provisions of this chapter shall apply only to those contracts which contain a disputes clause requiring that a contract dispute be resolved through an agency administrative process. Notwithstanding any other provision of this chapter, contracts of the Tennessee Valley Authority for the sale of fertilizer or electric power or related to the conduct or operation of the electric power system shall be excluded from the chapter.

(c) Foreign government or international organization contracts

This chapter does not apply to a contract with a foreign government, or agency thereof, or

international organization, or subsidiary body thereof, if the head of the agency determines that the application of the chapter to the contract would not be in the public interest.

(Pub. L. 95–563, § 3, Nov. 1, 1978, 92 Stat. 2383.)

§ 603. Maritime contracts

Appeals under paragraph (g) of section 607 of this title and suits under section 609 of this title, arising out of maritime contracts, shall be governed by the Act of March 9, 1920, as amended (41 Stat. 525, as amended; 46 U.S.C. 741–752)[1] or the Act of March 3, 1925, as amended (43 Stat. 1112, as amended; 46 U.S.C. 781–790)[1] as applicable, to the extent that those Acts are not inconsistent with this chapter.

(Pub. L. 95–563, § 4, Nov. 1, 1978, 92 Stat. 2384.)

REFERENCES IN TEXT

The Act of March 9, 1920, referred to in text, is act Mar. 9, 1920, ch. 95, 41 Stat. 525, commonly known as the ''Suits in Admiralty Act'', which was classified generally to chapter 20 (§§ 741 to 743, 744 to 752) of former Title 46, Appendix, Shipping, and was repealed and restated in chapter 309 of Title 46, Shipping, by Pub. L. 109–304, §§ 6(c), 19, Oct. 6, 2006, 120 Stat. 1509, 1710. Section 30901 of Title 46 provides that chapter 309 of Title 46 may be cited as the Suits in Admiralty Act. For disposition of sections of former Title 46, Appendix, to Title 46, see Disposition Table preceding section 101 of Title 46.

The Act of March 3, 1925, referred to in text, is act Mar. 3, 1925, ch. 428, 43 Stat. 1112, commonly known as the ''Public Vessels Act'', which was classified generally to chapter 22 (§§ 781 to 790) of former Title 46, Appendix, Shipping, and was repealed and restated in chapter 311 of Title 46, Shipping, by Pub. L. 109–304, §§ 6(c), 19, Oct. 6, 2006, 120 Stat. 1509, 1710. Section 31101 of Title 46 provides that chapter 311 of Title 46 may be cited as the Public Vessels Act. For disposition of sections of former Title 46, Appendix, to Title 46, see Disposition Table preceding section 101 of Title 46.

§ 604. Fraudulent claims

If a contractor is unable to support any part of his claim and it is determined that such inability is attributable to misrepresentation of fact or fraud on the part of the contractor, he shall be liable to the Government for an amount equal to such unsupported part of the claim in addition to all costs to the Government attributable to the cost of reviewing said part of his claim. Liability under this subsection[1] shall be determined within six years of the commission of such misrepresentation of fact or fraud.

(Pub. L. 95–563, § 5, Nov. 1, 1978, 92 Stat. 2384.)

§ 605. Decision by contracting officer

(a) Contractor claims

All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. All claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer. Each claim by a contractor against the government relating to a contract and each claim by the government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim. The preceding sentence does not apply to a claim by the government against a contractor that is based on a claim by the contractor involving fraud. The contracting officer shall issue his decisions in writing, and shall mail or otherwise furnish a copy of the decision to the contractor. The decision shall state the reasons for the decision reached, and shall inform the contractor of his rights as provided in this chapter. Specific findings of fact are not required, but, if made, shall not be binding in any subsequent proceeding. The authority of this subsection shall not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle, or determine. This section shall not authorize any agency head to settle, compromise, pay, or otherwise adjust any claim involving fraud.

(b) Review; performance of contract pending appeal

The contracting officer's decision on the claim shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is timely commenced as authorized by this chapter. Nothing in this chapter shall prohibit executive agencies from including a clause in government contracts requiring that pending final decision of an appeal, action, or final settlement, a contractor shall proceed diligently with performance of the contract in accordance with the contracting officer's decision.

(c) Amount of claim; certification; notification; time of issuance; presumption

(1) A contracting officer shall issue a decision on any submitted claim of $100,000 or less within sixty days from his receipt of a written request from the contractor that a decision be rendered within that period. For claims of more than $100,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable, and that the certifier is duly authorized to certify the claim on behalf of the contractor.

(2) A contracting officer shall, within sixty days of receipt of a submitted certified claim over $100,000—

(A) issue a decision; or

(B) notify the contractor of the time within which a decision will be issued.

(3) The decision of a contracting officer on submitted claims shall be issued within a reasonable time, in accordance with regulations promulgated by the agency, taking into account such factors as the size and complexity of the claim and the adequacy of the information in support of the claim provided by the contractor.

(4) A contractor may request the tribunal concerned to direct a contracting officer to issue a decision in a specified period of time, as determined by the tribunal concerned, in the event of undue delay on the part of the contracting officer.

[1] See References in Text note below.

[1] So in original. Probably should be ''section''.

(5) Any failure by the contracting officer to issue a decision on a contract claim within the period required will be deemed to be a decision by the contracting officer denying the claim and will authorize the commencement of the appeal or suit on the claim as otherwise provided in this chapter. However, in the event an appeal or suit is so commenced in the absence of a prior decision by the contracting officer, the tribunal concerned may, at its option, stay the proceedings to obtain a decision on the claim by the contracting officer.

(6) The contracting officer shall have no obligation to render a final decision on any claim of more than $100,000 that is not certified in accordance with paragraph (1) if, within 60 days after receipt of the claim, the contracting officer notifies the contractor in writing of the reasons why any attempted certification was found to be defective. A defect in the certification of a claim shall not deprive a court or an agency board of contract appeals of jurisdiction over that claim. Prior to the entry of a final judgment by a court or a decision by an agency board of contract appeals, the court or agency board shall require a defective certification to be corrected.

(7) The certification required by paragraph (1) may be executed by any person duly authorized to bind the contractor with respect to the claim.

(d) Alternative means of dispute resolution

Notwithstanding any other provision of this chapter, a contractor and a contracting officer may use any alternative means of dispute resolution under subchapter IV of chapter 5 of title 5, or other mutually agreeable procedures, for resolving claims. The contractor shall certify the claim when required to do so as provided under subsection (c)(1) of this section or as otherwise required by law. All provisions of subchapter IV of chapter 5 of title 5 shall apply to such alternative means of dispute resolution.

(e) Termination of authority to engage in alternative means of dispute resolution; savings provision

In any case in which the contracting officer rejects a contractor's request for alternative dispute resolution proceedings, the contracting officer shall provide the contractor with a written explanation, citing one or more of the conditions in section 572(b) of title 5 or such other specific reasons that alternative dispute resolution procedures are inappropriate for the resolution of the dispute. In any case in which a contractor rejects a request of an agency for alternative dispute resolution proceedings, the contractor shall inform the agency in writing of the contractor's specific reasons for rejecting the request.

(Pub. L. 95–563, §6, Nov. 1, 1978, 92 Stat. 2384; Pub. L. 101–552, §6(a), Nov. 15, 1990, 104 Stat. 2745; Pub. L. 102–572, title IX, §907(a)(1), Oct. 29, 1992, 106 Stat. 4518; Pub. L. 103–355, title II, §§2351(a)(1), (b), (e), 2352, Oct. 13, 1994, 108 Stat. 3322; Pub. L. 104–106, div. D, title XLIII, §§4321(a)(6), (7), 4322(b)(6), Feb. 10, 1996, 110 Stat. 671, 677; Pub. L. 104–320, §6, Oct. 19, 1996, 110 Stat. 3871; Pub. L. 105–85, div. A, title X, §1073(g)(3), Nov. 18, 1997, 111 Stat. 1906.)

AMENDMENTS

1997—Subsecs. (d), (e). Pub. L. 105–85 struck out ''(as in effect on September 30, 1995)'' after ''title 5'' wherever appearing.

1996—Subsec. (a). Pub. L. 104–106, §4321(a)(6), made technical correction to Pub. L. 103–355, §2351(a). See 1994 Amendment note below.

Subsec. (d). Pub. L. 104–320, §6(1), substituted ''The contractor shall certify the claim when required to do so as provided under subsection (c)(1) of this section or as otherwise required by law.'' for ''In a case in which such alternative means of dispute resolution or other mutually agreeable procedures are used, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his or her knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable.''

Pub. L. 104–106, §4322(b)(6), inserted ''(as in effect on September 30, 1995)'' after ''title 5'' in two places.

Subsec. (e). Pub. L. 104–320, §6(2), struck out first sentence which read as follows: ''The authority of agencies to engage in alternative means of dispute resolution proceedings under subsection (d) of this section shall cease to be effective on October 1, 1999, except that such authority shall continue in effect with respect to then pending dispute resolution proceedings which, in the judgment of the agencies that are parties to such proceedings, require such continuation, until such proceedings terminate.''

Pub. L. 104–106, §4322(b)(6), inserted ''(as in effect on September 30, 1995)'' after ''title 5''.

Pub. L. 104–106, §4321(a)(7), made technical amendment to Pub. L. 103–355, §2352(b). See 1994 Amendment note below.

1994—Subsec. (a). Pub. L. 103–355, §2351(a)(1), as amended by Pub. L. 104–106, §4321(a)(6), inserted after second sentence ''Each claim by a contractor against the government relating to a contract and each claim by the government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim. The preceding sentence does not apply to a claim by the government against a contractor that is based on a claim by the contractor involving fraud.''

Subsec. (c). Pub. L. 103–355, §2351(b), substituted ''$100,000'' for ''$50,000'' wherever appearing.

Subsec. (c)(4). Pub. L. 103–355, §2351(e), substituted ''tribunal concerned'' for ''agency board of contract appeals'' and ''tribunal concerned,'' for ''board,''.

Subsec. (e). Pub. L. 103–355, §2352(b), as amended by Pub. L. 104–106, §4321(a)(7), inserted after first sentence ''In any case in which the contracting officer rejects a contractor's request for alternative dispute resolution proceedings, the contracting officer shall provide the contractor with a written explanation, citing one or more of the conditions in section 572(b) of title 5 or such other specific reasons that alternative dispute resolution procedures are inappropriate for the resolution of the dispute. In any case in which a contractor rejects a request of an agency for alternative dispute resolution proceedings, the contractor shall inform the agency in writing of the contractor's specific reasons for rejecting the request.''

Pub. L. 103–355, §2352(a), substituted ''October 1, 1999'' for ''October 1, 1995''.

1992—Subsec. (c)(1). Pub. L. 102–572, §907(a)(1)(A), struck out ''and'' after ''belief,'' and inserted before period at end '', and that the certifier is duly authorized to certify the claim on behalf of the contractor''.

Subsec. (c)(6), (7). Pub. L. 102–572, §907(a)(1)(B), added pars. (6) and (7).

1990—Subsecs. (d), (e). Pub. L. 101–552 added subsecs. (d) and (e).

EFFECTIVE DATE OF 1996 AMENDMENT

Section 4321(a) of Pub. L. 104–106 provided that the amendment made by that section is effective as of Oct. 13, 1994, and as if included in Pub. L. 103–355 as enacted.

For effective date and applicability of amendment by section 4322(b)(6) of Pub. L. 104–106, see section 4401 of Pub. L. 104–106, set out as a note under section 251 of this title.

EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103–355, see section 10001 of Pub. L. 103–355, set out as a note under section 251 of this title.

EFFECTIVE DATE OF 1992 AMENDMENT

Section 907(a)(2) of Pub. L. 102–572 provided that: ''The amendment made by paragraph (1)(B) [amending this section] shall be effective with respect to all claims filed before, on, or after the date of the enactment of this Act [Oct. 29, 1992], except for those claims which, before such date of enactment, have been the subject of an appeal to an agency board of contract appeals or a suit in the United States Claims Court.''

Section 907(a)(4) of Pub. L. 102–572 provided that: ''The amendments made by paragraph (1)(A) [amending this section] shall be effective with respect to certifications executed more than 60 days after the effective date of amendments to the Federal Acquisition Regulation implementing the amendments made by paragraph (1)(A) with respect to the certification of claims.'' [For effective date of implementing regulations, see 59 F.R. 11368, Mar. 10, 1994.]

EFFECT OF CONTRACT PROVISIONS PROVIDING FOR SUBMISSION OF CLAIMS EARLIER THAN SIX YEARS AFTER ACCRUAL

Section 2351(a)(2) of Pub. L. 103–355 provided that: ''Notwithstanding the third sentence of section 6(a) of the Contract Disputes Act of 1978 [41 U.S.C. 605(a)], as added by paragraph (1), if a contract in existence on the date of the enactment of this Act [Oct. 13, 1994] requires that a claim referred to in that sentence be submitted earlier than 6 years after the accrual of the claim, then the claim shall be submitted within the period required by the contract. The preceding sentence does not apply to a claim by the Federal Government against a contractor that is based on a claim by the contractor involving fraud.''

§ 606. Contractor's right of appeal to board of contract appeals

Within ninety days from the date of receipt of a contracting officer's decision under section 605 of this title, the contractor may appeal such decision to an agency board of contract appeals, as provided in section 607 of this title.

(Pub. L. 95–563, § 7, Nov. 1, 1978, 92 Stat. 2385.)

§ 607. Agency boards of contract appeals

(a) Establishment; consultation; Tennessee Valley Authority

(1) An Armed Services Board of Contract Appeals may be established within the Department of Defense when the Secretary of Defense, after consultation with the Administrator, determines from a workload study that the volume of contract claims justifies the establishment of a full-time agency board of at least three members who shall have no other inconsistent duties. Workload studies will be updated at least once every three years and submitted to the Administrator.

(2) The Board of Directors of the Tennessee Valley Authority may establish a board of contract appeals for the Authority of an indeterminate number of members.

(b) Appointment of members; chairman; compensation

(1) The members of the Armed Services Board of Contract Appeals 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' experience in public contract law. Full-time members of such Board serving as such on the effective date of this chapter shall be considered qualified. The chairman and vice chairman of such Board shall be designated by the Secretary of Defense from members so appointed. Compensation for the chairman, the vice chairman, and all other members of such Board shall be determined under section 5372a of title 5.

(2) The Board of Directors of the Tennessee Valley Authority shall establish criteria for the appointment of members to its agency board of contract appeals established in subsection (a)(2) of this section, and shall designate a chairman of such board. The chairman and all other members of such board shall receive compensation, at the daily equivalent of the rates determined under section 5372a of title 5, for each day they are engaged in the actual performance of their duties as members of the board.

(c) Postal Service Board of Contract Appeals

There is established an agency board of contract appeals to be known as the ''Postal Service Board of Contract Appeals''. Such board shall have jurisdiction to decide any appeal from a decision of a contracting officer of the United States Postal Service or the Postal Regulatory Commission relative to a contract made by either agency. Such board shall consist of judges appointed by the Postmaster General who shall meet the qualifications of and serve in the same manner as members of the Civilian Board of Contract Appeals. This chapter shall apply to contract disputes before the Postal Service Board of Contract Appeals in the same manner as they apply to contract disputes before the Civilian Board.

(d) Jurisdiction

The Armed Services Board shall have jurisdiction to decide any appeal from a decision of a contracting officer of the Department of Defense, the Department of the Army, the Department of the Navy, the Department of the Air Force, or the National Aeronautics and Space Administration relative to a contract made by that department or agency. The Civilian Board shall have jurisdiction to decide any appeal from a decision of a contracting officer of any executive agency (other than the Department of Defense, the Department of the Army, the Department of the Navy, the Department of the Air Force, the National Aeronautics and Space Administration, the United States Postal Service, the Postal Regulatory Commission, or the Tennessee Valley Authority) relative to a contract made by that agency. Each other agency board shall have jurisdiction to decide any appeal from a decision of a contracting officer relative to a contract made by its agency. In exercising this jurisdiction, the agency board is authorized to

grant any relief that would be available to a litigant asserting a contract claim in the United States Court of Federal Claims.

(e) Decisions

An agency board shall provide to the fullest extent practicable, informal, expeditious, and inexpensive resolution of disputes, and shall issue a decision in writing or take other appropriate action on each appeal submitted, and shall mail or otherwise furnish a copy of the decision to the contractor and the contracting officer.

(f) Accelerated appeal disposition

The rules of each agency board shall include a procedure for the accelerated disposition of any appeal from a decision of a contracting officer where the amount in dispute is $100,000 or less. The accelerated procedure shall be applicable at the sole election of only the contractor. Appeals under the accelerated procedure shall be resolved, whenever possible, within one hundred and eighty days from the date the contractor elects to utilize such procedure.

(g) Review

(1) The decision of an agency board of contract appeals shall be final, except that—

(A) a contractor may appeal such a decision to the United States Court of Appeals for the Federal Circuit within one hundred twenty days after the date of receipt of a copy of such decision, or

(B) the agency head, if he determines that an appeal should be taken, and with the prior approval of the Attorney General, transmits the decision of the board of contract appeals to the Court of Appeals for the Federal Circuit for judicial review under section 1295 of title 28, within one hundred and twenty days from the date of the agency's receipt of a copy of the board's decision.

(2) Notwithstanding the provisions of paragraph (1), the decision of the board of contract appeals of the Tennessee Valley Authority shall be final, except that—

(A) a contractor may appeal such a decision to a United States district court pursuant to the provisions of section 1337 of title 28, within one hundred twenty days after the date of receipt of a copy of such decision, or

(B) The Tennessee Valley Authority may appeal the decision to a United States district court pursuant to the provisions of section 1337 of title 28, within one hundred twenty days after the date of the decision in any case.

(3) An award by an arbitrator under this chapter shall be reviewed pursuant to sections 9 through 13 of title 9, except that the court may set aside or limit any award that is found to violate limitations imposed by Federal statute.

(Pub. L. 95–563, §8, Nov. 1, 1978, 92 Stat. 2385; Pub. L. 97–164, title I, §§156, 160(a)(15), Apr. 2, 1982, 96 Stat. 47, 48; Pub. L. 101–509, title V, §529 [title I, §104(d)(4)], Nov. 5, 1990, 104 Stat. 1427, 1447; Pub. L. 101–552, §6(b), Nov. 15, 1990, 104 Stat. 2746; Pub. L. 103–355, title II, §2351(c), Oct. 13, 1994, 108 Stat. 3322; Pub. L. 109–163, div. A, title VIII, §847(d)(2)–(4), Jan. 6, 2006, 119 Stat. 3393, 3394; Pub. L. 109–435, title VI, §604(f), Dec. 20, 2006, 120 Stat. 3242.)

REFERENCES IN TEXT

For the effective date of this chapter, referred to in subsec. (b)(1), see section 16 of Pub. L. 95–563, set out as an Effective Date note under section 601 of this title.

CODIFICATION

In subsec. (b)(1), ''administrative law judges'' substituted for ''hearing examiners'' on authority of section 3 of Pub. L. 95–251, Mar. 27, 1978, 92 Stat. 184, which is set out as a note under section 3105 of Title 5, Government Organization and Employees.

AMENDMENTS

2006—Subsec. (a)(1). Pub. L. 109–163, §847(d)(3)(A), substituted ''An Armed Services Board of Contract Appeals'' for ''Except as provided in paragraph (2) an agency board of contract appeals'' and ''the Department of Defense when the Secretary of Defense'' for ''an executive agency when the agency head''.

Subsec. (b)(1). Pub. L. 109–163, §847(d)(3)(B), substituted ''The members of the Armed Services Board of Contract Appeals'' for ''Except as provided in paragraph (2), the members of agency boards'' in first sentence, ''such Board'' for ''agency boards'' in second sentence, ''such Board'' for ''each board'' and ''the Secretary of Defense'' for ''the agency head'' in third sentence, and ''such Board'' for ''an agency board'' in fourth sentence.

Subsec. (c). Pub. L. 109–435 substituted ''Postal Regulatory Commission'' for ''Postal Rate Commission''.

Pub. L. 109–163, §847(d)(2)(B), added subsec. (c) and struck out heading and text of former subsec. (c). Text read as follows: ''If the volume of contract claims is not sufficient to justify an agency board under subsection (a) of this section or if he otherwise considers it appropriate, any agency head shall arrange for appeals from decisions by contracting officers of his agency to be decided by a board of contract appeals of another executive agency. In the event an agency head is unable to make such an arrangement with another agency, he shall submit the case to the Administrator for placement with an agency board. The provisions of this subsection shall not apply to the Tennessee Valley Authority.''

Subsec. (d). Pub. L. 109–435 substituted ''Postal Regulatory Commission'' for ''Postal Rate Commission''.

Pub. L. 109–163, §847(d)(2)(A)(ii), substituted ''Court of Federal Claims'' for ''Claims Court''.

Pub. L. 109–163, §847(d)(2)(A)(i), substituted three sentences relating to the jurisdiction of the Armed Services Board, the Civilian Board, and other agency boards for ''Each agency board shall have jurisdiction to decide any appeal from a decision of a contracting officer (1) relative to a contract made by its agency, and (2) relative to a contract made by any other agency when such agency or the Administrator has designated the agency board to decide the appeal.''

Subsec. (h). Pub. L. 109–163, §847(d)(4), struck out subsec. (h) which related to procedural guidelines.

Subsec. (i). Pub. L. 109–163, §847(d)(4), struck out subsec. (i) which required all agency boards of three or more full time members, except that of the Tennessee Valley Authority, within one hundred and twenty days after Nov. 1, 1978, to develop workload studies for approval by the agency head specified in subsec. (a)(1).

1994—Subsec. (f). Pub. L. 103–355 substituted ''$100,000'' for ''$50,000''.

1990—Subsec. (b)(1). Pub. L. 101–509, §529 [title I, §104(d)(4)(A)], substituted ''Compensation for the chairman, the vice chairman, and all other members of an agency board shall be determined under section 5372a of title 5.'' for ''The chairman of each agency board shall receive compensation at a rate equal to that paid a GS–18 under the General Schedule contained in section 5332, of title 5, the vice chairman shall receive compensation at a rate equal to that paid a GS–17 under such General Schedule, and all other members shall receive compensation at a rate equal to that paid a GS–16 under such General Schedule. Such positions shall be in

addition to the number of positions which may be placed in GS–16, GS–17, and GS–18 of such General Schedule under existing law.''

Subsec. (b)(2). Pub. L. 101–509, § 529 [title I, § 104(d)(4)(B)], substituted ''The chairman and all other members of such board shall receive compensation, at the daily equivalent of the rates determined under section 5372a of title 5, for each day they are engaged in the actual performance of their duties as members of the board.'' for ''The chairman of such board shall receive compensation at a rate equal to the daily rate paid a GS–18 under the General Schedule contained in section 5332, of title 5, for each day he is engaged in the actual performance of his duties as a member of such board. All other members of such board shall receive compensation at a rate equal to the daily rate paid a GS–16 under such General Schedule for each day they are engaged in the actual performance of their duties as members of such board.''

Subsec. (g)(3). Pub. L. 101–552 added par. (3).

1982—Subsec. (d). Pub. L. 97–164, § 160(a)(15), substituted ''United States Claims Court'' for ''Court of Claims''.

Subsec. (g)(1)(A). Pub. L. 97–164, § 156(1), substituted ''United States Court of Appeals for the Federal Circuit'' for ''Court of Claims''.

Subsec. (g)(1)(B). Pub. L. 97–164, § 156(2), substituted ''Court of Appeals for the Federal Circuit for judicial review under section 1295 of title 28'' for ''United States Court of Claims for judicial review, under section 2510 of title 28''.

EFFECTIVE DATE OF 2006 AMENDMENT

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

EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103–355, see section 10001 of Pub. L. 103–355, set out as a note under section 251 of this title.

EFFECTIVE DATE OF 1992 AMENDMENT

Amendment by Pub. L. 102–572 effective Oct. 29, 1992, see section 911 of Pub. L. 102–572, set out as a note under section 171 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1990 AMENDMENT

Amendment by Pub. L. 101–509 effective on such date as the President shall determine, but not earlier than 90 days, and not later than 180 days, after Nov. 5, 1990, see section 529 [title III, § 305] of Pub. L. 101–509, set out as a note under section 5301 of Title 5, Government Organization and Employees.

EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97–164 effective Oct. 1, 1982, see section 402 of Pub. L. 97–164, set out as a note under section 171 of Title 28, Judiciary and Judicial Procedure.

BOARDS OF CONTRACT APPEALS; TRANSFERS; TERMINATION; REFERENCES

Pub. L. 109–163, div. A, title VIII, § 847(b), (c), (e), Jan. 6, 2006, 119 Stat. 3392, 3394, provided that:

''(b) TRANSFERS.—The personnel employed in connection with, and the assets, liabilities, contracts, property, records, and unexpended balance of appropriations, authorizations, allocations, and other funds employed, held, used, arising from, available to, or to be made available in connection with the functions vested by law in the agency boards of contract appeals established pursuant to section 8 of the Contract Disputes Act of 1978 (41 U.S.C. 607) (as in effect on the day before the effective date described in subsection (g) [see Effective Date of 2006 Amendment note above]) other than the Armed Services Board of Contract Appeals, the board of contract appeals of the Tennessee Valley Authority, and the Postal Service Board of Contract Appeals shall be transferred to the Civilian Board of Contract Appeals for appropriate allocation by the Chairman of that Board.

''(c) TERMINATION OF BOARDS OF CONTRACT APPEALS.—

''(1) TERMINATION.—Effective on the effective date described in subsection (g), the agency boards of contract appeals established pursuant to section 8 of the Contract Disputes Act of 1978 (41 U.S.C. 607) (as in effect on the day before such effective date), other than the Armed Services Board of Contract Appeals, the board of contract appeals of the Tennessee Valley Authority, and the Postal Service Board of Contract Appeals, shall terminate.

''(2) SAVINGS PROVISION.—(A) This section [enacting section 438 of this title, amending this section, section 601 of this title, and section 5372a of Title 5, Government Organization and Employees, and enacting provisions set out as a note under section 5372a of Title 5] and the amendments made by this section shall not affect any proceedings pending on the effective date described in subsection (g) before any agency board of contract appeals terminated by paragraph (1).

''(B) In the case of any such proceedings pending before an agency board of contract appeals other than the Armed Services Board of Contract Appeals or the board of contract appeals of the Tennessee Valley Authority, the proceedings shall be continued by the Civilian Board of Contract Appeals, and orders which were issued in any such proceeding by the agency board shall continue in effect until modified, terminated, superseded, or revoked by the Civilian Board of Contract Appeals, by a court of competent jurisdiction, or by operation of law.

''(e) REFERENCES.—Any reference 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 in any provision of law or in any rule, regulation, or other paper of the United States shall be treated as referring to the Civilian Board of Contract Appeals established under section 42 of the Office of Federal Procurement Policy Act [41 U.S.C. 438].''

§ 608. Small claims

(a) Accelerated disposition of appeals

The rules of each agency board shall include a procedure for the expedited disposition of any appeal from a decision of a contracting officer where the amount in dispute is $50,000 or less or, in the case of a small business concern (as defined in the Small Business Act [15 U.S.C. 631 et seq.] and regulations under that Act), $150,000 or less. The small claims procedure shall be applicable at the sole election of the contractor.

(b) Simplified rules of procedure

The small claims procedure shall provide for simplified rules of procedure to facilitate the decision of any appeal thereunder. Such appeals may be decided by a single member of the agency board with such concurrences as may be provided by rule or regulation.

(c) Time of decision

Appeals under the small claims procedure shall be resolved, whenever possible, within one hundred twenty days from the date on which the contractor elects to utilize such procedure.

(d) Finality of decision

A decision against the Government or the contractor reached under the small claims proce-

dure shall be final and conclusive and shall not be set aside except in cases of fraud.

(e) Effect of decision

Administrative determinations and final decisions under this section shall have no value as precedent for future cases under this chapter.

(f) Review of requisite amount in controversy

The Administrator is authorized to review at least every three years, beginning with the third year after November 1, 1978, the dollar amount defined in subsection (a) of this section as a small claim, and based upon economic indexes selected by the Administrator adjust that level accordingly.

(Pub. L. 95–563, § 9, Nov. 1, 1978, 92 Stat. 2387; Pub. L. 103–355, title II, § 2351(d), Oct. 13, 1994, 108 Stat. 3322; Pub. L. 109–364, div. A, title VIII, § 857, Oct. 17, 2006, 120 Stat. 2349.)

REFERENCES IN TEXT

The Small Business Act, referred to in subsec. (a), is Pub. L. 85–536, § 2(1 et seq.), July 18, 1958, 72 Stat. 384, which is classified generally to chapter 14A (§ 631 et seq.) of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see Short Title note set out under section 631 of Title 15 and Tables.

AMENDMENTS

2006—Subsec. (a). Pub. L. 109–364 inserted ''or, in the case of a small business concern (as defined in the Small Business Act and regulations under that Act), $150,000 or less'' after ''$50,000 or less''.

1994—Subsec. (a). Pub. L. 103–355 substituted ''$50,000'' for ''$10,000''.

EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103–355, see section 10001 of Pub. L. 103–355, set out as a note under section 251 of this title.

§ 609. Judicial review of board decisions

(a) Actions in United States Court of Federal Claims; district court actions; time for filing

(1) Except as provided in paragraph (2), and in lieu of appealing the decision of the contracting officer under section 605 of this title to an agency board, a contractor may bring an action directly on the claim in the United States Court of Federal Claims, notwithstanding any contract provision, regulation, or rule of law to the contrary.

(2) In the case of an action against the Tennessee Valley Authority, the contractor may only bring an action directly on the claim in a United States district court pursuant to section 1337 of title 28, notwithstanding any contract provision, regulation, or rule of law to the contrary.

(3) Any action under paragraph (1) or (2) shall be filed within twelve months from the date of the receipt by the contractor of the decision of the contracting officer concerning the claim, and shall proceed de novo in accordance with the rules of the appropriate court.

(b) Finality of board decision

In the event of an appeal by a contractor or the Government from a decision of any agency board pursuant to section 607 of this title, notwithstanding any contract provision, regulation, or rules of law to the contrary, the decision of the agency board on any question of law shall not be final or conclusive, but the decision on any question of fact shall be final and conclusive and shall not be set aside unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence.

(c) Remand or retention of case

In any appeal by a contractor or the Government from a decision of an agency board pursuant to section 607 of this title, the court may render an opinion and judgement and remand the case for further action by the agency board or by the executive agency as appropriate, with such direction as the court considers just and proper.

(d) Consolidation

If two or more suits arising from one contract are filed in the United States Court of Federal Claims and one or more agency boards, for the convenience of parties or witnesses or in the interest of justice, the United States Court of Federal Claims may order the consolidation of such suits in that court or transfer any suits to or among the agency boards involved.

(e) Judgments as to fewer than all claims

In any suit filed pursuant to this chapter involving two or more claims, counterclaims, cross-claims, or third-party claims, and where a portion of one such claim can be divided for purposes of decision or judgment, and in any such suit where multiple parties are involved, the court, whenever such action is appropriate, may enter a judgment as to one or more but fewer than all of the claims, portions thereof, or parties.

(f) Advisory opinions

(1) Whenever an action involving an issue described in paragraph (2) is pending in a district court of the United States, the district court may request a board of contract appeals to provide the court with an advisory opinion on the matters of contract interpretation at issue.

(2) An issue referred to in paragraph (1) is any issue that could be the proper subject of a final decision of a contracting officer appealable under this chapter.

(3) A district court shall direct any request under paragraph (1) to the board of contract appeals having jurisdiction under this chapter to adjudicate appeals of contract claims under the contract or contracts being interpreted by the court.

(4) After receiving a request for an advisory opinion under paragraph (1), a board of contract appeals shall provide the advisory opinion in a timely manner to the district court making the request.

(Pub. L. 95–563, § 10, Nov. 1, 1978, 92 Stat. 2388; Pub. L. 97–164, title I, §§ 157, 160(a)(15), 161(10), Apr. 2, 1982, 96 Stat. 47–49; Pub. L. 102–572, title IX, § 902(b)(1), Oct. 29, 1992, 106 Stat. 4516; Pub. L. 103–355, title II, § 2354, Oct. 13, 1994, 108 Stat. 3323.)

AMENDMENTS

1994—Subsec. (f). Pub. L. 103–355 added subsec. (f).

1992—Subsecs. (a)(1), (d). Pub. L. 102–572 substituted ''United States Court of Federal Claims'' for ''United States Claims Court'' wherever appearing.

1982—Subsec. (a)(1). Pub. L. 97–164, § 161(10), substituted ''Claims Court'' for ''Court of Claims''.

Subsec. (c). Pub. L. 97–164, § 157, struck out '', or, in its discretion and in lieu of remand it may retain the case and take such additional evidence or action as may be necessary for final disposition of the case'' after ''with such direction as the court considers just and proper''.

Subsec. (d). Pub. L. 97–164, § 160(a)(15), substituted ''United States Claims Court'' for ''Court of Claims'' in two places.

EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103–355, see section 10001 of Pub. L. 103–355, set out as a note under section 251 of this title.

EFFECTIVE DATE OF 1992 AMENDMENT

Amendment by Pub. L. 102–572 effective Oct. 29, 1992, see section 911 of Pub. L. 102–572, set out as a note under section 171 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97–164 effective Oct. 1, 1982, see section 402 of Pub. L. 97–164, set out as a note under section 171 of Title 28, Judiciary and Judicial Procedure.

§ 610. Subpena, discovery, and deposition

A member of an agency board of contract appeals may administer oaths to witnesses, authorize depositions and discovery proceedings, and require by subpena the attendance of witnesses, and production of books and papers, for the taking of testimony or evidence by deposition or in the hearing of an appeal by the agency board. In case of contumacy or refusal to obey a subpena by a person who resides, is found, or transacts business within the jurisdiction of a United States district court, the court, upon application of the agency board through the Attorney General; or upon application by the board of contract appeals of the Tennessee Valley Authority, shall have jurisdiction to issue the person an order requiring him to appear before the agency board or a member thereof, to produce evidence or to give testimony, or both. Any failure of any such person to obey the order of the court may be punished by the court as a contempt thereof.

(Pub. L. 95–563, § 11, Nov. 1, 1978, 92 Stat. 2388.)

§ 611. Interest

Interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim pursuant to section 605(a) of this title from the contractor until payment thereof. The interest provided for in this section shall be paid at the rate established by the Secretary of the Treasury pursuant to Public Law 92–41 (85 Stat. 97) for the Renegotiation Board.

(Pub. L. 95–563, § 12, Nov. 1, 1978, 92 Stat. 2389.)

REFERENCES IN TEXT

Provisions of Public Law 92–41, referred to in text, which authorized the Secretary of the Treasury to fix interest rates for the Renegotiation Board, were contained in section 2(a)(3) of Pub. L. 92–41, which was classified to section 1215(b)(2) of Title 50, Appendix, War and National Defense, and was omitted from the Code. See note preceding section 1211 of Title 50, Appendix.

INTEREST DUE ON CLAIMS WITH DEFECTIVE CERTIFICATIONS

Pub. L. 102–572, title IX, § 907(a)(3), Oct. 29, 1992, 106 Stat. 4518, provided that: ''If any interest is due under section 12 of the Contract Disputes Act of 1978 [41 U.S.C. 611] on a claim for which the certification under section 6(c)(1) [41 U.S.C. 605(c)(1)] is, on or after the date of the enactment of this Act [Oct. 29, 1992], found to be defective shall be paid from the later of the date on which the contracting officer initially received the claim or the date of the enactment of this Act.''

§ 612. Payment of claims

(a) Judgments

Any judgment against the United States on a claim under this chapter shall be paid promptly in accordance with the procedures provided by section 1304 of title 31.

(b) Monetary awards

Any monetary award to a contractor by an agency board of contract appeals shall be paid promptly in accordance with the procedures contained in subsection (a) of this section.

(c) Reimbursement

Payments made pursuant to subsections (a) and (b) of this section shall be reimbursed to the fund provided by section 1304 of title 31 by the agency whose appropriations were used for the contract out of available funds or by obtaining additional appropriations for such purposes.

(d) Tennessee Valley Authority

(1) Notwithstanding the provisions of subsection (a) through (c) of this section, any judgment against the Tennessee Valley Authority on a claim under this chapter shall be paid promptly in accordance with the provisions of section 831h(b) of title 16.

(2) Notwithstanding the provisions of subsection (a) through (c), any monetary award to a contractor by the board of contract appeals for the Tennessee Valley Authority shall be paid in accordance with the provisions of section 831h(b) of title 16.

(Pub. L. 95–563, § 13, Nov. 1, 1978, 92 Stat. 2389; Pub. L. 104–106, div. D, title XLIII, § 4322(b)(7), Feb. 10, 1996, 110 Stat. 677.)

AMENDMENTS

1996—Subsecs. (a), (c). Pub. L. 104–106 substituted ''section 1304 of title 31'' for ''section 1302 of the Act of July 27, 1956, (70 Stat. 694, as amended; 31 U.S.C. 724a)''.

EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104–106, see section 4401 of Pub. L. 104–106, set out as a note under section 251 of this title.

§ 613. Separability

If any provision of this chapter, or the application of such provision to any persons or circumstances, is held invalid, the remainder of this chapter, or the application of such provision to persons or circumstances other than those to which it is held invalid, shall not be affected thereby.

(Pub. L. 95–563, § 15, Nov. 1, 1978, 92 Stat. 2391.)

CHAPTER 10—DRUG-FREE WORKPLACE

Sec.
701. Drug-free workplace requirements for Federal contractors.
702. Drug-free workplace requirements for Federal grant recipients.
703. Employee sanctions and remedies.
704. Waiver.
705. Regulations.
706. Definitions.
707. Construction of chapter.

§ 701. Drug-free workplace requirements for Federal contractors

(a) Drug-free workplace requirement

(1) Requirement for persons other than individuals

No person, other than an individual, shall be considered a responsible source, under the meaning of such term as defined in section 403(8) of this title, for the purposes of being awarded a contract for the procurement of any property or services of a value greater than the simplified acquisition threshold (as defined in section 403(11) of this title) by any Federal agency, other than a contract for the procurement of commercial items (as defined in section 403(12) of this title), unless such person agrees to provide a drug-free workplace by—

(A) publishing a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the person's workplace and specifying the actions that will be taken against employees for violations of such prohibition;

(B) establishing a drug-free awareness program to inform employees about—

(i) the dangers of drug abuse in the workplace;

(ii) the person's policy of maintaining a drug-free workplace;

(iii) any available drug counseling, rehabilitation, and employee assistance programs; and

(iv) the penalties that may be imposed upon employees for drug abuse violations;

(C) making it a requirement that each employee to be engaged in the performance of such contract be given a copy of the statement required by subparagraph (A);

(D) notifying the employee in the statement required by subparagraph (A), that as a condition of employment on such contract, the employee will—

(i) abide by the terms of the statement; and

(ii) notify the employer of any criminal drug statute conviction for a violation occurring in the workplace no later than 5 days after such conviction;

(E) notifying the contracting agency within 10 days after receiving notice under subparagraph (D)(ii) from an employee or otherwise receiving actual notice of such conviction;

(F) imposing a sanction on, or requiring the satisfactory participation in a drug abuse assistance or rehabilitation program by, any employee who is so convicted, as required by section 703 of this title; and

(G) making a good faith effort to continue to maintain a drug-free workplace through implementation of subparagraphs (A), (B), (C), (D), (E), and (F).

(2) Requirement for individuals

No Federal agency shall enter into a contract with an individual unless such individual agrees that the individual will not engage in the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance in the performance of the contract.

(b) Suspension, termination, or debarment of contractor

(1) Grounds for suspension, termination, or debarment

Each contract awarded by a Federal agency shall be subject to suspension of payments under the contract or termination of the contract, or both, and the contractor thereunder or the individual who entered the contract with the Federal agency, as applicable, shall be subject to suspension or debarment in accordance with the requirements of this section if the head of the agency determines that—

(A) the contractor violates the requirements of subparagraph (A), (B), (C), (D), (E), or (F) of subsection (a)(1) of this section; or

(B) such a number of employees of such contractor have been convicted of violations of criminal drug statutes for violations occurring in the workplace as to indicate that the contractor has failed to make a good faith effort to provide a drug-free workplace as required by subsection (a) of this section.

(2) Conduct of suspension, termination, and debarment proceedings

(A) If a contracting officer determines, in writing, that cause for suspension of payments, termination, or suspension or debarment exists, an appropriate action shall be initiated by a contracting officer of the agency, to be conducted by the agency concerned in accordance with the Federal Acquisition Regulation and applicable agency procedures.

(B) The Federal Acquisition Regulation shall be revised to include rules for conducting suspension and debarment proceedings under this subsection, including rules providing notice, opportunity to respond in writing or in person, and such other procedures as may be necessary to provide a full and fair proceeding to a contractor or individual in such proceeding.

(3) Effect of debarment

Upon issuance of any final decision under this subsection requiring debarment of a contractor or individual, such contractor or individual shall be ineligible for award of any contract by any Federal agency, and for participation in any future procurement by any Federal agency, for a period specified in the decision, not to exceed 5 years.

(Pub. L. 100–690, title V, § 5152, Nov. 18, 1988, 102 Stat. 4304; Pub. L. 103–355, title IV, § 4104(d), title VIII, § 8301(f), Oct. 13, 1994, 108 Stat. 3342, 3397; Pub. L. 104–106, div. D, title XLIII, §§ 4301(a)(3), 4321(i)(13), Feb. 10, 1996, 110 Stat. 656, 677.)

AMENDMENTS

1996—Subsec. (a)(1). Pub. L. 104–106, § 4321(i)(13), substituted ''(as defined in section 403(12) of this title)'' for ''as defined in section 403 of this title'' in introductory provisions.

Pub. L. 104–106, § 4301(a)(3)(A), substituted ''agrees to'' for ''has certified to the contracting agency that it will'' in introductory provisions.

Subsec. (a)(2). Pub. L. 104–106, § 4301(a)(3)(B), substituted ''individual agrees'' for ''contract includes a certification by the individual''.

Subsec. (b)(1). Pub. L. 104–106, § 4301(a)(3)(C), redesignated subpar. (B) as (A), struck out ''such certification by failing to carry out'' after ''contractor violates'', redesignated subpar. (C) as (B), and struck out former subpar. (A) which read as follows: ''the contractor or individual has made a false certification under subsection (a) of this section;''.

1994—Subsec. (a)(1). Pub. L. 103–355 substituted ''greater than the simplified acquisition threshold (as defined in section 403(11) of this title) by any Federal agency, other than a contract for the procurement of commercial items as defined in section 403 of this title,'' for ''of $25,000 or more from any Federal agency'' in introductory provisions.

EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104–106, see section 4401 of Pub. L. 104–106, set out as a note under section 251 of this title.

EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103–355, see section 10001 of Pub. L. 103–355, set out as a note under section 251 of this title.

EFFECTIVE DATE

Section 5160 of Pub. L. 100–690 provided that: ''Sections 5152 and 5153 [enacting this section and section 702 of this title] shall be effective 120 days after the date of the enactment of this subtitle [Nov. 18, 1988].''

SHORT TITLE

Section 5151 of Pub. L. 100–690 provided that: ''This subtitle [subtitle D (§§ 5151–5160) of title V of Pub. L. 100–690, enacting this chapter] may be cited as the 'Drug-Free Workplace Act of 1988'.''

CONSISTENCY OF REGULATIONS WITH INTERNATIONAL OBLIGATIONS OF UNITED STATES; EXTRATERRITORIAL APPLICATION

Section 4804 of Pub. L. 100–690 required that regulations promulgated by agency heads be consistent with international obligations of United States, prior to repeal by Pub. L. 103–447, title I, § 103(b), Nov. 2, 1994, 108 Stat. 4693.

§ 702. Drug-free workplace requirements for Federal grant recipients

(a) Drug-free workplace requirement

(1) Persons other than individuals

No person, other than an individual, shall receive a grant from any Federal agency unless such person agrees to provide a drug-free workplace by—

(A) publishing a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violations of such prohibition;

(B) establishing a drug-free awareness program to inform employees about—

(i) the dangers of drug abuse in the workplace;

(ii) the grantee's policy of maintaining a drug-free workplace;

(iii) any available drug counseling, rehabilitation, and employee assistance programs; and

(iv) the penalties that may be imposed upon employees for drug abuse violations;

(C) making it a requirement that each employee to be engaged in the performance of such grant be given a copy of the statement required by subparagraph (A);

(D) notifying the employee in the statement required by subparagraph (A), that as a condition of employment in such grant, the employee will—

(i) abide by the terms of the statement; and

(ii) notify the employer of any criminal drug statute conviction for a violation occurring in the workplace no later than 5 days after such conviction;

(E) notifying the granting agency within 10 days after receiving notice of a conviction under subparagraph (D)(ii) from an employee or otherwise receiving actual notice of such conviction;

(F) imposing a sanction on, or requiring the satisfactory participation in a drug abuse assistance or rehabilitation program by, any employee who is so convicted, as required by section 703 of this title; and

(G) making a good faith effort to continue to maintain a drug-free workplace through implementation of subparagraphs (A), (B), (C), (D), (E), and (F).

(2) Individuals

No Federal agency shall make a grant to any individual unless such individual agrees as a condition of such grant that the individual will not engage in the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance in conducting any activity with such grant.

(b) Suspension, termination, or debarment of grantee

(1) Grounds for suspension, termination, or debarment

Each grant awarded by a Federal agency shall be subject to suspension of payments under the grant or termination of the grant, or both, and the grantee thereunder shall be subject to suspension or debarment, in accordance with the requirements of this section if the agency head of the granting agency or his official designee determines, in writing, that—

(A) the grantee violates the requirements of subparagraph (A), (B), (C), (D), (E), (F), or (G) of subsection (a)(1) of this section; or

(B) such a number of employees of such grantee have been convicted of violations of criminal drug statutes for violations occurring in the workplace as to indicate that the grantee has failed to make a good faith effort to provide a drug-free workplace as required by subsection (a)(1) of this section.

(2) Conduct of suspension, termination, and debarment proceedings

A suspension of payments, termination, or suspension or debarment proceeding subject to

this subsection shall be conducted in accordance with applicable law, including Executive Order 12549 or any superseding Executive order and any regulations promulgated to implement such law or Executive order.

(3) Effect of debarment

Upon issuance of any final decision under this subsection requiring debarment of a grantee, such grantee shall be ineligible for award of any grant from any Federal agency and for participation in any future grant from any Federal agency for a period specified in the decision, not to exceed 5 years.

(Pub. L. 100–690, title V, § 5153, Nov. 18, 1988, 102 Stat. 4306; Pub. L. 105–85, div. A, title VIII, § 809, Nov. 18, 1997, 111 Stat. 1838.)

REFERENCES IN TEXT

Executive Order 12549, referred to in subsec. (b)(2), is set out as a note under section 6101 of Title 31, Money and Finance.

AMENDMENTS

1997—Subsec. (a)(1). Pub. L. 105–85, § 809(1)(A), substituted ''agrees to'' for ''has certified to the granting agency that it will'' in introductory provisions.

Subsec. (a)(2). Pub. L. 105–85, § 809(1)(B), substituted ''agrees'' for ''certifies to the agency''.

Subsec. (b)(1)(A). Pub. L. 105–85, § 809(2)(C), struck out ''such certification by failing to carry out'' after ''violates''.

Pub. L. 105–85, § 809(2)(A), (B), redesignated subpar. (B) as (A) and struck out former subpar. (A) which read as follows: ''the grantee has made a false certification under subsection (a) of this section;''.

Subsec. (b)(1)(B), (C). Pub. L. 105–85, § 809(2)(B), redesignated subpars. (B) and (C) as (A) and (B), respectively.

EFFECTIVE DATE

Section effective 120 days after Nov. 18, 1988, see section 5160 of Pub. L. 100–690, set out as a note under section 701 of this title.

§ 703. Employee sanctions and remedies

A grantee or contractor shall, within 30 days after receiving notice from an employee of a conviction pursuant to section 701(a)(1)(D)(ii) or 702(a)(1)(D)(ii) of this title—

(1) take appropriate personnel action against such employee up to and including termination; or

(2) require such employee to satisfactorily participate in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency.

(Pub. L. 100–690, title V, § 5154, Nov. 18, 1988, 102 Stat. 4307.)

§ 704. Waiver

(a) In general

A termination, suspension of payments, or suspension or debarment under this chapter may be waived by the head of an agency with respect to a particular contract or grant if—

(1) in the case of a waiver with respect to a contract, the head of the agency determines under section 701(b)(1) of this title, after the issuance of a final determination under such section, that suspension of payments, or termination of the contract, or suspension or debarment of the contractor, or refusal to permit a person to be treated as a responsible source for a contract, as the case may be, would severely disrupt the operation of such agency to the detriment of the Federal Government or the general public; or

(2) in the case of a waiver with respect to a grant, the head of the agency determines that suspension of payments, termination of the grant, or suspension or debarment of the grantee would not be in the public interest.

(b) Exclusive authority

The authority of the head of an agency under this section to waive a termination, suspension, or debarment shall not be delegated.

(Pub. L. 100–690, title V, § 5155, Nov. 18, 1988, 102 Stat. 4307.)

§ 705. Regulations

Not later than 90 days after November 18, 1988, the governmentwide regulations governing actions under this chapter shall be issued pursuant to the Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.).

(Pub. L. 100–690, title V, § 5156, Nov. 18, 1988, 102 Stat. 4308.)

REFERENCES IN TEXT

The Office of Federal Procurement Policy Act, referred to in text, is Pub. L. 93–400, Aug. 30, 1974, 88 Stat. 796, as amended, which is classified principally to chapter 7 (§ 401 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 401 of this title and Tables.

§ 706. Definitions

For purposes of this chapter—

(1) the term ''drug-free workplace'' means a site for the performance of work done in connection with a specific grant or contract described in section 701 or 702 of this title of an entity at which employees of such entity are prohibited from engaging in the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance in accordance with the requirements of this Act;

(2) the term ''employee'' means the employee of a grantee or contractor directly engaged in the performance of work pursuant to the provisions of the grant or contract described in section 701 or 702 of this title;

(3) the term ''controlled substance'' means a controlled substance in schedules I through V of section 812 of title 21;

(4) the term ''conviction'' means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes;

(5) the term ''criminal drug statute'' means a criminal statute involving manufacture, distribution, dispensation, use, or possession of any controlled substance;

(6) the term ''grantee'' means the department, division, or other unit of a person responsible for the performance under the grant;

(7) the term ''contractor'' means the department, division, or other unit of a person re-

sponsible for the performance under the contract; and

(8) the term ''Federal agency'' means an agency as that term is defined in section 552(f) of title 5.

(Pub. L. 100–690, title V, § 5157, Nov. 18, 1988, 102 Stat. 4308.)

REFERENCES IN TEXT

This Act, referred to in par. (1), is Pub. L. 100–690, Nov. 18, 1988, 102 Stat. 4181, known as the Anti-Drug Abuse Act of 1988. For complete classification of this Act to the Code, see Short Title note set out under former section 1501 of Title 21, Food and Drugs, and Tables.

§ 707. Construction of chapter

Nothing in this chapter shall be construed to require law enforcement agencies, if the head of the agency determines it would be inappropriate in connection with the agency's undercover operations, to comply with the provisions of this chapter.

(Pub. L. 100–690, title V, § 5158, Nov. 18, 1988, 102 Stat. 4308.)