

poses and objectives of the two-phase selection procedures.” for “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.”

2006—Subsec. (f)(2). Pub. L. 109-163, §2807(a), amended par. (2) generally. Prior to amendment, par. (2) read as follows: “Any military construction contract that provides for an accelerated design effort, as authorized by paragraph (1), shall include as a condition of the contract that the liability of the United States in a termination for convenience may not exceed the actual costs incurred as of the termination date.”

Subsec. (f)(4). Pub. L. 109-163, §2807(b), substituted “2008” for “2007” wherever appearing.

2004—Subsec. (f). Pub. L. 108-375 added subsec. (f).

2003—Subsec. (c)(1). Pub. L. 108-178 substituted “chapter 11 of title 40” for “the Brooks Architect-Engineers Act (40 U.S.C. 541 et seq.)”.

2002—Subsec. (a). Pub. L. 107-217 substituted “chapter 11 of title 40” for “the Brooks Architect-Engineers Act (40 U.S.C. 541 et seq.)”.

1997—Subsec. (a). Pub. L. 105-85 substituted “(40 U.S.C.)” for “(41 U.S.C.)”.

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 2021 AMENDMENT

Amendment by Pub. L. 116-283 effective Jan. 1, 2022, with additional provisions for delayed implementation and applicability of existing law, see section 1801(d) of Pub. L. 116-283, set out as a note preceding section 3001 of this title.

EFFECTIVE DATE OF 2003 AMENDMENT

Amendment by Pub. L. 108-178 effective Aug. 21, 2002, see section 5 of Pub. L. 108-178, set out as a note under section 5334 of Title 5, Government Organization and Employees.

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 2220 of this title.

§ 3242. Supplies: economic order quantities

(a) QUANTITY TO PROCURE.—

(1) An agency referred to in section 3063 of this title 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.

(2) The Secretary of Defense shall take paragraph (1) into account in approving rates of obligation of appropriations under section 2204 of this title.

(b) OPINION OF OFFEROR WITH RESPECT TO QUANTITY TO BE PROCURED.—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.

(Added Pub. L. 98-525, title XII, §1233(a), Oct. 19, 1984, 98 Stat. 2600, §2384a; renumbered §3242 and amended Pub. L. 116-283, div. A, title XVIII, §1813(c), Jan. 1, 2021, 134 Stat. 4179; Pub. L. 117-81, div. A, title XVII, §1701(b)(5), Dec. 27, 2021, 135 Stat. 2133.)

Editorial Notes

AMENDMENTS

2021—Pub. L. 116-283, §1813(c), renumbered section 2384a of this title as this section.

Subsec. (a). Pub. L. 116-283, §1813(c)(1), as amended by Pub. L. 117-81, §1701(b)(5), inserted heading, in par. (1), substituted “section 3063” for “section 2303(a)” and reformatted subpars. (A) and (B) to add line breaks before each subpar. designation, and, in par. (2), realigned margin.

Subsec. (b). Pub. L. 116-283, §1813(c)(2), inserted heading.

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 2021 AMENDMENT

Amendment by Pub. L. 117-81 applicable as if included in the enactment of title XVIII of Pub. L. 116-283 as enacted, see section 1701(a)(2) of Pub. L. 117-81, set out in a note preceding section 3001 of this title and note below.

Amendment by Pub. L. 116-283 effective Jan. 1, 2022, with additional provisions for delayed implementation and applicability of existing law, see section 1801(d) of Pub. L. 116-283, set out as a note preceding section 3001 of this title.

EFFECTIVE DATE

Pub. L. 98-525, title XII, §1233(b), Oct. 19, 1984, 98 Stat. 2601, 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. 19, 1984].”

§ 3243. Encouragement of new competitors: qualification requirement

(a) QUALIFICATION REQUIREMENT DEFINED.—In this section, the term “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) ACTIONS BEFORE ESTABLISHING QUALIFICATION REQUIREMENT.—Except as provided in subsection (c), the head of the agency shall, before establishing a 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 and on a reimbursable

basis, a prompt opportunity to demonstrate 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 paragraph (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, AND REFERRAL OF OFFERS.—

(1) APPLICABILITY.—Subsection (b) does not apply with respect to a qualification requirement established by statute or administrative action before October 19, 1984, unless such requirement is a qualified products list.

(2) WAIVER AUTHORITY.—

(A) SUBMISSION OF DETERMINATION OF UNREASONABLENESS.—Except as provided in subparagraph (C), 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.

(B) AUTHORITY TO GRANT WAIVER.—After considering any comments of the advocate for competition reviewing such determination, the head of the purchasing office may waive the requirements of clauses (2) through (6) of subsection (b) for up to two years with respect to the item subject to the qualification requirement.

(C) INAPPLICABILITY TO QUALIFIED PRODUCTS LIST.—The waiver authority provided in this paragraph does not apply with respect to a qualified products list.

(3) SUBMISSION AND CONSIDERATION OF OFFER NOT TO BE DENIED IN CERTAIN CASES.—A potential offeror may not be denied the opportunity to submit and have considered an offer for a contract solely because the potential offeror (A) is not on a qualified bidders list, qualified manufacturers list, or qualified products list, or (B) has not been identified as meeting a qualification requirement established after October 19, 1984, if the potential offeror can demonstrate to the satisfaction of the contracting officer (or, in the case of a contract for the procurement of an aviation critical safety item or ship critical safety item, the head of the design control activity for such

item) 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.

(4) REFERRAL TO SMALL BUSINESS ADMINISTRATION.—Nothing contained in this subsection requires the referral of an offer to the Small Business Administration pursuant to section 8(b)(7) of the Small Business Act (15 U.S.C. 637(b)(7)) 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.

(5) DELAY OF PROCUREMENT NOT REQUIRED.—The head of an agency need not delay a proposed procurement in order to comply with subsection (b) or in order to provide a potential offeror with an opportunity to demonstrate its ability to meet the standards specified for qualification.

(6) REQUIREMENTS BEFORE ENFORCEMENT OF CERTAIN LISTS.—The requirements of subsection (b) also apply before enforcement of any qualified products list, qualified manufacturers list, or qualified bidders list.

(d) FEWER THAN 2 ACTUAL MANUFACTURERS.—

(1) SOLICITATION AND TESTING OF ADDITIONAL SOURCES OR PRODUCTS.—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) subject to paragraph (2), 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.

(2) CERTIFICATION WHEN AGENCY MAY BEAR COST.—Costs may be borne under paragraph (1)(B) 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 amortize the costs incurred by the agency within a reasonable period of time considering the duration and dollar value of anticipated future requirements.

(3) CERTIFICATION REQUIRED.—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 3 of the Small Business Act (15 U.S.C. 632).

(e) EXAMINATION AND REVALIDATION OF QUALIFICATION REQUIREMENT.—Within seven years

after the establishment of a qualification requirement under subsection (b) or within seven years following an agency's enforcement of a qualified products list, qualified manufacturers list, or qualified bidders list, any such qualification requirement shall be examined and reevaluated in accordance with the requirements of subsection (b). The preceding sentence does not apply in the case of a qualification requirement for which a waiver is in effect under subsection (c)(2).

(f) **RESTRICTION ON ENFORCEMENT.**—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).

(g) **DEFINITIONS.**—In this section:

(1) The term “aviation critical safety item” means a part, an assembly, installation equipment, launch equipment, recovery equipment, or support equipment for an aircraft or aviation weapon system if the part, assembly, or equipment contains a characteristic any failure, malfunction, or absence of which could cause a catastrophic or critical failure resulting in the loss of or serious damage to the aircraft or weapon system, an unacceptable risk of personal injury or loss of life, or an uncommanded engine shutdown that jeopardizes safety.

(2) The term “ship critical safety item” means any ship part, assembly, or support equipment containing a characteristic the failure, malfunction, or absence of which could cause a catastrophic or critical failure resulting in loss of or serious damage to the ship or unacceptable risk of personal injury or loss of life.

(3) The term “design control activity”, with respect to an aviation critical safety item or ship critical safety item, means the systems command of a military department that is specifically responsible for ensuring the airworthiness of an aviation system or equipment, or the seaworthiness of a ship or ship equipment, in which such item is to be used.

(Added Pub. L. 98–525, title XII, § 1216(a), Oct. 19, 1984, 98 Stat. 2593, § 2319; amended Pub. L. 100–26, § 7(d)(5), (i)(4), (k)(3), Apr. 21, 1987, 101 Stat. 281, 282, 284; Pub. L. 108–136, div. A, title VIII, § 802(d), Nov. 24, 2003, 117 Stat. 1541; Pub. L. 109–364, div. A, title I, § 130(d), Oct. 17, 2006, 120 Stat. 2110; renumbered § 3243 and amended Pub. L. 116–283, div. A, title XVIII, § 1813(d), Jan. 1, 2021, 134 Stat. 4179.)

Editorial Notes

AMENDMENTS

2021—Pub. L. 116–283, § 1813(d)(1), substituted “Encouragement of new competitors: qualification requirement” for “Encouragement of new competitors” in section catchline.

Pub. L. 116–283, § 1813(d), renumbered section 2319 of this title as this section.

Subsec. (a). Pub. L. 116–283, § 1813(d)(2), inserted heading.

Subsec. (b). Pub. L. 116–283, § 1813(d)(3)(A), inserted heading.

Subsec. (b)(5). Pub. L. 116–283, § 1813(d)(3)(B), substituted “paragraph (4)” for “clause (4)”.

Subsec. (c). Pub. L. 116–283, § 1813(d)(4)(A), inserted heading.

Subsec. (c)(1). Pub. L. 116–283, § 1813(d)(4)(A), inserted heading and struck out “of this section” after “Subsection (b)”.

Subsec. (c)(2). Pub. L. 116–283, § 1813(d)(4)(C)(i), inserted heading and realigned margin.

Subsec. (c)(2)(A). Pub. L. 116–283, § 1813(d)(4)(C)(i), inserted heading and substituted “Except as provided in subparagraph (C),” for “Except as provided in subparagraph (B),”.

Subsec. (c)(2)(B). Pub. L. 116–283, § 1813(d)(4)(C)(iii), (iv), redesignated second sentence of subsec. (c)(2)(A) as (B) and inserted heading. Former subpar. (B) redesignated (C).

Subsec. (c)(2)(B), (C). Pub. L. 116–283, § 1813(d)(4)(C)(ii), (v), redesignated subpar. (B) as (C) and inserted heading.

Subsec. (c)(3) to (6). Pub. L. 116–283, § 1813(d)(4)(B), (D)–(G), inserted headings and realigned margins.

Subsec. (d). Pub. L. 116–283, § 1813(d)(5)(A), inserted heading.

Subsec. (d)(1). Pub. L. 116–283, § 1813(d)(5)(A), (F), inserted heading and realigned margins of subpars. (A) and (B).

Subsec. (d)(1)(B). Pub. L. 116–283, § 1813(d)(5)(C), inserted “subject to paragraph (2),” before “bear the cost of” and substituted “that requirement.” for “that requirement, but such costs may be borne”. Remainder of subpar. (B) redesignated par. (2).

Subsec. (d)(2). Pub. L. 116–283, § 1813(d)(5)(D), (E), designated text of par. (1)(B) beginning with “only if the head” as (2), inserted heading, and inserted “Costs may be borne under paragraph (1)(B)” at beginning. Former par. (2) redesignated (3).

Subsec. (d)(3). Pub. L. 116–283, § 1813(d)(5)(B), redesignated par. (2) as (3), inserted heading, and realigned margin.

Subsecs. (e), (f). Pub. L. 116–283, § 1813(d)(6), (7), inserted headings.

2006—Subsec. (c)(3). Pub. L. 109–364, § 130(d)(1), inserted “or ship critical safety item” after “aviation critical safety item”.

Subsec. (g)(2), (3). Pub. L. 109–364, § 130(d)(2), added par. (2), redesignated former par. (2) as (3), inserted “or ship critical safety item” after “aviation critical safety item” and “, or the seaworthiness of a ship or ship equipment,” after “or equipment”, and substituted “such item” for “the item”.

2003—Subsec. (c)(3). Pub. L. 108–136, § 802(d)(1), inserted “(or, in the case of a contract for the procurement of an aviation critical safety item, the head of the design control activity for such item)” after “the contracting officer”.

Subsec. (g). Pub. L. 108–136, § 802(d)(2), added subsec. (g).

1987—Subsec. (a). Pub. L. 100–26, § 7(k)(3), inserted “the term” after “In this section,”.

Subsec. (c)(1), (3). Pub. L. 100–26, § 7(i)(4), substituted “October 19, 1984,” for “the date of the enactment of the Defense Procurement Reform Act of 1984”.

Subsec. (c)(4). Pub. L. 100–26, § 7(d)(5)(A), inserted “(15 U.S.C. 637(b)(7))” after “Small Business Act”.

Subsec. (d)(2). Pub. L. 100–26, § 7(d)(5)(B), inserted “(15 U.S.C. 632)” after “Small Business Act”.

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 2021 AMENDMENT

Amendment by Pub. L. 116–283 effective Jan. 1, 2022, with additional provisions for delayed implementation and applicability of existing law, see section 1801(d) of Pub. L. 116–283, set out as a note preceding section 3001 of this title.

EFFECTIVE DATE

Pub. L. 98–525, title XII, § 1216(c)(2), Oct. 19, 1984, 98 Stat. 2599, provided that: “Sections 2319 [now 10 U.S.C.

3243], [former] 2320, and [former] 2321 of title 10, United States Code (as added by subsection (a)), shall apply with respect to solicitations issued after the end of the one-year period beginning on the date of the enactment of this Act [Oct. 19, 1984].”

§ 3247. Contracts: regulations for bids

(a) The Secretary of Defense may—

(1) prescribe regulations for the preparation, submission, and opening of bids for contracts; and

(2) require that a bid be accompanied by a written guaranty, signed by one or more responsible persons, undertaking that the bidder, if his bid is accepted, will, within the time prescribed by the Secretary or other officer authorized to make the contract, make a contract and furnish a bond with good and sufficient sureties for the performance of the contract.

(b) If a bidder, after being notified of the acceptance of his bid, fails within the time prescribed under subsection (a)(2) to enter into a contract and furnish the prescribed bond, the Secretary concerned or other authorized officer shall—

(1) contract with another person; and

(2) charge against the defaulting bidder and his guarantors the difference between the amount specified by the bidder in his bid and the amount for which a contract is made with the other person, this difference being immediately recoverable by the United States for the use of the military department concerned in an action against the bidder and his guarantors, jointly or severally.

(c) Proceedings under this section are subject to regulations under section 121 of title 40, unless exempted therefrom under section 501(a)(2) of title 40.

(Aug. 10, 1956, ch. 1041, 70A Stat. 136, §2381; Pub. L. 98–525, title XIV, §1405(35), Oct. 19, 1984, 98 Stat. 2624; Pub. L. 103–355, title I, §1507, Oct. 13, 1994, 108 Stat. 3298; Pub. L. 107–217, §3(b)(6), Aug. 21, 2002, 116 Stat. 1295; renumbered §3247, Pub. L. 116–283, div. A, title XVIII, §1813(e), Jan. 1, 2021, 134 Stat. 4181.)

HISTORICAL AND REVISION NOTES

<i>Revised section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
2381(a)	5:218 (1st sentence, less 1st 16 words; and 2d sentence).	Apr. 10, 1878, ch. 58, 20 Stat. 36; Mar. 3, 1883, ch. 120, 22 Stat. 487; Oct. 31, 1951, ch. 654, §2(4), 65 Stat. 706.
2381(b)	5:218 (less 1st and 2d sentences).	Feb. 19, 1948, ch. 65, §12 (1st sentence), 62 Stat. 26.
2381(c)	5:218 (1st 16 words of 1st sentence) [applicability of 5:218 extended to Navy by 5:412b and 41:161 (1st sentence)].	

In subsection (a)(1), the word “may” is substituted for the words “is authorized to”. The words “rules and * * * to be observed” are omitted as surplusage.

In subsection (a)(2), the word “undertaking” is substituted for the words “to the effect that he or they undertake”. The words “make a contract” are inserted for clarity. The words “in the premises” are omitted as surplusage. The words “for the performance of the contract” are substituted for the words “to furnish the supplies proposed or to perform the service required”.

In subsection (b), the word “duly” is omitted as surplusage. The words “with good and sufficient security

for the proper fulfillment of its terms” are omitted as covered by subsection (a)(2). The words “the prescribed” are inserted before the word “bond”.

Subsection (b)(1) is substituted for the words “proceed to contract with some other person to furnish the supplies or perform the services required”.

In subsection (b)(2) the word “charge” is substituted for the words “forthwith cause * * * to be charged”. The words “a contract is made with the other person” are substituted for the words “he may have contracted with another party to furnish the supplies or perform the service for the whole period of the proposal”. The words “guarantor or” are omitted as surplusage. The words “this difference being” are substituted for the words “and the sum may be”. The words “of debt” are omitted, since that action no longer exists. The words “the bidder and his guarantors, jointly or severally” are substituted for the words “either or all of such persons”.

In subsection (c), the words “Proceedings under this section are” are inserted for clarity. The words “unless exempted therefrom under section 481(a) of that title” are inserted to preserve the possibility of exemption of proceedings under the revised section from the provisions of the Federal Property and Administrative Services Act of 1949, as amended.

Editorial Notes

AMENDMENTS

2021—Pub. L. 116–283 renumbered section 2381 of this title as this section.

2002—Subsec. (c). Pub. L. 107–217 substituted “section 121 of title 40” for “section 205 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 486)” and “section 501(a)(2) of title 40” for “section 201(a) of that Act (40 U.S.C. 481(a))”.

1994—Subsec. (a). Pub. L. 103–355 substituted “The Secretary of Defense may—

“(1) prescribe regulations for the preparation, submission, and opening of bids for contracts; and” for “The Secretary of a military department may—

“(1) prescribe regulations for the preparation, submission, and opening of bids for contracts with that department; and”.

1984—Subsec. (c). Pub. L. 98–525 substituted “section 205 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 486)” for “section 486 of title 40” and “section 201(a) of that Act (40 U.S.C. 481(a))” for “section 481(a) of this title”.

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 2021 AMENDMENT

Amendment by Pub. L. 116–283 effective Jan. 1, 2022, with additional provisions for delayed implementation and applicability of existing law, see section 1801(d) of Pub. L. 116–283, set out as a note preceding section 3001 of this title.

§ 3249. Advocates for competition

Each advocate for competition designated pursuant to section 1705(a) of title 41 for an agency named in section 3063 of this title shall be a general or flag officer if a member of the armed forces or in a position classified above GS–15 pursuant to section 5108 of title 5, if a civilian employee and shall be designated to serve for a minimum of two years.

(Added Pub. L. 98–525, title XII, §1216(a), Oct. 19, 1984, 98 Stat. 2593, §2318; amended Pub. L. 100–26, §7(d)(4), Apr. 21, 1987, 101 Stat. 281; Pub. L. 102–25, title VII, §701(f)(1), Apr. 6, 1991, 105 Stat. 115; Pub. L. 103–355, title I, §1031, Oct. 13, 1994, 108 Stat. 3260; Pub. L. 111–350, §5(b)(17), Jan. 4, 2011, 124 Stat. 3843; Pub. L. 112–239, div. A, title