

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
3103	41:263.	June 30, 1949, ch. 288, title III, § 313, as added Pub. L. 103-355, title V, § 5051(a), Oct. 13, 1994, 108 Stat. 3351; Pub. L. 105-85, div. A, title VIII, § 851(a), Nov. 18, 1997, 111 Stat. 1851.

§ 3104. Small business concerns

It is the policy of Congress that a fair proportion of the total purchases and contracts for property and services for the Federal Government shall be placed with small business concerns.

(Pub. L. 111-350, § 3, Jan. 4, 2011, 124 Stat. 3744.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
3104	41:252(b).	June 30, 1949, ch. 288, title III, § 302(b), 63 Stat. 393; July 12, 1952, ch. 703, § 1(m), 66 Stat. 594; Pub. L. 98-369, div. B, title VII, § 2714(a)(1)(A), July 18, 1984, 98 Stat. 1184.

The word “declared” is omitted as unnecessary.

§ 3105. New contracts and grants and merit-based selection procedures

(a) CONGRESSIONAL POLICY.—It is the policy of Congress that—

(1) an executive agency should not be required by legislation to award—

(A) a new contract to a specific non-Federal Government entity; or

(B) a new grant for research, development, test, or evaluation to a non-Federal Government entity; and

(2) a program, project, or technology identified in legislation be procured or awarded through merit-based selection procedures.

(b) NEW CONTRACT AND NEW GRANT DESCRIBED.—For purposes of this section—

(1) 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 prior contract; and

(2) 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 prior grant.

(c) REQUIREMENTS FOR AWARDING NEW CONTRACT OR NEW GRANT.—A provision of law may not be construed as requiring a new contract or a new grant to be awarded to a specified non-Federal Government entity unless the provision of law specifically—

(1) refers to this section;

(2) identifies the particular non-Federal Government entity involved; and

(3) states that the award to that entity is required by the provision of law in contravention of the policy set forth in subsection (a).

(d) EXCEPTION.—This section does not apply to a contract or grant that calls on the National Academy of Sciences to investigate, examine, or

experiment on a subject of science or art of significance to an executive agency and to report on those matters to Congress or an agency of the Federal Government.

(Pub. L. 111-350, § 3, Jan. 4, 2011, 124 Stat. 3744.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
3105(a)	41:253(i)(1).	June 30, 1949, ch. 288, title III, § 303(i), as added Pub. L. 103-355, title VII, § 7203(b)(1)(B), Oct. 13, 1994, 108 Stat. 3380; Pub. L. 104-106, title XLI, § 4101(b)(1), Feb. 10, 1996, 110 Stat. 642.
	41:266(a).	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; Pub. L. 104-106, title XLIII, § 4321(e)(9), Feb. 10, 1996, 110 Stat. 675.
3105(b)	41:253(i)(3).	
	41:266(c).	
3105(c)	41:253(i)(2).	
	41:266(b).	
3105(d)	41:253(i)(4).	
	41:266(d).	

§ 3106. Erection, repair, or furnishing of public buildings and improvements not authorized, and certain contracts not permitted, by this division

This division does not—

(1) authorize the erection, repair, or furnishing of a public building or public improvement; or

(2) permit a contract for the construction or repair of a building, road, sidewalk, sewer, main, or similar item using procedures other than sealed-bid procedures under section 3301(b)(1)(A) of this title if the conditions set forth in section 3301(b)(1)(A) of this title apply or the contract is to be performed outside the United States.

(Pub. L. 111-350, § 3, Jan. 4, 2011, 124 Stat. 3745.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
3106	41:252(c)(1).	June 30, 1949, ch. 288, title III, § 302(c)(1), 63 Stat. 393; July 12, 1952, ch. 703, § 1(m), 66 Stat. 594; Pub. L. 85-800, §§ 2, 3, Aug. 28, 1958, 72 Stat. 966; Pub. L. 89-343, § 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)(B), July 18, 1984, 98 Stat. 1184.

In paragraph (1), the words “but such authorization shall be required in the same manner as heretofore” are omitted as unnecessary.

CHAPTER 33—PLANNING AND SOLICITATION

Sec.

3301. Full and open competition.

3302. Requirements for purchase of property and services pursuant to multiple award contracts.

Sec.	
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Editorial Notes

AMENDMENTS

2018—Pub. L. 115-232, div. A, title VIII, § 836(b)(10)(B)(ii), Aug. 13, 2018, 132 Stat. 1863, substituted “Preference for commercial products and commercial services” for “Preference for commercial items” in item 3307.

2013—Pub. L. 112-239, div. A, title VIII, § 851(a)(2), Jan. 2, 2013, 126 Stat. 1855, added item 3312.

§ 3301. Full and open competition

(a) IN GENERAL.—Except as provided in sections 3303, 3304(a), and 3305 of this title and except in the case of procurement procedures otherwise expressly authorized by statute, an executive agency in conducting a procurement for property or services shall—

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

(2) use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement.

(b) APPROPRIATE COMPETITIVE PROCEDURES.—

(1) USE OF SEALED BIDS.—In determining the competitive procedures appropriate under the circumstance, an executive agency shall—

(A) 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; or

(B) request competitive proposals if sealed bids are not appropriate under subparagraph (A).

(2) SEALED BID NOT REQUIRED.—Paragraph (1)(A) does not require the use of sealed-bid procedures in cases in which section 204(e)¹ of title 23 applies.

(c) EFFICIENT FULFILLMENT OF GOVERNMENT REQUIREMENTS.—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 Federal Government’s requirements.

¹ See References in Text note below.

(Pub. L. 111-350, § 3, Jan. 4, 2011, 124 Stat. 3745.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
3301(a)	41:253(a)(1).	June 30, 1949, ch. 288, title III, § 303(a), 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, title VII, § 2711(a)(1), July 18, 1984, 98 Stat. 1175; Pub. L. 103-355, title I, § 1051(1), Oct. 13, 1994, 108 Stat. 3260.
3301(b)(1)	41:253(a)(2).	June 30, 1949, ch. 288, title III, § 302(c)(2), as added Pub. L. 98-369, title VII, § 2714(a)(1)(B), July 18, 1984, 98 Stat. 1184.
3301(b)(2)	41:252(c)(2).	
3301(c)	41:253(h).	June 30, 1949, ch. 288, title III, § 303(h), as added Pub. L. 104-106, title XLI, § 4101(b)(2), Feb. 10, 1996, 110 Stat. 642.

Editorial Notes

REFERENCES IN TEXT

Section 204 of title 23, referred to in subsec. (b)(2), was repealed and a new section 204 enacted by Pub. L. 112-141, div. A, title I, § 1119(a), July 6, 2012, 126 Stat. 473, 489.

Statutory Notes and Related Subsidiaries

REGULATIONS

Pub. L. 113-291, div. A, title VIII, § 836, Dec. 19, 2014, 128 Stat. 3449, provided that: “Not later than 180 days after the date of the enactment of this Act [Dec. 19, 2014], the Administrator for Federal Procurement Policy shall prescribe regulations providing that when the Federal Government makes a purchase of services and supplies offered under the Federal Strategic Sourcing Initiative (managed by the Office of Federal Procurement Policy) but such Initiative is not used, the contract file for the purchase shall include a brief analysis of the comparative value, including price and nonprice factors, between the services and supplies offered under such Initiative and services and supplies offered under the source or sources used for the purchase.”

CONSTRUCTION

Pub. L. 98-369, div. B, title VII, § 2711(c), July 18, 1984, 98 Stat. 1181, provided that: “The amendments made by this section [see Tables for classification] do not supersede or affect the provisions of section 8(a) of the Small Business Act (15 U.S.C. 637(a)).”

PILOT PROGRAMS FOR AUTHORITY TO ACQUIRE INNOVATIVE COMMERCIAL ITEMS USING GENERAL SOLICITATION COMPETITIVE PROCEDURES

Pub. L. 114-328, div. A, title VIII, § 880, Dec. 23, 2016, 130 Stat. 2313, as amended by Pub. L. 115-232, div. A, title VIII, § 836(f)(10), Aug. 13, 2018, 132 Stat. 1872; Pub. L. 117-263, div. G, title LXXII, § 7227(a), Dec. 23, 2022, 136 Stat. 3675, provided that:

“(a) AUTHORITY.—

“(1) IN GENERAL.—The head of an agency may carry out a pilot program, to be known as a ‘commercial solutions opening pilot program’, under which innovative commercial products may be acquired through a competitive selection of proposals resulting from a general solicitation and the peer review of such proposals.

“(2) HEAD OF AN AGENCY.—In this section, the term ‘head of an agency’ means the following:

“(A) The Secretary of Homeland Security.

“(B) The Administrator of General Services.

“(3) APPLICABILITY OF SECTION.—This section applies to the following agencies:

“(A) The Department of Homeland Security.

“(B) The General Services Administration.

“(b) TREATMENT AS COMPETITIVE PROCEDURES.—Use of general solicitation competitive procedures for the pilot program under subsection (a) shall be considered, in the case of the Department of Homeland Security and the General Services Administration, to be use of competitive procedures for purposes of division C of [subtitle I of] title 41, United States Code (as defined in section 152 of such title).

“(c) LIMITATION.—The head of an agency may not enter into a contract under the pilot program for an amount in excess of \$25,000,000.

“(d) GUIDANCE.—The head of an agency shall issue guidance for the implementation of the pilot program under this section within that agency. Such guidance shall be issued in consultation with the Office of Management and Budget and shall be posted for access by the public.

“(e) REPORT REQUIRED.—

“(1) IN GENERAL.—Not later than three years after the date of the enactment of this Act [Dec. 23, 2016], the head of an agency shall submit to the congressional committees specified in paragraph (3) a report on the activities the agency carried out under the pilot program.

“(2) ELEMENTS OF REPORT.—Each report under this subsection shall include the following:

“(A) An assessment of the impact of the pilot program on competition.

“(B) A comparison of acquisition timelines for—

“(i) procurements made using the pilot program; and

“(ii) procurements made using other competitive procedures that do not use general solicitations.

“(C) A recommendation on whether the authority for the pilot program should be made permanent.

“(3) SPECIFIED CONGRESSIONAL COMMITTEES.—The congressional committees specified in this paragraph are the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Oversight and Government Reform [now Committee on Oversight and Reform] of the House of Representatives.

“(f) DEFINITIONS.—In this section—

“(1) the term ‘commercial product’—

“(A) has the meaning given the term ‘commercial item’ in section 2.101 of the Federal Acquisition Regulation; and

“(B) includes a commercial product or a commercial service, as defined in sections 103 and 103a, respectively, of title 41, United States Code; and

“(2) the term ‘innovative’ means—

“(A) any new technology, process, or method, including research and development; or

“(B) any new application of an existing technology, process, or method.

“(g) TERMINATION.—The authority to enter into a contract under a pilot program under this section terminates on September 30, 2027.”

GOVERNMENTWIDE SOFTWARE PURCHASING PROGRAM

Pub. L. 113-291, div. A, title VIII, § 837, Dec. 19, 2014, 128 Stat. 3450, provided that:

“(a) IN GENERAL.—The Administrator of General Services shall identify and develop a strategic sourcing initiative to enhance Governmentwide acquisition, shared use, and dissemination of software, as well as compliance with end user license agreements.

“(b) GOVERNMENTWIDE USER LICENSE AGREEMENT.—The Administrator, in developing the initiative under subsection (a), shall allow for the purchase of a license agreement that is available for use by all Executive agencies (as defined in section 105 of title 5, United States Code) as one user to the maximum extent practicable and as appropriate.”

§ 3302. Requirements for purchase of property and services pursuant to multiple award contracts

(a) DEFINITIONS.—In this section:

(1) EXECUTIVE AGENCY.—The term “executive agency” has the same meaning given in section 133 of this title.

(2) INDIVIDUAL PURCHASE.—The term “individual purchase” means a task order, delivery order, or other purchase.

(3) MULTIPLE AWARD CONTRACT.—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 3012(3) of title 10;

(B) a multiple award task order contract that is entered into under the authority of chapter 245 of title 10 or chapter 41 of this title; 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) SOLE SOURCE TASK OR DELIVERY ORDER.—The term “sole source task or delivery order” means any order that does not follow the competitive procedures in paragraph (2) or (3) of subsection (c).

(b) REGULATIONS REQUIRED.—The Federal Acquisition Regulation shall require enhanced competition in the purchase of property and services by all executive agencies pursuant to multiple award contracts.

(c) CONTENT OF REGULATIONS.—

(1) IN GENERAL.—The regulations required by subsection (b) shall provide 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) to (4) of section 4106(c) of this title or section 3406(c) of title 10 applies to the 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) 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 the 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 the property or services under a multiple award contract as described in subsection (a)(3)(A) 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.

(d) PUBLIC NOTICE REQUIREMENTS RELATED TO SOLE SOURCE TASK OR DELIVERY ORDERS.—

(1) PUBLIC NOTICE REQUIRED.—The Federal Acquisition Regulation shall 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 the orders are placed, except in the event of extraordinary circumstances or classified orders; and

(B) disclose the determination required by subsection (c)(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 3204(e)(1) of title 10 and section 3304(e)(1) of this title, 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.

(e) APPLICABILITY.—The regulations required by subsection (b) shall apply to all individual purchases of property or services that are made under multiple award contracts on or after the effective date of the regulations, without regard to whether the multiple award contracts were entered into before, on, or after the effective date.

(f) COMMERCIAL LEASING SERVICES.—The regulations required by subsection (b) shall not apply to individual purchases for commercial leasing services that are made on a no cost basis and made under a multiple award contract awarded in accordance with the requirements for full and open competition.

(Pub. L. 111-350, § 3, Jan. 4, 2011, 124 Stat. 3746; Pub. L. 111-383, div. A, title X, § 1075(e)(14), Jan. 7, 2011, 124 Stat. 4375; Pub. L. 116-92, div. A, title VIII, § 893(b), Dec. 20, 2019, 133 Stat. 1540; Pub. L. 117-81, div. A, title XVII, § 1702(h)(12), Dec. 27, 2021, 135 Stat. 2158.)

AMENDMENT NOT SHOWN IN TEXT

This section was derived from Pub. L. 110-417, [div. A], title VIII, § 863(a)-(e), Oct. 14, 2008, 122 Stat. 4547, which was set out as a note under

section 253h of former Title 41, Public Contracts, prior to being repealed and reenacted by Pub. L. 111-350, §§ 3, 7(b), Jan. 4, 2011, 124 Stat. 3677, 3855. Section 863(b)(3)(A) of Pub. L. 110-417 was restated as subsec. (c)(3)(A) of this section and subsequently amended by Pub. L. 111-383, div. A, title X, § 1075(e)(14), Jan. 7, 2011, 124 Stat. 4375. For applicability of that amendment to this section, see section 6(a) of Pub. L. 111-350, set out as a Transitional and Savings Provisions note preceding section 101 of this title. Section 863(b)(3)(A) of Pub. L. 110-417 was amended by striking “subsection (d)(2)(A)” and inserting “subsection (d)(3)(A)”. Such reference did not appear in the text of subsec. (c)(3)(A) as enacted. See Historical and Revision Notes below.

REPEAL OF SUBSECTION (f)

Pub. L. 116-92, div. A, title VIII, § 893(b)(2), Dec. 20, 2019, 133 Stat. 1540 provided that, effective Dec. 31, 2025, subsection (f) of this section is repealed. See 2019 Amendment note below.

HISTORICAL AND REVISION NOTES

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
3302	41:253h note.	Pub. L. 110-417, [div. A], title VIII, § 863(a)-(e), Oct. 14, 2008, 122 Stat. 4547.

In subsection (b), the words “Not later than one year after the date of the enactment of this Act” are omitted because of section 6(f) of the bill. The words “shall require” are substituted for “shall be amended to require” to reflect the permanence of the provision.

In subsection (c)(2)(A), the words “except as provided in paragraph (3)” are omitted as unnecessary.

In subsection (c)(3)(A), “subsection (a)(3)(A)” is substituted for “subsection (d)(2)(A)” for consistency in the revised title and to correct an error in the law.

In subsection (d)(1), the words “Not later than one year after the date of the enactment of this Act” are omitted because of section 6(f) of the bill. The words “shall require” are substituted for “shall be amended to require” to reflect the permanence of the provision.

Editorial Notes

AMENDMENTS

2021—Subsec. (a)(3). Pub. L. 117-81, § 1702(h)(12)(A), substituted “section 3012(3)” for “section 2302(2)(C)” in subpar. (A) and “chapter 245 of title 10” for “sections 2304a to 2304d of title 10,” in subpar. (B).

Subsec. (c)(1)(A)(i). Pub. L. 117-81, § 1702(h)(12)(B), substituted “section 3406(c)” for “section 2304c(b)”.

Subsec. (d)(1)(B). Pub. L. 117-81, § 1702(h)(12)(C), substituted “section 3204(e)(1)” for “section 2304(f)(1)”.

2019—Subsec. (f). Pub. L. 116-92, § 893(b)(2), struck out subsec. (f). Text read as follows: “The regulations required by subsection (b) shall not apply to individual purchases for commercial leasing services that are made on a no cost basis and made under a multiple award contract awarded in accordance with the requirements for full and open competition.”

Pub. L. 116-92, § 893(b)(1), added subsec. (f).

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 2019 AMENDMENT

Pub. L. 116-92, div. A, title VIII, § 893(b)(2), Dec. 20, 2019, 133 Stat. 1540, provided that the amendment made by section 893(b)(2) is effective Dec. 31, 2025.

INDIVIDUAL ACQUISITION FOR COMMERCIAL LEASING SERVICES

Pub. L. 115-232, div. A, title VIII, § 877, Aug. 13, 2018, 132 Stat. 1907, which related to individual acquisition

for commercial leasing services not construed as purchase of property or services under certain conditions, was repealed by Pub. L. 116-92, div. A, title VIII, § 893(a), Dec. 20, 2019, 133 Stat. 1540.

§ 3303. Exclusion of particular source or restriction of solicitation to small business concerns

(a) EXCLUSION OF PARTICULAR SOURCE.—

(1) CRITERIA FOR EXCLUSION.—An executive agency may provide for the procurement of property or services covered by section 3301 of this title using competitive procedures but excluding a particular source to establish or maintain an alternative source of supply for that property or service if the agency head determines that to do so would—

(A) increase or maintain competition and likely result in reduced overall cost for the procurement, or for an anticipated procurement, of the property or services;

(B) 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) 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) ensure the continuous availability of a reliable source of supply of the property or service;

(E) satisfy projected needs for the property or service determined on the basis of a history of high demand for the property or service; or

(F) satisfy a critical need for medical, safety, or emergency supplies.

(2) DETERMINATION FOR CLASS DISALLOWED.—A determination under paragraph (1) may not be made for a class of purchases or contracts.

(b) EXCLUSION OF OTHER THAN SMALL BUSINESS CONCERNS.—An executive agency may provide for the procurement of property or services covered by section 3301 of this title using competitive procedures, but excluding other than small business concerns in furtherance of sections 9 and 15 of the Small Business Act (15 U.S.C. 638, 644).

(c) NONAPPLICATION OF JUSTIFICATION AND APPROVAL REQUIREMENTS.—A contract awarded pursuant to the competitive procedures referred to in subsections (a) and (b) is not subject to the justification and approval required by section 3304(e)(1) of this title.

(Pub. L. 111-350, § 3, Jan. 4, 2011, 124 Stat. 3747.)

HISTORICAL AND REVISION NOTES

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
3303	41:253(b).	June 30, 1949, ch. 288, title III, § 303(b), 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, title VII, § 2711(a)(1), July 18, 1984, 98 Stat. 1175; Pub. L. 98-577, title V, § 504(a)(1), Oct. 30, 1984, 98 Stat. 3086; Pub. L. 103-355, title I, § 1052, Oct. 13, 1994, 108 Stat. 3260.

§ 3304. Use of noncompetitive procedures

(a) WHEN NONCOMPETITIVE PROCEDURES MAY BE USED.—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 Federal 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—

(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;

(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 a court, administrative tribunal, or agency, whether or not the expert is expected to testify; or

(D) 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 Federal Government and a foreign government or an 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 that government, have the effect of requiring the use of procedures other than competitive procedures;

(5) subject to section 3105 of this title, 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 product 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 (who may not delegate the authority under this paragraph)—

(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 Congress in writing of that determination not less than 30 days before the award of the contract.

(b) **PROPERTY OR SERVICES DEEMED AVAILABLE FROM ONLY ONE SOURCE.**—For the purposes of subsection (a)(1), in the case of—

(1) a contract for property or services to be awarded on the basis of acceptance of an unsolicited research proposal, the property or services are deemed 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 Federal Government and does not resemble the substance of a pending competitive procurement; or

(2) a follow-on contract for the continued development or production of a major system or highly specialized equipment, the property may be deemed to be available only from the original source and may be procured through procedures other than competitive procedures when it is likely that award to a source other than the original source would result in—

(A) substantial duplication of cost to the Federal Government that is not expected to be recovered through competition; or

(B) unacceptable delay in fulfilling the executive agency's needs.

(c) **PROPERTY OR SERVICES NEEDED WITH UNUSUAL AND COMPELLING URGENCY.**—

(1) **ALLOWABLE CONTRACT PERIOD.**—The contract period of a contract described in paragraph (2) that is entered into by an executive agency pursuant to the authority provided under subsection (a)(2)—

(A) 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

(B) may not exceed one year unless the head of the executive agency entering into the contract determines that exceptional circumstances apply.

(2) **APPLICABILITY OF ALLOWABLE CONTRACT PERIOD.**—This subsection applies to any contract in an amount greater than the simplified acquisition threshold.

(d) **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 para-

graph (2) or (6) of subsection (a) shall request offers from as many potential sources as is practicable under the circumstances.

(e) **JUSTIFICATION FOR USE OF NONCOMPETITIVE PROCEDURES.**—

(1) **PREREQUISITES FOR AWARDED CONTRACT.**—Except as provided in paragraphs (3) and (4), 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 those procedures in writing and certifies the accuracy and completeness of the justification;

(B) the justification is approved, in the case of a contract for an amount—

(i) exceeding \$500,000 but equal to or less than \$10,000,000, by the advocate for competition for the procuring activity (without further delegation) or by an official referred to in clause (ii) or (iii);

(ii) exceeding \$10,000,000 but equal to or less than \$50,000,000, by the head of the procuring activity or by 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 which the individual is entitled to receive the daily equivalent of the maximum annual rate of basic pay payable for level IV of the Executive Schedule (or in a comparable or higher position under another schedule); or

(iii) exceeding \$50,000,000, by the senior procurement executive of the agency designated pursuant to section 1702(c) of this title (without further delegation); and

(C) any required notice has been published with respect to the contract pursuant to section 1708 of this title and the executive agency has considered all bids or proposals received in response to that notice.

(2) **ELEMENTS OF JUSTIFICATION.**—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 any sources that expressed in writing an interest in the procurement; and

(F) a statement of any actions the agency may take to remove or overcome a barrier to competition before a subsequent procurement for those needs.

(3) **JUSTIFICATION ALLOWED AFTER CONTRACT AWARDED.**—In the case of a procurement permitted by subsection (a)(2), the justification and approval required by paragraph (1) may be made after the contract is awarded.

(4) **JUSTIFICATION NOT REQUIRED.**—The justification and approval required by paragraph (1) are not required if—

(A) a statute expressly requires that the procurement be made from a specified source;

(B) the agency's need is for a brand-name commercial product for authorized resale;

(C) the procurement is permitted by subsection (a)(7); or

(D) the procurement is conducted under chapter 85 of this title or section 8(a) of the Small Business Act (15 U.S.C. 637(a)).

(5) RESTRICTIONS ON EXECUTIVE AGENCIES.—

(A) CONTRACTS AND PROCUREMENT OF PROPERTY OR SERVICES.—In no case may an executive agency—

(i) 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 available to the agency for procurement functions; or

(ii) procure property or services from another executive agency unless the other executive agency complies fully with the requirements of this division in its procurement of the property or services.

(B) ADDITIONAL RESTRICTION.—The restriction set out in subparagraph (A)(ii) is in addition to any other restriction provided by law.

(f) PUBLIC AVAILABILITY OF JUSTIFICATION AND APPROVAL REQUIRED FOR USING NONCOMPETITIVE PROCEDURES.—

(1) TIME REQUIREMENT.—

(A) WITHIN 14 DAYS AFTER CONTRACT AWARD.—Except as provided in subparagraph (B), in the case of a procurement permitted by subsection (a), 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 (e)(1) with respect to the procurement.

(B) WITHIN 30 DAYS AFTER CONTRACT AWARD.—In the case of a procurement permitted by subsection (a)(2), subparagraph (A) shall be applied by substituting “30 days” for “14 days”.

(2) AVAILABILITY ON WEBSITES.—The documents referred to in subparagraph (A) of paragraph (1) shall be made available on the website of the agency and through a Government-wide website selected by the Administrator.

(3) EXCEPTION TO AVAILABILITY AND APPROVAL REQUIREMENT.—This subsection does not require the public availability of information that is exempt from public disclosure under section 552(b) of title 5.

(Pub. L. 111-350, § 3, Jan. 4, 2011, 124 Stat. 3748; Pub. L. 115-232, div. A, title VIII, § 836(b)(7), Aug. 13, 2018, 132 Stat. 1861.)

HISTORICAL AND REVISION NOTES

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
3304(a)	41:253(c), (d)(2).	June 30, 1949, ch. 288, title III, § 303(c)-(f), (j), 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, title VII, § 2711(a)(1), July 18, 1984, 98 Stat. 1176; Pub. L. 98-577, title V, § 504(a)(2), Oct. 30, 1984, 98 Stat. 3086; Pub. L. 99-145, title IX, § 961(a)(2), title XIII, § 1304(c)(2), Nov. 8, 1985, 99 Stat. 703, 742; Pub. L. 103-355, title I, §§ 1053, 1055(a), title VII, § 7203(b)(1)(A), Oct. 13, 1994, 108 Stat. 3261, 3265, 3380; Pub. L. 104-106, title XLI, § 4102(b), title XLIII, § 4321(e)(2), Feb. 10, 1996, 110 Stat. 643, 674; Pub. L. 104-320, §§ 7(a)(2), 11(c)(2), Oct. 19, 1996, 110 Stat. 3871, 3873; 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.
3304(b)	41:253(d)(1).	
3304(c)	41:253(d)(3).	
3304(d)	41:253(e).	
3304(e)(1)	41:253(f)(1).	
3304(e)(2)	41:253(f)(3).	
3304(e)(3), (4).	41:253(f)(2).	
3304(e)(5)	41:253(f)(4).	
3304(f)	41:253(j).	

In subsection (a)(7), the words “(who may not delegate the authority under this paragraph)” are substituted for 41:253(d)(2) to move the restriction closer to where it applies.

In subsection (e)(1)(B)(i), the words “advocate for competition” are substituted for “competition advocate” for consistency with section 1705 of the revised title.

In subsection (e)(1)(B)(ii), the reference to section 5376 of title 5 is substituted for the reference to grade GS-16 or above under the General Schedule because of section 529 [title I, § 101(c)(1)] of the Treasury, Postal Service and General Government Appropriations Act, 1991 (Public Law 101-509, 104 Stat. 1442, 5 U.S.C. 5376 note).

In subsection (e)(5)(B), the words “and not in lieu of” are omitted as unnecessary.

In subsection (f)(2), the words “referred to in subparagraph (A) of paragraph (1)” are added for clarity.

SENATE REVISION AMENDMENT

In subsec. (e)(1)(B)(ii), “for level IV of the Executive Schedule” substituted for “under section 5376 of title 5” by S. Amdt. 4726 (111th Cong.). See 156 Cong. Rec. 18682 (2010).

Editorial Notes

AMENDMENTS

2018—Subsecs. (a)(5), (e)(4)(B). Pub. L. 115-232 substituted “commercial product” for “commercial item”.

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 2018 AMENDMENT

Amendment by Pub. L. 115-232 effective Jan. 1, 2020, subject to a savings provision, see section 836(h) of Pub. L. 115-232, set out as an Effective Date of 2018 Amendment; Savings Provision note under section 453b of Title 6, Domestic Security.

GENERAL SERVICES ADMINISTRATION: NOTIFICATION OF USE OF NONCOMPETITIVE PROCEDURES IN RESPONSE TO PUBLIC HEALTH EMERGENCY DECLARATION

Pub. L. 116-136, div. B, title V, § 15003, Mar. 27, 2020, 134 Stat. 532, provided that: “Notwithstanding 41 U.S.C.

3304(a)(7)(B), the Administrator, when making a determination that use of noncompetitive procedures is necessary for public interest in accordance with 41 U.S.C. 3304(a)(7)(A) in response to a public health emergency declaration by the Secretary of Health and Human Services under section 319 of the Public Health Service Act (42 U.S.C. 247(d) [247d]), is required to notify Congress in writing of that determination not less than 3 days prior to the award of the contract.”

JUSTIFICATION AND APPROVAL OF SOLE-SOURCE CONTRACTS

Pub. L. 111–84, div. A, title VIII, §811, Oct. 28, 2009, 123 Stat. 2405, as amended by Pub. L. 117–81, div. A, title XVII, §1702(i)(3), Dec. 27, 2021, 135 Stat. 2159, 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 3204(e)(1)(C) and 3204(f) 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)) [now 41 U.S.C. 3304(e)(1)(C) and 3304(f)], 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 3204(e)(4)(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 [former] 41 U.S.C. 253(f)(2)(D)(ii) [see 41 U.S.C. 3304(e)(4)(D)].

“(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 3004 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)) [now 41 U.S.C. 151].

“(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 3204(e)(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)) [now 41 U.S.C. 3304(e)(1)(B)].”

§ 3305. Simplified procedures for small purchases

(a) AUTHORIZATION.—To promote efficiency and economy in contracting and to avoid unnecessary burdens for agencies and contractors, the Federal Acquisition Regulation shall provide for special simplified procedures for purchases of property and services for amounts—

(1) not greater than the simplified acquisition threshold; and

(2) greater than the simplified acquisition threshold but not greater than \$5,000,000 for 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 products or commercial services.

(b) LEASEHOLD INTERESTS IN REAL PROPERTY.—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. The rental rate under a multiyear lease does 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.

(c) PROHIBITION ON DIVIDING CONTRACTS.—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 to use the simplified procedures required by subsection (a).

(d) PROMOTION OF COMPETITION.—In using the simplified procedures, an executive agency shall promote competition to the maximum extent practicable.

(e) COMPLIANCE WITH SPECIAL REQUIREMENTS OF FEDERAL ACQUISITION REGULATION.—An executive agency shall comply with the Federal Acquisition Regulation provisions referred to in section 1901(e) of this title.

(Pub. L. 111–350, §3, Jan. 4, 2011, 124 Stat. 3752; Pub. L. 115–232, div. A, title VIII, §836(b)(8), Aug. 13, 2018, 132 Stat. 1861.)

HISTORICAL AND REVISION NOTES

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
3305	41:253(g).	June 30, 1949, ch. 288, title III, §303(g), 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, title VII, §2711(a)(1), July 18, 1984, 98 Stat. 1178; Pub. L. 99–145, title XIII, §1304(c)(3), Nov. 8, 1985, 99 Stat. 742; Pub. L. 101–510, title VIII, §806(c), Nov. 5, 1990, 104 Stat. 1592; Pub. L. 103–355, title I, §1051(2), title IV, §4402(a), Oct. 13, 1994, 108 Stat. 3260, 3348; Pub. L. 104–106, title XLII, §4202(b)(1), Feb. 10, 1996, 110 Stat. 653; Pub. L. 105–85, title VIII, §850(d)(4)(B), Nov. 18, 1997, 111 Stat. 1850.

Editorial Notes**AMENDMENTS**

2018—Subsec. (a)(2). Pub. L. 115-232 substituted “commercial products or commercial services” for “commercial items”.

Statutory Notes and Related Subsidiaries**EFFECTIVE DATE OF 2018 AMENDMENT**

Amendment by Pub. L. 115-232 effective Jan. 1, 2020, subject to a savings provision, see section 836(h) of Pub. L. 115-232, set out as an Effective Date of 2018 Amendment; Savings Provision note under section 453b of Title 6, Domestic Security.

§ 3306. Planning and solicitation requirements**(a) PLANNING AND SPECIFICATIONS.—**

(1) **PREPARING FOR PROCUREMENT.**—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 the manner necessary to obtain full and open competition with due regard to the nature of the property or services to be acquired.

(2) **REQUIREMENTS OF SPECIFICATIONS.**—Each solicitation under this division shall include specifications that—

(A) consistent with this division, permit full and open competition; and

(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) **TYPES OF SPECIFICATIONS.**—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 those needs. Subject to those 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), each solicitation for sealed bids or competitive proposals (other than for a procurement for commercial products or commercial services 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 that 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 the award made after, discussions with the offerors, or a statement that the proposals are intended to be evaluated, and the 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 GENERAL.**—In prescribing the evaluation factors to be included in each solicitation for competitive proposals, an executive agency shall—

(A) establish clearly 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) except as provided in paragraph (3), include cost or price to the Federal Government as an evaluation factor that must be considered in the evaluation of proposals; and

(C) except as provided in paragraph (3), 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) **RESTRICTION ON IMPLEMENTING REGULATIONS.**—Regulations implementing paragraph (1)(C) 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.

(3) **EXCEPTIONS FOR CERTAIN INDEFINITE DELIVERY, INDEFINITE QUANTITY MULTIPLE-AWARD CONTRACTS AND CERTAIN FEDERAL SUPPLY SCHEDULE CONTRACTS FOR SERVICES ACQUIRED ON AN HOURLY RATE.**—If an executive agency issues a solicitation for one or more contracts for services to be acquired on an hourly rate basis under the authority of sections 4103 and 4106 of this title or section 152(3) of this title and section 501(b) of title 40 and the executive agency intends to make a contract award to each qualifying offeror and the contract or contracts will feature individually competed task or delivery orders based on hourly rates—

(A) the contracting officer need not consider price as an evaluation factor for contract award; and

(B) if, pursuant to subparagraph (A), price is not considered as an evaluation factor for contract award, cost or price to the Federal Government shall be considered in conjunction with the issuance pursuant to sections 4106(c) and 152(3) of this title of any task or delivery order under any contract resulting from the solicitation.

(4) DEFINITION.—In paragraph (3), the term “qualifying offeror” means an offeror that—

(A) is determined to be a responsible source;

(B) submits a proposal that conforms to the requirements of the solicitation;

(C) meets all technical requirements; and

(D) is otherwise eligible for award.

(d) ADDITIONAL INFORMATION IN SOLICITATION.—This section does not prohibit 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) LIMITATION ON 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 the 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.

(f) AUTHORIZATION OF TELECOMMUTING FOR FEDERAL CONTRACTORS.—

(1) DEFINITION.—In this subsection, the term “executive agency” has the meaning given that term in section 133 of this title.

(2) FEDERAL ACQUISITION REGULATION TO ALLOW TELECOMMUTING.—The Federal Acquisition Regulation issued in accordance with sections 1121(b) and 1303(a)(1) of this title shall permit telecommuting by employees of Federal Government contractors in the performance of contracts entered into with executive agencies.

(3) SCOPE OF ALLOWANCE.—The Federal Acquisition Regulation at a minimum shall provide that a solicitation for the acquisition of property or services may not set forth any requirement or evaluation criteria that would—

(A) render an offeror ineligible to enter into a contract on the basis of the inclusion of a plan of the offeror to allow 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 telecommuting is allowed and documents in writing the basis for the determination; or

(B) reduce the scoring of an offer on the basis of the inclusion in the offer of a plan of the offeror to allow 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 allowed and documents in writing the basis for the determination.

(Pub. L. 111–350, §3, Jan. 4, 2011, 124 Stat. 3752; Pub. L. 115–232, div. A, title VIII, §§836(b)(9), 876, Aug. 13, 2018, 132 Stat. 1861, 1907.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
3306(a)–(e) ..	41:253a.	June 30, 1949, ch. 288, title III, §303A, as added Pub. L. 98–369, title VII, §2711(a)(2), July 18, 1984, 98 Stat. 1178; 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, title XLII, §4202(b)(2), Feb. 10, 1996, 110 Stat. 653.
3306(f)	41:253a note.	Pub. L. 108–136, title XIV, §1428, Nov. 24, 2003, 117 Stat. 1670.

In subsection (f)(2), the words “Not later than 180 days after the date of the enactment of this Act, the Federal Acquisition Regulatory Council shall amend” are omitted as obsolete.

Editorial Notes

AMENDMENTS

2018—Subsec. (b). Pub. L. 115–232, §836(b)(9), substituted “commercial products or commercial services” for “commercial items” in introductory provisions.

Subsec. (c)(1)(B), (C). Pub. L. 115–232, §876(1), inserted “except as provided in paragraph (3),” after subpar. designation.

Subsec. (c)(3), (4). Pub. L. 115–232, §876(2), added pars. (3) and (4).

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 2018 AMENDMENT

Amendment by section 836(b)(9) of Pub. L. 115–232 effective Jan. 1, 2020, subject to a savings provision, see section 836(h) of Pub. L. 115–232, set out as an Effective Date of 2018 Amendment; Savings Provision note under section 453b of Title 6, Domestic Security.

§ 3307. Preference for commercial products and commercial services

(a) RELATIONSHIP OF PROVISIONS OF LAW TO PROCUREMENT OF COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES.—

(1) THIS DIVISION.—Unless otherwise specifically provided, all other provisions in this division also apply to the procurement of commercial products and commercial services.

(2) LAWS LISTED IN FEDERAL ACQUISITION REGULATION.—A contract for the procurement of a commercial product or commercial service entered into by the head of an executive agency is not subject to a law properly listed in the Federal Acquisition Regulation pursuant to section 1906 of this title.

(b) 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) those requirements are defined so that commercial services or commercial products or, to the extent that commercial products suitable to meet the executive agency's needs are not available, nondevelopmental items other than commercial products may be procured to fulfill those requirements; and

(3) offerors of commercial services, commercial products, and nondevelopmental items other than commercial products are provided an opportunity to compete in any procurement to fill those requirements.

(c) IMPLEMENTATION.—The head of each executive agency shall ensure that procurement officials in that executive agency, to the maximum extent practicable—

(1) acquire commercial services or commercial products or nondevelopmental items other than commercial products to meet the needs of the executive agency;

(2) require that prime contractors and subcontractors at all levels under contracts of the executive agency incorporate commercial services or commercial products or nondevelopmental items other than commercial products 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 services or commercial products or, to the extent that commercial products suitable to meet the executive agency's needs are not available, nondevelopmental items other than commercial products;

(4) state specifications in terms that enable and encourage bidders and offerors to supply commercial services or commercial products or, to the extent that commercial products suitable to meet the executive agency's needs are not available, nondevelopmental items other than commercial products 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 products and commercial services; and

(6) require training of appropriate personnel in the acquisition of commercial products and commercial services.

(d) MARKET RESEARCH.—

(1) WHEN TO BE USED.—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) USE OF RESULTS.—The head of an executive agency shall use the results of market research to determine whether commercial services or commercial products or, to the extent that commercial products suitable to meet the executive agency's needs are not available, nondevelopmental items other than commercial products are 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) ONLY MINIMUM INFORMATION REQUIRED TO BE SUBMITTED.—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).

(4) DOCUMENTATION.—The head of the agency shall document the results of market research in a manner appropriate to the size and complexity of the acquisition.

(e) REGULATIONS.—

(1) IN GENERAL.—The Federal Acquisition Regulation shall provide regulations to implement this section, sections 102, 103, 103a, 104, 105, and 110 of this title, and chapter 247 of title 10.

(2) CONTRACT CLAUSES.—

(A) DEFINITION.—In this paragraph, the term "subcontract" includes a transfer of commercial products or commercial services between divisions, subsidiaries, or affiliates of a contractor or subcontractor.

(B) LIST OF CLAUSES TO BE INCLUDED.—The regulations prescribed under paragraph (1) shall contain a list of contract clauses to be included in contracts for the acquisition of end items that are commercial products. To the maximum extent practicable, the list shall include only those contract clauses that are—

(i) required to implement provisions of law or executive orders applicable to acquisitions of commercial products, commercial components, or commercial services; or

(ii) determined to be consistent with standard commercial practice.

(C) REQUIREMENTS OF PRIME CONTRACTOR.—The regulations shall provide that the Federal Government shall not require a prime contractor to apply to any of its divisions, subsidiaries, affiliates, subcontractors, or suppliers that are furnishing commercial products or commercial services any contract clause except those that are—

(i) required to implement provisions of law or executive orders applicable to subcontractors furnishing commercial products, commercial components, or commercial services; or

(ii) determined to be consistent with standard commercial practice.

(D) CLAUSES THAT MAY BE USED IN A CONTRACT.—To the maximum extent practicable, only the contract clauses listed pursuant to subparagraph (B) may be used in a contract, and only the contract clauses referred to in subparagraph (C) may be required to be used in a subcontract, for the acquisition of commercial products, commercial components, or commercial services by or for an executive agency.

(E) WAIVER OF CONTRACT CLAUSES.—The Federal Acquisition Regulation shall provide

standards and procedures for waiving the use of contract clauses required pursuant to subparagraph (B), other than those required by law, including standards for determining the cases in which a waiver is appropriate.

(3) MARKET ACCEPTANCE.—

(A) REQUIREMENT OF OFFERORS.—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—

(i) have achieved commercial market acceptance or been satisfactorily supplied to an executive agency under current or recent contracts for the same or similar requirements; and

(ii) otherwise meet the item description, specifications, or other criteria prescribed in the public notice and solicitation relating to the contract.

(B) REGULATION TO PROVIDE GUIDANCE ON CRITERIA.—The Federal Acquisition Regulation shall provide guidance to ensure that the criteria for determining commercial market acceptance include the consideration of—

(i) the minimum needs of the executive agency concerned; and

(ii) the entire relevant commercial market, including small businesses.

(4) PROVISIONS RELATING TO TYPES OF CONTRACTS.—

(A) TYPES OF CONTRACTS THAT MAY BE USED.—The Federal Acquisition Regulation shall include, for acquisitions of commercial products or commercial services—

(i) a requirement that firm, fixed price contracts or fixed price with economic price adjustment contracts be used to the maximum extent practicable;

(ii) a prohibition on use of cost type contracts; and

(iii) subject to subparagraph (B), authority for use of a time-and-materials or labor-hour contract for the procurement of commercial services that are commonly sold to the general public through those contracts and are purchased by the procuring agency on a competitive basis.

(B) WHEN TIME-AND-MATERIALS OR LABOR-HOUR CONTRACT MAY BE USED.—A time-and-materials or labor-hour contract may be used pursuant to the authority referred to in subparagraph (A)(iii)—

(i) only for a procurement of commercial services in a category of commercial services described in subparagraph (C); and

(ii) only if the contracting officer for the 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 a subsequent change in the ceiling price only on a determination, documented in the contract file, that it is in the best interest of the pro-

curing agency to change the ceiling price.

(C) CATEGORIES OF COMMERCIAL SERVICES.—The categories of commercial services referred to in subparagraph (B) are as follows:

(i) Commercial services procured for support of a commercial product, as described in section 103a(1) of this title.

(ii) Any other category of commercial services that the Administrator for Federal Procurement Policy designates in the Federal Acquisition Regulation for the purposes of this subparagraph on the basis that—

(I) the commercial services in the 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 the category.

(5) CONTRACT QUALITY REQUIREMENTS.—Regulations prescribed under paragraph (1) shall include provisions that—

(A) allow, to the maximum extent practicable, a contractor under a commercial products acquisition to use the existing quality assurance system of the contractor as a substitute for compliance with an otherwise applicable requirement for the Federal Government to inspect or test the commercial products before the contractor's tender of those products for acceptance by the Federal Government;

(B) require that, to the maximum extent practicable, the executive agency take advantage of warranties (including extended warranties) offered by offerors of commercial products and use those warranties for the repair and replacement of commercial products; and

(C) set forth guidance regarding the use of past performance of commercial products and sources as a factor in contract award decisions.

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3754; Pub. L. 115-232, div. A, title VIII, §836(b)(10)(A), (B)(i), Aug. 13, 2018, 132 Stat. 1861-1863; Pub. L. 116-92, div. A, title VIII, §818(b), Dec. 20, 2019, 133 Stat. 1488; Pub. L. 117-81, div. A, title XVII, §1702(h)(13), Dec. 27, 2021, 135 Stat. 2158.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
3307(a)	41:264.	June 30, 1949, ch. 288, title III, §§314, 314B, as added Pub. L. 103-355, title VIII, §§8201, 8203, Oct. 13, 1994, 108 Stat. 3394.
3307(b)	41:264b(a).	Pub. L. 103-355, title VIII, §8002, Oct. 13, 1994, 108 Stat. 3386; Pub. L. 108-136, title XIV, 1432, Nov. 24, 2003, 117 Stat. 1672.
3307(c)	41:264b(b).	
3307(d)	41:264b(c).	
3307(e)	41:264 note.	

Subsection (a)(1) is substituted for 41 U.S.C. 264(a) for clarity.

In subsection (e), the text of section 8002(f) of the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355, 41 U.S.C. 264 note) is omitted as obsolete.

In subsection (e)(2)(B)(i) and (C)(i), the words “as the case may be” are omitted as unnecessary.

Editorial Notes

AMENDMENTS

2021—Subsec. (e)(1). Pub. L. 117-81 substituted “chapter 247” for “chapter 140”.

2019—Subsec. (d)(4). Pub. L. 116-92 added par. (4).

2018—Pub. L. 115-232, § 836(b)(10)(B)(i), substituted “Preference for commercial products and commercial services” for “Preference for commercial items” in section catchline.

Subsec. (a). Pub. L. 115-232, § 836(b)(10)(A)(i)(I), substituted “Commercial Products and Commercial Services” for “Commercial Items” in heading.

Subsec. (a)(1). Pub. L. 115-232, § 836(b)(10)(A)(i)(II), substituted “commercial products and commercial services” for “commercial items”.

Subsec. (a)(2). Pub. L. 115-232, § 836(b)(10)(A)(i)(III), substituted “a commercial product or commercial service” for “a commercial item”.

Subsec. (b)(2). Pub. L. 115-232, § 836(b)(10)(A)(ii)(I), substituted “commercial services or commercial products or, to the extent that commercial products suitable to meet the executive agency’s needs are not available, nondevelopmental items other than commercial products” for “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”.

Subsec. (b)(3). Pub. L. 115-232, § 836(b)(10)(A)(ii)(II), substituted “commercial services, commercial products, and nondevelopmental items other than commercial products” for “commercial items and nondevelopmental items other than commercial items”.

Subsec. (c)(1), (2). Pub. L. 115-232, § 836(b)(10)(A)(iii)(I), substituted “commercial services or commercial products or nondevelopmental items other than commercial products” for “commercial items or nondevelopmental items other than commercial items”.

Subsec. (c)(3), (4). Pub. L. 115-232, § 836(b)(10)(A)(iii)(II), substituted “commercial services or commercial products or, to the extent that commercial products suitable to meet the executive agency’s needs are not available, nondevelopmental items other than commercial products” for “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”.

Subsec. (c)(5), (6). Pub. L. 115-232, § 836(b)(10)(A)(iii)(III), substituted “commercial products and commercial services” for “commercial items”.

Subsec. (d)(2). Pub. L. 115-232, § 836(b)(10)(A)(iv), in introductory provisions, substituted “commercial services or commercial products or, to the extent that commercial products suitable to meet the executive agency’s needs are not available, nondevelopmental items other than commercial products” for “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”.

Subsec. (e)(1). Pub. L. 115-232, § 836(b)(10)(A)(v)(I), inserted “103a, 104,” after “sections 102, 103.”

Subsec. (e)(2)(A). Pub. L. 115-232, § 836(b)(10)(A)(v)(II), substituted “commercial products or commercial services” for “commercial items”.

Subsec. (e)(2)(B). Pub. L. 115-232, § 836(b)(10)(A)(v)(III), (IV), in introductory provisions, substituted “end items that are commercial products” for “commercial end items” and, in cl. (i), substituted “commercial products, commercial components, or commercial services” for “commercial items or commercial components”.

Subsec. (e)(2)(C). Pub. L. 115-232, § 836(b)(10)(A)(v)(IV), (V), in introductory provisions, substituted “commer-

cial products or commercial services” for “commercial items” and, in cl. (i), substituted “commercial products, commercial components, or commercial services” for “commercial items or commercial components”.

Subsec. (e)(2)(D). Pub. L. 115-232, § 836(b)(10)(A)(v)(IV), substituted “commercial products, commercial components, or commercial services” for “commercial items or commercial components”.

Subsec. (e)(4)(A). Pub. L. 115-232, § 836(b)(10)(A)(v)(VI), substituted “commercial products or commercial services” for “commercial items” in introductory provisions.

Subsec. (e)(4)(C)(i). Pub. L. 115-232, § 836(b)(10)(A)(v)(VII), substituted “commercial product, as described in section 103a(1)” for “commercial item, as described in section 103(5)”.

Subsec. (e)(5). Pub. L. 115-232, § 836(b)(10)(A)(v)(VIII), substituted “products” for “items” wherever appearing.

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 2018 AMENDMENT

Amendment by Pub. L. 115-232 effective Jan. 1, 2020, subject to a savings provision, see section 836(h) of Pub. L. 115-232, set out as an Effective Date of 2018 Amendment; Savings Provision note under section 453b of Title 6, Domestic Security.

§ 3308. Planning for future competition in contracts for major systems

(a) DEVELOPMENT CONTRACT.—

(1) DETERMINING WHETHER PROPOSALS ARE NECESSARY.—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 paragraph (2). In determining whether to require the proposals, the head of the agency shall consider the purposes for which the system is being procured and the technology necessary to meet the system’s required capabilities. If the proposals are required, the head of the agency shall consider them in evaluating the offeror’s price.

(2) CONTENTS OF PROPOSALS.—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:

(A) Proposals to incorporate in the design of the major system items that 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.

(B) 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 that the Federal Government will be able to acquire competitively in the future.

(b) PRODUCTION CONTRACT.—

(1) DETERMINING WHETHER PROPOSALS ARE NECESSARY.—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 paragraph (2). In determining whether to require the proposals, the head of the agency shall consider the purposes for which the system is

being procured and the technology necessary to meet the system's required capabilities. If the proposals are required, the head of the agency shall consider them in evaluating the offeror's price.

(2) **CONTENT OF PROPOSALS.**—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 Federal Government will be able to obtain on a competitive basis items procured in connection with the system that are likely to be reproposed in substantial quantities during the service life of the system. Proposals submitted in response to this requirement may include the following:

(A) Proposals to provide to the Federal Government the right to use technical data to be provided under the contract for competitive procurement of the item, together with the cost to the Federal Government of acquiring the data and the right to use the data.

(B) Proposals for the qualification or development of multiple sources of supply for the item.

(c) **CONSIDERATION OF FACTORS AS OBJECTIVES IN NEGOTIATIONS.**—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 subsections (a) and (b) to be considered in evaluating an offer for a contract may be considered as objectives in negotiating the contract to be awarded.

(Pub. L. 111-350, § 3, Jan. 4, 2011, 124 Stat. 3758.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
3308	41:253b(j).	June 30, 1949, ch. 288, title III, § 303B(j), formerly § 303B(f), as added Pub. L. 98-577, title II, § 201(a), Oct. 30, 1984, 98 Stat. 3068; redesignated as § 303B(g), Pub. L. 103-355, title I, § 1064(1), Oct. 13, 1994, 108 Stat. 3268; redesignated as § 303B(j), Pub. L. 104-106, title XLI, § 4104(b)(2), Feb. 10, 1996, 110 Stat. 645.

§ 3309. Design-build selection procedures

(a) **AUTHORIZATION.**—Unless the traditional acquisition approach of design-bid-build established under sections 1101 to 1104 of title 40 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) 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—

(1) the contracting officer anticipates that 3 or more offers will be received for the contract;

(2) design work must be performed before an offeror can develop a price or cost proposal for the contract;

(3) the offeror will incur a substantial amount of expense in preparing the offer; and

(4) the contracting officer has considered information such as the following:

(A) The extent to which the project requirements have been adequately defined.

(B) The time constraints for delivery of the project.

(C) The capability and experience of potential contractors.

(D) The suitability of the project for use of the two-phase selection procedures.

(E) The capability of the agency to manage the two-phase selection process.

(F) Other criteria established by the agency.

(c) **PROCEDURES DESCRIBED.**—Two-phase selection procedures consist of the following:

(1) **DEVELOPMENT OF SCOPE OF WORK STATEMENT.**—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 Federal Government's requirements (which may include criteria and preliminary design, budget parameters, and schedule or delivery requirements) to enable the offerors to submit proposals that meet the Federal 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) **SOLICITATION OF PHASE-ONE PROPOSALS.**—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) **EVALUATION FACTORS.**—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) **SELECTION BY CONTRACTING OFFICER.**—

(A) **NUMBER OF OFFERORS SELECTED AND WHAT IS TO BE EVALUATED.**—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—

(i) the technical submission for the proposal, including design concepts or proposed solutions to requirements addressed within the scope of work, or both; and

(ii) the evaluation factors and subfactors, including cost or price, that must be considered in the evaluations of proposals in accordance with subsections (b) to (d) of section 3306 of this title.

(B) SEPARATE EVALUATIONS.—The contracting officer separately evaluates the submissions described in clauses (i) and (ii) of subparagraph (A).

(5) AWARDING OF CONTRACT.—The agency awards the contract in accordance with chapter 37 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) shall state the maximum number of offerors that are to be selected to submit competitive proposals pursuant to subsection (c)(4). 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 Federal 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 subsection (a) 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.

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3759.)

HISTORICAL AND REVISION NOTES

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
3309	41:253m.	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.

In subsections (a) and (c)(1), the words “sections 1101 to 1104 of title 40” are substituted for “the Brooks Architect-Engineers Act (title IX of this Act)” and “the Brooks Architect-Engineers Act (40 U.S.C. 541 et seq.)”, respectively, because of section 5(c) of Public Law 107-217 (40 U.S.C. note prec. 101) and for consistency with title 40.

In subsection (c)(5), the reference to section 253b of this title is limited to chapter 37 of the revised title for clarity.

Statutory Notes and Related Subsidiaries

PROHIBITION ON USE OF A REVERSE AUCTION FOR THE AWARD OF A CONTRACT FOR COMPLEX, SPECIALIZED, OR SUBSTANTIAL DESIGN AND CONSTRUCTION SERVICES

Pub. L. 116-260, div. U, title IV, §402, Dec. 27, 2020, 134 Stat. 2292, as amended by Pub. L. 117-28, §2, July 26, 2021, 135 Stat. 304, provided that:

“(a) FINDINGS.—Congress makes the following findings:

“(1) In contrast to a traditional auction in which the buyers bid up the price, sellers bid down the price in a reverse auction.

“(2) Reverse auctions, while providing value for the vast majority of Federal acquisitions, including certain construction-related acquisitions, are limited in value for complex, specialized, or substantial design and construction services.

“(b) REVERSE AUCTION DEFINED.—In this section, the term ‘reverse auction’ means, with respect to any procurement by an executive agency, a real-time auction generally conducted through an electronic medium among two or more offerors who compete by submitting bids for a supply or service contract, or a delivery order, task order, or purchase order under the contract, with the ability to submit revised lower bids at any time before the closing of the auction.

“(c) PROHIBITION.—

“(1) IN GENERAL.—Not later than 270 days after the date of the enactment of this section [July 26, 2021], the Federal Acquisition Regulation shall be amended to prohibit the use of reverse auctions for awarding contracts for complex, specialized, or substantial design and construction services.

“(2) APPLICABILITY TO ACQUISITIONS ABOVE THE SIMPLIFIED ACQUISITION THRESHOLD.—The prohibition on reverse auctions for complex, specialized, or substantial design and construction services shall apply only to acquisitions above the simplified acquisition threshold (SAT) for construction and design services pursuant to part 36 of the Federal Acquisition Regulation.

“(d) RULEMAKING FOR COMPLEX, SPECIALIZED, OR SUBSTANTIAL SERVICES.—Not later than 180 days after the date of the enactment of this section, the Federal Acquisition Regulatory Council shall promulgate a definition of complex, specialized, or substantial design and construction services, which shall include—

“(1) site planning and landscape design;

“(2) architectural and engineering services (as defined in section 1102 of title 40, United States Code);

“(3) interior design;

“(4) performance of substantial construction work for facility, infrastructure, and environmental restoration projects; and

“(5) construction or substantial alteration of public buildings or public works.

“(e) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to restrict the use of reverse auctions for the procurement of other goods and services except as specifically provided for under this section.

“(f) REPORT.—Not later than two years after the date of the enactment of this section, the Administrator of General Services shall submit to the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Oversight and Reform of the House of Representatives a report on the effectiveness of this section in delivering complex, specialized, or substantial design and construction services to the United States Government.”

§ 3310. Quantities to order

(a) FACTORS AFFECTING QUANTITY TO ORDER.—Each executive agency shall procure supplies in a quantity that—

(1) will result in the total cost and unit cost most advantageous to the Federal Government, where practicable; and

(2) does not exceed the quantity reasonably expected to be required by the agency.

(b) **OFFEROR'S OPINION OF QUANTITY.**—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 supplies proposed to be procured is economically advantageous to the Federal Government and, if applicable, to recommend a quantity that would be more economically advantageous to the Federal Government. Each recommendation shall include a quotation of the total price and the unit price for supplies procured in each recommended quantity.

(Pub. L. 111-350, § 3, Jan. 4, 2011, 124 Stat. 3761.)

HISTORICAL AND REVISION NOTES

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
3310	41:253f.	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.

In subsection (b), the words “or quantities” are omitted because of 1:1.

§ 3311. Qualification requirement

(a) **DEFINITION.**—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 ENFORCING QUALIFICATION REQUIREMENT.**—Except as provided in subsection (c), the head of an agency, before enforcing any qualification requirement, shall—

(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 on request all requirements that a prospective offeror, or its product, must satisfy to become qualified, with those 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 cost of testing and evaluation likely to be incurred by a potential offeror to become qualified;

(4) ensure that a potential offeror is provided, on request, a prompt opportunity to demonstrate at its own expense (except as provided in subsection (d)) its ability to meet the standards specified for qualification using—

(A) qualified personnel and facilities—

- (i) of the agency concerned;
- (ii) of another agency obtained through interagency agreement; or
- (iii) under contract; or

(B) 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 those services be provided by a contractor that—

(A) is not expected to benefit from an absence of additional qualified sources; and

(B) is required in the 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 whether qualification is attained and, if not attained, is promptly furnished specific information about why qualification was not attained.

(c) **APPLICABILITY, WAIVER AUTHORITY, AND REFERRAL OF OFFERS.**—

(1) **APPLICABILITY.**—Subsection (b) does not apply to a qualification requirement established by statute prior to October 30, 1984.

(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 that 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 the determination, the head of the procuring activity may waive the requirements of paragraphs (2) to (5) of subsection (b) for up to 2 years with respect to the item subject to the qualification requirement.

(C) **NONAPPLICABILITY TO QUALIFIED PRODUCTS LIST.**—Waiver authority under this paragraph does not apply with respect to a qualified products list.

(3) **SUBMISSION AND CONSIDERATION OF OFFER NOT TO BE DENIED.**—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 those standards before the date specified for award of the contract.

(4) **REFERRAL TO SMALL BUSINESS ADMINISTRATION NOT REQUIRED.**—This subsection does not require 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 that requirement.

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

(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 2 actual manufacturers or the products of 2 actual manufacturers, respectively, the head of the agency concerned shall—

(A) publish notice periodically soliciting additional sources or products to seek qualification, unless the contracting officer determines that doing so would compromise national security; and

(B) subject to paragraph (2), bear the cost of conducting the specified testing and evaluation (excluding the cost 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 that has met the standards specified for qualification and that could reasonably be expected to compete for a contract for that requirement.

(2) WHEN AGENCY MAY BEAR COST.—The head of the agency concerned may bear the cost under paragraph (1)(B) only if the head of the agency determines that the 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 cost incurred by the agency.

(3) CERTIFICATION REQUIRED.—The head of the agency shall require a prospective contractor requesting the Federal Government to bear testing and evaluation costs under paragraph (1)(B) to certify 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 7 years after the establishment of a qualification requirement, the need for the requirement shall be examined and the standards of the requirement revalidated in accordance with the requirements of subsection (b). This subsection does not apply in the case of a qualification requirement for which a waiver is in effect under subsection (c)(2).

(f) WHEN ENFORCEMENT OF QUALIFICATION REQUIREMENT NOT ALLOWED.—Except in an emergency as determined by the head of the agency, after the head of the agency determines not to enforce a qualification requirement for a solicitation, the agency may not enforce the requirement unless the agency complies with the requirements of subsection (b).

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3761.)

HISTORICAL AND REVISION NOTES

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
3311	41:253c.	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.

In subsection (d)(1)(A), the words “in the Commerce Business Daily” are omitted as obsolete. See revision note for section 1708(d) of the revised title.

§ 3312. Database on price trends of items and services under Federal contracts

(a) DATABASE REQUIRED.—The Administrator shall establish and maintain a database of information on price trends for items and services under contracts with the Federal Government. The information in the database shall be designed to assist Federal acquisition officials in the following:

(1) Monitoring developments in price trends for items and services under contracts with the Federal Government.

(2) Conducting price or cost analyses for items and services under offers for contracts with the Federal Government, or otherwise conducting determinations of the reasonableness of prices for items and services under such offers, and addressing unjustified escalation in prices being paid by the Federal Government for items and services under contracts with the Federal Government.

(b) USE.—(1) The database under subsection (a) shall be available to executive agencies in the evaluation of offers for contracts with the Federal Government for items and services.

(2) The Secretary of Defense may satisfy the requirements of this section by complying with the requirements of section 892¹ of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011 (10 U.S.C. 2306a note).

(Added Pub. L. 112-239, div. A, title VIII, §851(a)(1), Jan. 2, 2013, 126 Stat. 1855.)

Editorial Notes

REFERENCES IN TEXT

Section 892 of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011, referred to in subsection (b)(2), is section 892 of Pub. L. 111-383, which was formerly set out as a note under section 2306a of Title 10, Armed Forces, prior to repeal by Pub. L. 114-92, div. A, title X, §1073(f), Nov. 25, 2015, 129 Stat. 996.

Statutory Notes and Related Subsidiaries

USE OF ELEMENTS OF DEPARTMENT OF DEFENSE PILOT PROJECT

Pub. L. 112-239, div. A, title VIII, §851(b), Jan. 2, 2013, 126 Stat. 1855, provided that: “In establishing the database required by section 3312 of title 41, United States Code (as added by subsection (a)), the Administrator for Federal Procurement Policy shall use and incorporate appropriate elements of the pilot project on pricing being carried out by the Under Secretary of Defense for Acquisition, Technology, and Logistics pursuant to sec-

¹ See References in Text note below.

tion 892 of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011 [Pub. L. 111-383] (10 U.S.C. 2306a note) and the Better Buying Power initiative of the Secretary of Defense.”

CHAPTER 35—TRUTHFUL COST OR PRICING DATA

Sec.	
3501.	General.
3502.	Required cost or pricing data and certification.
3503.	Exceptions.
3504.	Cost or pricing data on below-threshold contracts.
3505.	Submission of other information.
3506.	Price reductions for defective cost or pricing data.
3507.	Interest and penalties for certain overpayments.
3508.	Right to examine contractor records.
3509.	Notification of violations of Federal criminal law or overpayments.

SENATE REVISION AMENDMENT

In chapter 35 heading, “OR” substituted for “AND” by S. Amdt. 4726 (111th Cong.). See 156 Cong. Rec. 18683 (2010).

§ 3501. General

(a) DEFINITIONS.—In this chapter:

(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 section 3506(a)(2) of this title, another date agreed upon between the parties, a prudent buyer or seller would reasonably expect to affect price negotiations significantly. The term does not include information that is judgmental, but does include factual information from which a judgment was derived.

(2) SUBCONTRACT.—The term “subcontract” includes a transfer of commercial products or commercial services between divisions, subsidiaries, or affiliates of a contractor or a subcontractor.

(b) REGULATIONS.—

(1) MINIMIZING ABUSE OF COMMERCIAL SERVICES AUTHORITY.—The Federal Acquisition Regulation 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 services for purposes of this chapter 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 the services.

(2) INFORMATION TO SUBMIT.—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 services under comparable terms and conditions by both government and commercial customers; and

(B) if the contracting officer determines that the information described in subpara-

graph (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.

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3764; Pub. L. 115-232, div. A, title VIII, §836(b)(11), Aug. 13, 2018, 132 Stat. 1863.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
3501(a)	41:254b(h).	June 30, 1949, ch. 288, title III, §304A(h), formerly §304A(f), as added Pub. L. 103-355, title I, §1251(a)(2), Oct. 13, 1994, 108 Stat. 3284; redesignated as §304A(h), Pub. L. 104-106, title XLII, §4201(b)(2)(B), Feb. 10, 1996, 110 Stat. 652.
3501(b)	41:254b note.	Pub. L. 110-417, [div. A], title VIII, §868, Oct. 14, 2008, 122 Stat. 4552.

Subsection (a) of Pub. L. 110-417, §868 is omitted as unnecessary.

In subsection (b)(1), the words “The Federal Acquisition Regulation” are substituted for “The regulations modified pursuant to subsection (a)” for clarity and conformity with the revised title.

Editorial Notes

AMENDMENTS

2018—Subsec. (a). Pub. L. 115-232, §836(b)(11)(A), redesignated pars. (2) and (3) as (1) and (2), respectively, substituted “commercial products or commercial services” for “commercial items” in par. (2), as redesignated, and struck out former par. (1), which defined “commercial item”.

Subsec. (b)(1). Pub. L. 115-232, §836(b)(11)(B), in heading, struck out “item” before “authority” and, in text, substituted “commercial services” for “commercial items”.

Subsec. (b)(2)(A). Pub. L. 115-232, §836(b)(11)(B)(ii), substituted “commercial services” for “commercial items”.

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 2018 AMENDMENT

Amendment by Pub. L. 115-232 effective Jan. 1, 2020, subject to a savings provision, see section 836(h) of Pub. L. 115-232, set out as an Effective Date of 2018 Amendment; Savings Provision note under section 453b of Title 6, Domestic Security.

§ 3502. Required cost or pricing data and certification

(a) WHEN REQUIRED.—The head of an executive agency shall require offerors, contractors, and subcontractors to make cost or pricing data available as follows:

(1) OFFEROR FOR PRIME CONTRACT.—An offeror for a prime contract under this division 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—

(A) in the case of a prime contract entered into after June 30, 2018, the price of the contract to the Federal Government is expected to exceed \$2,000,000; and

(B) in the case of a prime contract entered into on or before June 30, 2018, the price of the contract to the Federal Government is expected to exceed \$750,000.