

information subject to inclusion in the database as listed in subsection (c) current as of the date of submittal of the information under this subsection; and

(2) update the information submitted under paragraph (1) on a semiannual basis.

(g) **RULEMAKING.**—The Administrator of General Services shall prescribe regulations that may be necessary to carry out this section.

(Pub. L. 111–350, § 3, Jan. 4, 2011, 124 Stat. 3740; Pub. L. 111–212, title III, § 3010, July 29, 2010, 124 Stat. 2340; Pub. L. 111–383, div. A, title VIII, § 834(d), Jan. 7, 2011, 124 Stat. 4279; Pub. L. 112–239, div. A, title VIII, § 852, title XVII, § 1704(d)(2), Jan. 2, 2013, 126 Stat. 1856, 2096; Pub. L. 113–291, div. A, title XII, § 1270, Dec. 19, 2014, 128 Stat. 3587; Pub. L. 116–283, div. A, title VIII, § 885, Jan. 1, 2021, 134 Stat. 3791.)

AMENDMENTS NOT SHOWN IN TEXT

This section was derived from section 417b of former Title 41, Public Contracts, which was amended by Pub. L. 111–212, title III, § 3010, July 29, 2010, 124 Stat. 2340, and Pub. L. 111–383, div. A, title VIII, § 834(d), Jan. 7, 2011, 124 Stat. 4279, prior to being repealed and reenacted as this section by Pub. L. 111–350, §§ 3, 7(b), Jan. 4, 2011, 124 Stat. 3677, 3855. For applicability of those amendments 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 417b of former Title 41 was amended by adding at the end of subsec. (e)(1) the following: “In addition, the Administrator shall post all such information, excluding past performance reviews, on a publicly available Internet website.” and by adding at the end of subsec. (c)(1) the following new subparagraph:

“(E) In an administrative proceeding, a final determination of contractor fault by the Secretary of Defense pursuant to section 823(d) of the National Defense Authorization Act for Fiscal Year 2010 (10 U.S.C. 2302 note).”

HISTORICAL AND REVISION NOTES

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
2313	41:417b.	Pub. L. 110–417, [div. A], title VIII, § 872, Oct. 14, 2008, 122 Stat. 4555.

In subsection (a), 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.

In subsection (c)(7), the word “practicable” is substituted for “practical” to correct an error in the law.

In subsection (f), 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 (f)(2), the words “the information submitted under paragraph (1)” are substituted for “such information” for clarity.

Editorial Notes

REFERENCES IN TEXT

Section 1704(b) of the National Defense Authorization Act for Fiscal Year 2013, referred to in subsec. (c)(1)(E)(ii), is section 1704(b) of Pub. L. 112–239, which is classified to section 7104b(b) of Title 22, Foreign Relations and Intercourse.

AMENDMENTS

2021—Subsec. (d)(3). Pub. L. 116–283, § 885(1), inserted “, and an identification of any beneficial owner of such corporation,” after “to the corporation”.

Subsec. (d)(4). Pub. L. 116–283, § 885(2), added par. (4).

2014—Subsec. (c)(8). Pub. L. 113–291 added par. (8).

2013—Subsec. (c)(1)(E). Pub. L. 112–239, § 1704(d)(2), amended subpar. (E) generally. Prior to amendment, subpar. (E), as added by Pub. L. 111–383, § 834(d), read as follows: “(E) In an administrative proceeding, a final determination of contractor fault by the Secretary of Defense pursuant to section 823(d) of the National Defense Authorization Act for Fiscal Year 2010 (10 U.S.C. 2302 note).” See Amendments Not Shown in Text note above.

Subsec. (d)(3). Pub. L. 112–239, § 852, added par. (3).

Statutory Notes and Related Subsidiaries

DEADLINE FOR ESTABLISHING DATABASE

Pub. L. 111–350, § 6(f)(3), Jan. 4, 2011, 124 Stat. 3855, provided that: “The requirement in section 2313(a) of title 41, United States Code, to establish a database shall be done not later than one year after October 14, 2008.”

DEADLINE FOR AMENDING FEDERAL ACQUISITION REGULATION

Pub. L. 111–350, § 6(f)(4), Jan. 4, 2011, 124 Stat. 3855, provided that: “The Federal Acquisition Regulation shall be amended to meet the requirements of sections 2313(f), 3302(b) and (d), 4710(b), and 4711(b) of title 41, United States Code, not later than one year after October 14, 2008.”

DIVISION C—PROCUREMENT

DEFINITIONS

For additional definitions of terms used in this division, with certain exceptions, see section 102 of Title 40, Public Buildings, Property, and Works.

CHAPTER 31—GENERAL

- Sec.
- 3101. Applicability.
- 3102. Delegation and assignment of powers, functions, and responsibilities.
- 3103. Acquisition programs.
- 3104. Small business concerns.
- 3105. New contracts and grants and merit-based selection procedures.
- 3106. Erection, repair, or furnishing of public buildings and improvements not authorized, and certain contracts not permitted, by this division.

Statutory Notes and Related Subsidiaries

COST-EFFECTIVENESS ANALYSIS OF EQUIPMENT RENTAL

Pub. L. 115–254, div. B, title V, § 555, Oct. 5, 2018, 132 Stat. 3381, as amended by Pub. L. 117–81, div. A, title XVII, § 1702(i)(1), Dec. 27, 2021, 135 Stat. 2159, provided that:

“(a) **AGENCY ANALYSIS OF EQUIPMENT ACQUISITION.**—

“(1) **IN GENERAL.**—Except as provided for under subsection (d), the head of each executive agency shall acquire equipment using the method of acquisition most advantageous to the Federal Government based on a case-by-case analysis of comparative costs and other factors, including those factors listed in section 7.401 of the Federal Acquisition Regulation.

“(2) **METHODS OF ACQUISITION.**—The methods of acquisition to be compared in the analysis under paragraph (1) shall include, at a minimum, purchase, short-term rental or lease, long-term rental or lease, interagency acquisition, and acquisition agreements

with a State or a local government as described in subsection (c).

“(3) AMENDMENT OF FEDERAL ACQUISITION REGULATION.—Not later than 180 days after the date of the enactment of this Act [Oct. 5, 2018], the Federal Acquisition Regulatory Council shall amend the Federal Acquisition Regulation to implement the requirement of this subsection, including a determination of the factors for executive agencies to consider for purposes of performing the analysis under paragraph (1).

“(4) RULE OF CONSTRUCTION.—Nothing in this subsection shall be construed to affect the requirements of chapter 37 of title 41, United States Code, sections 3206 through 3208 and sections 3301 through 3309 of title 10, United States Code, or section 1535 of title 31, United States Code.

“(b) DATE OF IMPLEMENTATION.—The analysis described in subsection (a) shall be applied to contracts for the acquisition of equipment entered into on or after the date that the Federal Acquisition Regulation is amended pursuant to paragraph (3) of such subsection.

“(c) ACQUISITION AGREEMENTS WITH STATES OR LOCAL GOVERNMENTS.—

“(1) IN GENERAL.—Notwithstanding any other provision of law, including chapter 37 of title 41, United States Code, the Small Business Act (15 U.S.C. 631 et seq.), and sections 3206 through 3208 and sections 3301 through 3309 of title 10, United States Code, the head of an executive agency may enter into an acquisition agreement authorized by this section directly with a State or a local government if the agency head determines that the agreement otherwise satisfies the requirements of subsection (a)(1).

“(2) TERMS AND CONDITIONS.—Any agreement under paragraph (1) shall contain such terms and conditions as the head of the agency deems necessary or appropriate to protect the interests of the United States.

“(d) EXCEPTIONS.—The analysis otherwise required under subsection (a) is not required—

“(1) when the President has issued an emergency declaration or a major disaster declaration pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 et seq.);

“(2) in other emergency situations if the agency head makes a determination that obtaining such equipment is necessary in order to protect human life or property; or

“(3) when otherwise authorized by law.

“(e) STUDY OF AGENCY ANALYSES.—Not later than 2 years after the date of the enactment of this Act, the Comptroller General of the United States shall submit to the Committee on Oversight and Government Reform [now Committee on Oversight and Reform] of the House of Representatives and the Committee on Homeland Security and Governmental Affairs of the Senate a comprehensive report on the decisions made by the executive agencies with the highest levels of acquisition spending, and a sample of executive agencies with lower levels of acquisition spending, to acquire high-value equipment by lease, rental, or purchase pursuant to subpart 7.4 of the Federal Acquisition Regulation.

“(f) DEFINITIONS.—In this section:

“(1) EXECUTIVE AGENCY.—The term ‘executive agency’ has the meaning given that term in section 102 of title 40, United States Code.

“(2) INTERAGENCY ACQUISITION.—The term ‘inter-agency acquisition’ has the meaning given that term in section 2.101 of the Federal Acquisition Regulation.

“(3) STATE.—The term ‘State’ has the meaning given the term in section 6501 of title 31, United States Code.

“(4) LOCAL GOVERNMENT.—The term ‘local government’ means any unit of local government within a State, including a county, municipality, city, borough, town, township, parish, local public authority, school district, special district, intrastate district, council of governments, or regional or interstate government entity, and any agency or instrumentality of a local government.”

UNIFORM CONTRACT WRITING SYSTEM REQUIREMENTS

Pub. L. 112-239, div. A, title VIII, §862, Jan. 2, 2013, 126 Stat. 1859, provided that:

“(a) UNIFORM STANDARDS AND CONTROLS REQUIRED.—Not later than 180 days after the date of the enactment of this Act [Jan. 2, 2013], the officials specified in subsection (b) shall—

“(1) establish uniform data standards, internal control requirements, independent verification and validation requirements, and business process rules for processing procurement requests, contracts, receipts, and invoices by the Department of Defense or other executive agencies, as applicable;

“(2) establish and maintain one or more approved electronic contract writing systems that conform with the standards, requirements, and rules established pursuant to paragraph (1); and

“(3) require the use of electronic contract writing systems approved in accordance with paragraph (2) for all contracts entered into by the Department of Defense or other executive agencies, as applicable.

“(b) COVERED OFFICIALS.—The officials specified in this subsection are the following:

“(1) The Secretary of Defense, with respect to the Department of Defense and the military departments.

“(2) The Administrator for Federal Procurement Policy, with respect to the executive agencies other than the Department of Defense and the military departments.

“(c) ELECTRONIC WRITING SYSTEMS FOR DEPARTMENT OF STATE AND USAID.—Notwithstanding subsection (b)(2), the Secretary of State and the Administrator of the United States Agency for International Development may meet the requirements of subsection (a)(2) with respect to approved electronic contract writing systems for the Department of State and the United States Agency for International Development, respectively, if the Secretary and the Administrator, as the case may be, demonstrate to the Administrator for Federal Procurement Policy that prior investment of resources in existing contract writing systems will result in the most cost effective and efficient means to satisfy such requirements.

“(d) PHASE-IN OF IMPLEMENTATION OF REQUIREMENT FOR APPROVED SYSTEMS.—The officials specified in subsection (b) may phase in the implementation of the requirement to use approved electronic contract writing systems in accordance with subsection (a)(3) over a period of up to five years beginning with the date of the enactment of this Act [Jan. 2, 2013].

“(e) REPORTS.—Not later than 180 days after the date of the enactment of this Act [Jan. 2, 2013], the officials specified in subsection (b) shall each submit to the appropriate committees of Congress a report on the implementation of the requirements of this section. Each report shall, at a minimum—

“(1) describe the standards, requirements, and rules established pursuant to subsection (a)(1);

“(2) identify the electronic contract writing systems approved pursuant to subsection (a)(2) and, if multiple systems are approved, explain why the use of such multiple systems is the most efficient and effective approach to meet the contract writing needs of the Federal Government; and

“(3) provide the schedule for phasing in the use of approved electronic contract writing systems in accordance with subsections (a)(3) and (d).

“(f) DEFINITIONS.—In this section:

“(1) The term ‘appropriate committees of Congress’ means—

“(A) the Committee on Armed Services, the Committee on Foreign Relations, the Committee on Homeland Security and Governmental Affairs, and the Committee on Appropriations of the Senate; and

“(B) the Committee on Armed Services, the Committee on Foreign Affairs, the Committee on Oversight and Government Reform, and the Committee on Appropriations of the House of Representatives.

“(2) The term ‘executive agency’ has the meaning given that term in section 133 of title 41, United States Code.”

§ 3101. Applicability

(a) IN GENERAL.—An executive agency shall make purchases and contracts for property and services in accordance with this division and implementing regulations of the Administrator of General Services.

(b) SIMPLIFIED ACQUISITION THRESHOLD AND PROCEDURES.—

(1) SIMPLIFIED ACQUISITION THRESHOLD.—

(A) DEFINITION.—For purposes of an acquisition by an executive agency, the simplified acquisition threshold is as specified in section 134 of this title.

(B) INAPPLICABLE LAWS.—A law properly listed in the Federal Acquisition Regulation pursuant to section 1905 of this title does not apply to or with respect to a contract or subcontract that is not greater than the simplified acquisition threshold.

(2) SIMPLIFIED ACQUISITION PROCEDURES.—Simplified acquisition procedures contained in the Federal Acquisition Regulation pursuant to section 1901 of this title apply in executive agencies as provided in section 1901.

(c) EXCEPTIONS.—

(1) IN GENERAL.—This division does not apply—

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

(B) except as provided in paragraph (2), when this division is made inapplicable pursuant to law.

(2) APPLICABILITY OF CERTAIN LAWS RELATED TO ADVERTISING, OPENING OF BIDS, AND LENGTH OF CONTRACT.—Sections 6101, 6103, and 6304 of this title do not apply to the procurement of property or services made by an executive agency pursuant to this division. However, when this division is made inapplicable by any law, sections 6101 and 6103 of this title apply in the absence of authority conferred by statute to procure without advertising or without regard to section 6101 of this title. A law that authorizes an executive agency (other than an executive agency exempted from this division by this subsection) to procure property or services without advertising or without regard to section 6101 of this title is deemed to authorize the procurement pursuant to the provisions of this division relating to procedures other than sealed-bid procedures.

(Pub. L. 111-350, § 3, Jan. 4, 2011, 124 Stat. 3742.)

HISTORICAL AND REVISION NOTES

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
3101(a)	41:252(a) (words before 1st semi-colon).	June 30, 1949, ch. 288, title III, § 302(a), 63 Stat. 393; July 12, 1952, ch. 703, § 1(m), 66 Stat. 594; Pub. L. 85-800, § 1, Aug. 28, 1958, 72 Stat. 966; Pub. L. 89-343, § 1, Nov. 8, 1965, 79 Stat. 1303.
3101(b)(1)	41:252a.	June 30, 1949, ch. 288, title III, § 302A, as added Pub. L. 103-355, title IV, §§ 4003, 4103(a), Oct. 13, 1994, 108 Stat. 3338, 3341.

HISTORICAL AND REVISION NOTES—CONTINUED

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
3101(b)(2)	41:252b.	June 30, 1949, ch. 288, title III, § 302B, as added Pub. L. 103-355, title IV, § 4203(b), Oct. 13, 1994, 108 Stat. 3346.
3101(c)(1)	41:252(a) (words after 1st semi-colon and before “but when”).	
3101(c)(2)	41:252(a) (words after “other law”). 41:260.	June 30, 1949, ch. 288, title III, § 310, 63 Stat. 397; July 12, 1952, ch. 703, § 1(m), (n), 66 Stat. 594; Pub. L. 85-800, § 6, Aug. 28, 1958, 72 Stat. 967; Pub. L. 89-343, § 5, Nov. 8, 1965, 79 Stat. 1303; Pub. L. 98-369, div. B, title VII, § 2714(a)(6), July 18, 1984, 98 Stat. 1185.

In subsection (c)(1)(B), the words “except as provided in paragraph (2)” are added for clarity. The words “section 113(e) of title 40 or any other” are omitted as unnecessary.

Executive Documents

EX. ORD. NO. 13005. EMPOWERMENT CONTRACTING

Ex. Ord. No. 13005, May 21, 1996, 61 F.R. 26069, provided:

In order to promote economy and efficiency in Federal procurement, it is necessary to secure broad-based competition for Federal contracts. This broad competition is best achieved where there is an expansive pool of potential contractors capable of producing quality goods and services at competitive prices. A great and largely untapped opportunity for expanding the pool of such contractors can be found in this Nation’s economically distressed communities.

Fostering growth of Federal contractors in economically distressed communities and ensuring that those contractors become viable businesses for the long term will promote economy and efficiency in Federal procurement and help to empower those communities. Fostering growth of long-term viable contractors will be promoted by offering appropriate incentives to qualified businesses.

Accordingly, by the authority vested in me as President by the Constitution and the laws of the United States, including section 486(a) [now 121(a)] of title 40, United States Code, and section 301 of title 3, United States Code, it is hereby ordered as follows:

SECTION 1. *Policy.* The purpose of this order is to strengthen the economy and to improve the efficiency of the Federal procurement system by encouraging business development that expands the industrial base and increases competition.

SEC. 2. *Empowerment Contracting Program.* In consultation with the Secretaries of the Departments of Housing and Urban Development, Labor, and Defense; the Administrator of General Services; the Administrator of the National Aeronautics and Space Administration; the Administrator of the Small Business Administration; and the Administrator for Federal Procurement Policy, the Secretary of the Department of Commerce shall develop policies and procedures to ensure that agencies, to the extent permitted by law, grant qualified large businesses and qualified small businesses appropriate incentives to encourage business activity in areas of general economic distress, including a price or an evaluation credit, when assessing offers for government contracts in unrestricted competitions, where the incentives would promote the policy set forth in this order. In developing such policies and procedures, the Secretary shall consider the size of the qualified businesses.

SEC. 3. *Monitoring and Evaluation.* The Secretary shall:

(a) monitor the implementation and operation of the policies and procedures developed in accordance with this order;

(b) develop a process to ensure the proper administration of the program and to reduce the potential for fraud by the intended beneficiaries of the program;

(c) develop principles and a process to evaluate the effectiveness of the policies and procedures developed in accordance with this order; and

(d) by December 1 of each year, issue a report to the President on the status and effectiveness of the program.

SEC. 4. *Implementation Guidelines.* In implementing this order, the Secretary shall:

(a) issue rules, regulations, and guidelines necessary to implement this order, including a requirement for the periodic review of the eligibility of qualified businesses and distressed areas;

(b) draft all rules, regulations, and guidelines necessary to implement this order within 90 days of the date of this order; and

(c) ensure that all policies and procedures and all rules, regulations, and guidelines adopted and implemented in accordance with this order minimize the administrative burden on affected agencies and the procurement process.

SEC. 5. *Definitions.* For purposes of this Executive order:

(a) “Agency” means any authority of the United States that is an “agency” under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10).

(b) “Area of general economic distress” shall be defined, for all urban and rural communities, as any census tract that has a poverty rate of at least 20 percent or any designated Federal Empowerment Zone, Supplemental Empowerment Zone, Enhanced Enterprise Community, or Enterprise Community. In addition, the Secretary may designate as an area of general economic distress any additional rural or Indian reservation area after considering the following factors:

- (1) Unemployment rate;
- (2) Degree of poverty;
- (3) Extent of outmigration; and
- (4) Rate of business formation and rate of business growth.

(c) “Qualified large business” means a large for-profit or not-for-profit trade or business that (1) employs a significant number of residents from the area of general economic distress; and (2) either has a significant physical presence in the area of general economic distress or has a direct impact on generating significant economic activity in the area of general economic distress.

(d) “Qualified small business” means a small for-profit or not-for-profit trade or business that (1) employs a significant number of residents from the area of general economic distress; (2) has a significant physical presence in the area of general economic distress; or (3) has a direct impact on generating significant economic activity in the area of general economic distress.

(e) “Secretary” means the Secretary of Commerce.

SEC. 6. *Agency Authority.* Nothing in this Executive order shall be construed as displacing the agencies’ authority or responsibilities, as authorized by law, including specifically other programs designed to promote the development of small or disadvantaged businesses.

SEC. 7. *Judicial Review.* This Executive order does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

WILLIAM J. CLINTON.

EX. ORD. NO. 13627. STRENGTHENING PROTECTIONS AGAINST TRAFFICKING IN PERSONS IN FEDERAL CONTRACTS

Ex. Ord. No. 13627, Sept. 25, 2012, 77 F.R. 60029, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act (40 U.S.C. 101 et seq.) and the Trafficking Victims Protection Act of 2000, as amended (TVPA) (Public Law 106-386, Division A), and in order to strengthen protections against trafficking in persons in Federal contracting, it is hereby ordered as follows:

SECTION 1. *Policy.* More than 20 million men, women, and children throughout the world are victims of severe forms of trafficking in persons (“trafficking” or “trafficking in persons”)—defined in section 103 of the TVPA, 22 U.S.C. 7102(8) [now 7102(11)], to include sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age, or the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion, for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

The United States has long had a zero-tolerance policy regarding Government employees and contractor personnel engaging in any form of this criminal behavior. As the largest single purchaser of goods and services in the world, the United States Government bears a responsibility to ensure that taxpayer dollars do not contribute to trafficking in persons. By providing our Government workforce with additional tools and training to apply and enforce existing policy, and by providing additional clarity to Government contractors and subcontractors on the steps necessary to fully comply with that policy, this order will help to protect vulnerable individuals as contractors and subcontractors perform vital services and manufacture the goods procured by the United States.

In addition, the improved safeguards provided by this order to strengthen compliance with anti-trafficking laws will promote economy and efficiency in Government procurement. These safeguards, which have been largely modeled on successful practices in the private sector, will increase stability, productivity, and certainty in Federal contracting by avoiding the disruption and disarray caused by the use of trafficked labor and resulting investigative and enforcement actions.

SEC. 2. *Anti-Trafficking Provisions.* (a) Within 180 days of the date of this order, the Federal Acquisition Regulatory (FAR) Council, in consultation with the Secretary of State, the Attorney General, the Secretary of Labor, the Secretary of Homeland Security, the Administrator for the United States Agency for International Development, and the heads of such other executive departments and agencies (agencies) as the FAR Council determines to be appropriate, shall take steps necessary to amend the Federal Acquisition Regulation to:

(1) strengthen the efficacy of the Government’s zero-tolerance policy on trafficking in persons by Federal contractors and subcontractors in solicitations, contracts, and subcontracts for supplies or services (including construction and commercial items), by:

(A) expressly prohibiting Federal contractors, contractor employees, subcontractors, and subcontractor employees from engaging in any of the following types of trafficking-related activities:

- (i) using misleading or fraudulent recruitment practices during the recruitment of employees, such as failing to disclose basic information or making material misrepresentations regarding the key terms and conditions of employment, including wages and fringe benefits, the location of work, living conditions and housing (if employer provided or arranged), any significant costs to be charged to the employee, and, if applicable, the hazardous nature of the work;
- (ii) charging employees recruitment fees;
- (iii) destroying, concealing, confiscating, or otherwise denying access by an employee to the employee’s identity documents, such as passports or drivers’ licenses; and
- (iv) for portions of contracts and subcontracts:

(I) performed outside the United States, failing to pay return transportation costs upon the end of em-

ployment, for an employee who is not a national of the country in which the work is taking place and who was brought into that country for the purpose of working on a U.S. Government contract or subcontract;

(II) not covered by subsection (a)(1)(A)(iv)(I) of this section, failing to pay return transportation costs upon the end of employment, for an employee who is not a national of the country in which the work is taking place and who was brought into that country for the purpose of working on a U.S. Government contract or subcontract, if the payment of such costs is required under existing temporary worker programs or pursuant to a written agreement with the employee; provided, however

(III) that the requirements of subsections (a)(1)(A)(iv)(I) and (II) shall not apply to:

(aa) an employee who is legally permitted to remain in the country of employment and who chooses to do so; or

(bb) an employee who is a victim of trafficking and is seeking victim services or legal redress in the country of employment, or an employee who is a witness in a trafficking-related enforcement action;

(v) other specific activities that the FAR Council identifies as directly supporting or promoting trafficking in persons, the procurement of commercial sex acts, or the use of forced labor in the performance of the contract or subcontract;

(B) requiring contractors and their subcontractors, by contract clause, to agree to cooperate fully in providing reasonable access to allow contracting agencies and other responsible enforcement agencies to conduct audits, investigations, or other actions to ascertain compliance with the TVPA, this order, or any other applicable law or regulation establishing restrictions on trafficking in persons, the procurement of commercial sex acts, or the use of forced labor; and

(C) requiring contracting officers to notify, in accordance with agency procedures, the agency's Inspector General, the agency official responsible for initiating suspension or debarment actions, and law enforcement, if appropriate, if they become aware of any activities that would justify termination under section 106(g) of the TVPA, 22 U.S.C. 7104(g), or are inconsistent with the requirements of this order or any other applicable law or regulation establishing restrictions on trafficking in persons, the procurement of commercial sex acts, or the use of forced labor, and further requiring that the agency official responsible for initiating suspension and debarment actions consider whether suspension or debarment is necessary in order to protect the Government's interest;

(2) except as provided in subsection (a)(3) of this section, ensure that provisions in solicitations and clauses in contracts and subcontracts, where the estimated value of the supplies acquired or services required to be performed outside the United States exceeds \$500,000, include the following requirements pertaining to the portion of the contract or subcontract performed outside the United States:

(A) that each such contractor and subcontractor maintain a compliance plan during the performance of the contract or subcontract that is appropriate for the size and complexity of the contract or subcontract and the nature and scope of the activities performed, including the risk that the contract or subcontract will involve services or supplies susceptible to trafficking. The compliance plan shall be provided to the contracting officer upon request, and relevant contents of the plan shall be posted no later than the initiation of contract performance at the workplace and on the contractor or subcontractor's Web site (if one is maintained), and shall, at a minimum, include:

(i) an awareness program to inform employees about:

(I) the policy of ensuring that employees do not engage in trafficking in persons or related activities, including those specified in subsection (a)(1)(A) of

this section, the procurement of commercial sex acts, or the use of forced labor; and

(II) the actions that will be taken against employees for violation of such policy;

(i) a process for employees to report, without fear of retaliation, any activity that would justify termination under section 106(g) of the TVPA, or is inconsistent with the requirements of this order, or any other applicable law or regulation establishing restrictions on trafficking in persons, the procurement of commercial sex acts, or the use of forced labor;

(iii) a recruitment and wage plan that only permits the use of recruitment companies with trained employees, prohibits charging recruitment fees to the employee, and ensures that wages meet applicable host country legal requirements or explains any variance;

(iv) a housing plan, if the contractor or subcontractor intends to provide or arrange housing, that ensures that the housing meets host country housing and safety standards or explains any variance; and

(v) procedures to prevent subcontractors at any tier from engaging in trafficking in persons, including those trafficking-related activities described in subsection (a)(1)(A) of this section, and to monitor, detect, and terminate any subcontractors or subcontractor employees that have engaged in such activities; and

(B) that each such contractor and subcontractor shall certify, prior to receiving an award and annually thereafter during the term of the contract or subcontract, that:

(i) it has the compliance plan referred to in subsection (a)(2)(A) of this section in place to prevent trafficking-related activities described in section 106(g) of the TVPA and this order; and

(ii) either, to the best of its knowledge and belief, neither it nor any of its subcontractors has engaged in any such activities; or, if abuses have been found, the contractor or subcontractor has taken the appropriate remedial and referral actions;

(3) specify that the requirements in subsections (a)(2)(A) and (B) of this section shall not apply with respect to contracts or subcontracts for commercially available off-the-shelf items.

(b) Not later than 1 year after the date of this order, the member agencies of the President's Interagency Task Force to Monitor and Combat Trafficking in Persons (PITF), established pursuant to section 105 of the TVPA, 22 U.S.C. 7103, shall jointly establish a process for evaluating and identifying, for Federal contracts and subcontracts performed substantially within the United States, whether there are industries or sectors with a history (or where there is current evidence) of trafficking-related or forced labor activities described in section 106(g) of the TVPA, in subsection (a)(1)(A) of this section, or any other applicable law or regulation establishing restrictions on trafficking in persons, the procurement of commercial sex acts, or the use of forced labor. Where the PITF has identified such industries or sectors, it shall notify agencies of these designations, and individual agencies shall, in consultation with the Office of Federal Procurement Policy of the Office of Management and Budget, adopt and publish appropriate safeguards, guidance, and compliance assistance to prevent trafficking and forced labor in Federal contracting in these identified areas.

SEC. 3. *Guidance and Training.* (a) The Administrator for Federal Procurement Policy shall:

(1) in consultation with appropriate management councils, such as the Chief Acquisition Officers Council, provide guidance to agencies on developing appropriate internal procedures and controls for awarding and administering Federal contracts to improve monitoring of and compliance with actions to prevent trafficking in persons, consistent with section 106 of the TVPA, including the development of methods to track the number of trafficking violations reported and remedies applied; and

(2) in consultation with the Federal Acquisition Institute and appropriate management councils, such as the Chief Acquisition Officers Council:

(A) develop methods to track the number of Federal employees trained; and

(B) implement training requirements to ensure that the Federal acquisition workforce is trained on the policies and responsibilities for combating trafficking, including on:

(i) applicable laws, regulations, and policies; and
(ii) internal controls and oversight procedures implemented by the agency, including enforcement procedures available to the agency to investigate, manage, and mitigate contractor and subcontractor trafficking violations.

(b) The member agencies of PITF shall jointly facilitate the sharing of information that may be used by acquisition, program, and other offices within agencies to evaluate where the risk of trafficking in persons may be heightened based on the nature of the work to be performed, the place of performance, and any other relevant considerations.

SEC. 4. *Effective Date.* This order shall become effective immediately and shall apply to solicitations issued on or after the effective date for the action taken by the FAR Council under subsection 2(a) of this order.

SEC. 5. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(1) the authority granted by law to an executive department, agency, or the head thereof; or

(2) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

BARACK OBAMA.

EXECUTIVE ORDER No. 13673

Ex. Ord. No. 13673, July 31, 2014, 79 F.R. 45309, as amended by Ex. Ord. No. 13683, §3, Dec. 11, 2014, 79 F.R. 75042; Ex. Ord. No. 13738, Aug. 23, 2016, 81 F.R. 58807, which related to compliance with labor laws by Federal contractors, was revoked by Ex. Ord. No. 13782, §1, Mar. 27, 2017, 82 F.R. 15607, set out below.

EX. ORD. NO. 13782. REVOCATION OF FEDERAL CONTRACTING EXECUTIVE ORDERS

Ex. Ord. No. 13782, Mar. 27, 2017, 82 F.R. 15607, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

SECTION 1. *Revocation.* Executive Order 13673 of July 31, 2014, section 3 of Executive Order 13683 of December 11, 2014, and Executive Order 13738 of August 23, 2016, are revoked.

SEC. 2. *Reconsideration of Existing Rules.* All executive departments and agencies shall, as appropriate and to the extent consistent with law, consider promptly rescinding any orders, rules, regulations, guidance, guidelines, or policies implementing or enforcing the revoked Executive Orders and revoked provision listed in section 1 of this order.

SEC. 3. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the

United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

DONALD J. TRUMP.

GOVERNMENT CONTRACTING

Memorandum of President of the United States, Mar. 4, 2009, 74 F.R. 9755, provided:

Memorandum for the Heads of Executive Departments and Agencies

The Federal Government has an overriding obligation to American taxpayers. It should perform its functions efficiently and effectively while ensuring that its actions result in the best value for the taxpayers.

Since 2001, spending on Government contracts has more than doubled, reaching over \$500 billion in 2008. During this same period, there has been a significant increase in the dollars awarded without full and open competition and an increase in the dollars obligated through cost-reimbursement contracts. Between fiscal years 2000 and 2008, for example, dollars obligated under cost-reimbursement contracts nearly doubled, from \$71 billion in 2000 to \$135 billion in 2008. Reversing these trends away from full and open competition and toward cost-reimbursement contracts could result in savings of billions of dollars each year for the American taxpayer.

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

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

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

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

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

It is the policy of the Federal Government that executive agencies shall not engage in noncompetitive con-

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

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

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

- (1) govern the appropriate use and oversight of sole-source and other types of noncompetitive contracts and to maximize the use of full and open competition and other competitive procurement processes;
- (2) govern the appropriate use and oversight of all contract types, in full consideration of the agency's needs, and to minimize risk and maximize the value of Government contracts generally, consistent with the regulations to be promulgated pursuant to section 864 of Public Law 110-417;
- (3) assist agencies in assessing the capacity and ability of the Federal acquisition workforce to develop, manage, and oversee acquisitions appropriately; and
- (4) clarify when governmental outsourcing for services is and is not appropriate, consistent with section 321 of Public Law 110-417 (31 U.S.C. 501 note).

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

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

BARACK OBAMA.

§ 3102. Delegation and assignment of powers, functions, and responsibilities

(a) IN GENERAL.—Except to the extent expressly prohibited by another law, the head of an executive agency may delegate to another of-

ficer or official of that agency any power under this division.

(b) PROCUREMENTS FOR OR WITH ANOTHER AGENCY.—Subject to subsection (a), to facilitate the procurement of property and services covered by this division by an executive agency for another executive agency, and to facilitate joint procurement by executive agencies—

(1) the head of an executive agency may delegate functions and assign responsibilities relating to procurement to any officer or employee within the agency;

(2) the heads of 2 or more executive agencies, consistent with section 1535 of title 31 and regulations prescribed under section 1074 of the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355, 31 U.S.C. 1535 note), may by agreement delegate procurement functions and assign procurement responsibilities from one executive agency to another of those executive agencies or to an officer or civilian employee of another of those executive agencies; and

(3) the heads of 2 or more executive agencies may establish joint or combined offices to exercise procurement functions and responsibilities.

(Pub. L. 111-350, § 3, Jan. 4, 2011, 124 Stat. 3743.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
3102	41:261.	June 30, 1949, ch. 288, title III, § 311, as added Pub. L. 103-355, title I, § 1552, Oct. 13, 1994, 108 Stat. 3299.

§ 3103. Acquisition programs

(a) CONGRESSIONAL POLICY.—It is the policy of Congress that the head of each executive agency should achieve, on average, 90 percent of the cost, performance, and schedule goals established for major acquisition programs of the agency.

(b) ESTABLISHMENT OF GOALS.—

(1) BY HEAD OF EXECUTIVE AGENCY.—The head of each executive agency shall approve or define the cost, performance, and schedule goals for major acquisition programs of the agency.

(2) BY CHIEF FINANCIAL OFFICER.—The chief financial officer of an executive agency shall evaluate the cost goals proposed for each major acquisition program of the agency.

(c) IDENTIFICATION OF NONCOMPLIANT PROGRAMS.—When it is necessary to implement the policy set out in subsection (a), the head of an executive agency shall—

(1) determine whether there is a continuing need for programs that are significantly behind schedule, over budget, or not in compliance with performance or capability requirements; and

(2) identify suitable actions to be taken, including termination, with respect to those programs.

(Pub. L. 111-350, § 3, Jan. 4, 2011, 124 Stat. 3743.)

HISTORICAL AND REVISION NOTES

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
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

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
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

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
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

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
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.	
3303.	Exclusion of particular source or restriction of solicitation to small business concerns.
3304.	Use of noncompetitive procedures.
3305.	Simplified procedures for small purchases.
3306.	Planning and solicitation requirements.
3307.	Preference for commercial products and commercial services.
3308.	Planning for future competition in contracts for major systems.
3309.	Design-build selection procedures.
3310.	Quantities to order.
3311.	Qualification requirement.
3312.	Database on price trends of items and services under Federal contracts.

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

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
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

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
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.

(2) **CONTRACTOR.**—The contractor for a prime contract under this division shall be required to submit cost or pricing data before the pricing of a change or modification to the contract if—

(A) in the case of a change or modification made to a prime contract referred to in paragraph (1)(A), the price adjustment is expected to exceed \$2,000,000;

(B) in the case of a change or modification made to a prime contract that was entered into on or before June 30, 2018, and that has been modified pursuant to subsection (f), the price adjustment is expected to exceed \$750,000; and

(C) in the case of a change or modification not covered by subparagraph (A) or (B), the price adjustment is expected to exceed \$750,000.

(3) **OFFEROR FOR SUBCONTRACT.**—An offeror for a subcontract (at any tier) of a contract under this division shall be required to submit cost or pricing data before the award of the subcontract if the prime contractor and each higher-tier subcontractor have been required to make available cost or pricing data under this chapter and—

(A) in the case of a subcontract under a prime contract referred to in paragraph (1)(A), the price of the subcontract is expected to exceed \$2,000,000;

(B) in the case of a subcontract entered into under a prime contract that was entered into on or before June 30, 2018, and that has been modified pursuant to subsection (f), the price of the subcontract is expected to exceed \$2,000,000; and

(C) in the case of a subcontract not covered by subparagraph (A) or (B), the price of the subcontract is expected to exceed \$750,000.

(4) **SUBCONTRACTOR.**—The subcontractor for a subcontract covered by paragraph (3) shall be required to submit cost or pricing data before the pricing of a change or modification to the subcontract if—

(A) in the case of a change or modification to a subcontract referred to in paragraph (3)(A) or (B), the price adjustment is expected to exceed \$2,000,000; and

(B) in the case of a change or modification to a subcontract referred to in paragraph (3)(C), the price adjustment is expected to exceed \$750,000.

(b) **CERTIFICATION.**—A person required, as an offeror, contractor, or subcontractor, to submit cost or pricing data under subsection (a) (or required by the head of the procuring activity concerned to submit the data under section 3504 of this title) shall be required to certify that, to the best of the person's knowledge and belief, the cost or pricing data submitted are accurate, complete, and current.

(c) **TO WHOM SUBMITTED.**—Cost or pricing data required to be submitted under subsection (a) (or under section 3504 of this title), and a certification required to be submitted under subsection (b), shall be submitted—

(1) in the case of a submission by a prime contractor (or an offeror for a prime contract),

to the contracting officer for the contract (or a designated representative of the contracting officer); or

(2) in the case of a submission by a subcontractor (or an offeror for a subcontract), to the prime contractor.

(d) **APPLICATION OF CHAPTER.**—Except as provided under section 3503 of this title, this chapter applies to contracts entered into by the head of an executive agency on behalf of a foreign government.

(e) **SUBCONTRACTS NOT AFFECTED BY WAIVER.**—A waiver of requirements for submission of certified cost or pricing data that is granted under section 3503(a)(3) of this title in the case of a contract or subcontract does not waive the requirement under subsection (a)(3) of this section for submission of cost or pricing data in the case of subcontracts under that contract or subcontract unless the head of the procuring activity granting the waiver determines that the requirement under subsection (a)(3) of this section should be waived in the case of those subcontracts and justifies in writing the reason for the determination.

(f) **MODIFICATIONS TO PRIOR CONTRACTS.**—On the request of a contractor that was required to submit cost or pricing data under subsection (a) in connection with a prime contract entered into on or before June 30, 2018, the head of the executive agency that entered into the contract shall modify the contract to reflect paragraphs (2)(B) and (3)(B) of subsection (a). All those modifications shall be made without requiring consideration.

(g) **ADJUSTMENT OF AMOUNTS.**—Effective on October 1 of each year that is divisible by 5, each amount set forth in subsection (a) shall be adjusted in accordance with section 1908.

(Pub. L. 111–350, § 3, Jan. 4, 2011, 124 Stat. 3765; Pub. L. 115–91, div. A, title VIII, § 811(a)(2), Dec. 12, 2017, 131 Stat. 1459.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
3502	41:254b(a).	June 30, 1949, ch. 288, title III, § 304A(a), as added Pub. L. 103–355, title I, § 1251(a)(2), Oct. 13, 1994, 108 Stat. 3278; Pub. L. 105–261, div. A, title VIII, § 805(b), Oct. 17, 1998, 112 Stat. 2083.

Editorial Notes

AMENDMENTS

2017—Subsec. (a). Pub. L. 115–91, § 811(a)(2)(A)(i), (ii), substituted “June 30, 2018” for “October 13, 1994” and “\$750,000” for “\$100,000” wherever appearing.

Subsec. (a)(1)(A), (2)(A). Pub. L. 115–91, § 811(a)(2)(A)(iii), substituted “\$2,000,000” for “\$500,000”. Subsec. (a)(2)(B). Pub. L. 115–91, § 811(a)(2)(A)(iv), substituted “\$750,000” for “\$500,000”.

Subsec. (a)(3)(A), (B), (4)(A). Pub. L. 115–91, § 811(a)(2)(A)(iii), substituted “\$2,000,000” for “\$500,000”.

Subsec. (f). Pub. L. 115–91, § 811(a)(2)(B), substituted “June 30, 2018” for “October 13, 1994”.

Subsec. (g). Pub. L. 115–91, § 811(a)(2)(C), substituted “in accordance with section 1908.” for “to the amount that is equal to the fiscal year 1994 constant dollar value of the amount set forth. Any amount, as so adjusted, that is not evenly divisible by \$50,000 shall be

rounded to the nearest multiple of \$50,000. In the case of an amount that is evenly divisible by \$25,000 but not evenly divisible by \$50,000, the amount shall be rounded to the next higher multiple of \$50,000.”

§ 3503. Exceptions

(a) IN GENERAL.—Submission of certified cost or pricing data shall not be required under section 3502 of this title in the case of a contract, a subcontract, or a modification of a contract or subcontract—

(1) for which the price agreed on is based on—

- (A) adequate price competition; or
- (B) prices set by law or regulation;

(2) for the acquisition of a commercial product or a commercial service; or

(3) in an exceptional case when the head of the procuring activity, without delegation, determines that the requirements of this chapter may be waived and justifies in writing the reasons for the determination.

(b) MODIFICATIONS OF CONTRACTS AND SUBCONTRACTS FOR COMMERCIAL PRODUCTS OR COMMERCIAL SERVICES.—In the case of a modification of a contract or subcontract for a commercial product or a commercial service that is not covered by the exception to the submission of certified cost or pricing data in paragraph (1) or (2) of subsection (a), submission of certified cost or pricing data shall not be required under section 3502 of this title if—

(1) the contract or subcontract being modified is a contract or subcontract for which submission of certified cost or pricing data may not be required by reason of paragraph (1) or (2) of subsection (a); and

(2) the modification would not change the contract or subcontract from a contract or subcontract for the acquisition of a commercial product or a commercial service to a contract or subcontract for the acquisition of an item other than a commercial product or a commercial service.

(Pub. L. 111-350, § 3, Jan. 4, 2011, 124 Stat. 3766; Pub. L. 115-232, div. A, title VIII, § 836(b)(12), 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>
3503	41:254b(b).	June 30, 1949, ch. 288, title III, § 304A(b), as added Pub. L. 103-355, title I, § 1251(a)(2), Oct. 13, 1994, 108 Stat. 3279; Pub. L. 104-106, title XLII, § 4201(b)(1), Feb. 10, 1996, 110 Stat. 651.

In subsection (b)(2), the words “as the case may be” are omitted as unnecessary.

Editorial Notes

AMENDMENTS

2018—Subsec. (a)(2). Pub. L. 115-232, § 836(b)(12)(A), substituted “a commercial product or a commercial service” for “a commercial item”.

Subsec. (b). Pub. L. 115-232, § 836(b)(12)(B), in heading, substituted “Commercial Products or Commercial Services” for “Commercial Items” and, in text, substituted “a commercial product or a commercial service” for “a commercial item” 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.

§ 3504. Cost or pricing data on below-threshold contracts

(a) AUTHORITY TO REQUIRE SUBMISSION.—Subject to subsection (b), when certified cost or pricing data are not required to be submitted by section 3502 of this title for a contract, subcontract, or modification of a contract or subcontract, the data may nevertheless be required to be submitted by the head of the procuring activity, but only if the head of the procuring activity determines that the data are necessary for the evaluation by the agency of the reasonableness of the price of the contract, subcontract, or modification of a contract or subcontract. In any case in which the head of the procuring activity requires the data to be submitted under this section, the head of the procuring activity shall justify in writing the reason for the requirement.

(b) EXCEPTION.—The head of the procuring activity may not require certified cost or pricing data to be submitted under this section for any contract or subcontract, or modification of a contract or subcontract, covered by the exceptions in section 3503(a)(1) or (2) of this title.

(c) DELEGATION OF AUTHORITY PROHIBITED.—The head of a procuring activity may not delegate the functions under this section.

(Pub. L. 111-350, § 3, Jan. 4, 2011, 124 Stat. 3767.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
3504	41:254b(c).	June 30, 1949, ch. 288, title III, § 304A(c), as added Pub. L. 103-355, title I, § 1251(a)(2), Oct. 13, 1994, 108 Stat. 3280; Pub. L. 104-106, title XLII, § 4201(b)(1), 4321(e)(3), Feb. 10, 1996, 110 Stat. 651, 675.

§ 3505. Submission of other information

(a) AUTHORITY TO REQUIRE SUBMISSION.—When certified cost or pricing data are not required to be submitted under this chapter for a contract, subcontract, or modification of a contract or subcontract, the contracting officer shall require submission of data other than certified cost or pricing data to the extent necessary to determine the reasonableness of the price of the contract, subcontract, or modification of the contract or subcontract. Except in the case of a contract or subcontract covered by the exceptions in section 3503(a)(1) of this title, the contracting officer shall require that the data submitted include, at a minimum, appropriate information on the prices at which the same item or similar items have previously been sold that is adequate for evaluating the reasonableness of the price for the procurement.

(b) LIMITATIONS ON AUTHORITY.—The Federal Acquisition Regulation shall include the fol-

lowing provisions regarding the types of information that contracting officers may require under subsection (a):

(1) **REASONABLE LIMITATIONS.**—Reasonable limitations on requests for sales data relating to commercial products or commercial services.

(2) **LIMITATION ON SCOPE OF REQUEST.**—A requirement that a contracting officer limit, to the maximum extent practicable, the scope of any request for information relating to commercial products or commercial services from an offeror to only that information that is in the form regularly maintained by the offeror in commercial operations.

(3) **INFORMATION NOT TO BE DISCLOSED.**—A statement that any information received relating to commercial products or commercial services that is exempt from disclosure under section 552(b) of title 5 shall not be disclosed by the Federal Government.

(Pub. L. 111-350, § 3, Jan. 4, 2011, 124 Stat. 3767; Pub. L. 115-232, div. A, title VIII, § 836(b)(13), Aug. 13, 2018, 132 Stat. 1863.)

HISTORICAL AND REVISION NOTES

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
3505	41:254b(d).	June 30, 1949, ch. 288, title III, § 304A(d), as added Pub. L. 103-355, title I, § 1251(a)(2), Oct. 13, 1994, 108 Stat. 3281; Pub. L. 104-106, title XLII, §§ 4201(b)(1), 4321(e)(4), Feb. 10, 1996, 110 Stat. 652, 675; Pub. L. 105-261, div. A, title VIII, § 808(b), Oct. 17, 1998, 112 Stat. 2085.

Editorial Notes

AMENDMENTS

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

§ 3506. Price reductions for defective cost or pricing data

(a) **PROVISION REQUIRING ADJUSTMENT.**—

(1) **IN GENERAL.**—A prime contract (or change or modification to a prime contract) under which a certificate under section 3502(b) of this title is required shall contain a provision that the price of the contract to the Federal Government, including profit or fee, shall be adjusted to exclude any significant amount by which it may be determined by the head of the executive agency that the price was increased because the contractor (or any subcontractor required to make the certificate available) submitted defective cost or pricing data.

(2) **WHAT CONSTITUTES DEFECTIVE COST OR PRICING DATA.**—For the purposes of this chapter, defective cost or pricing data are cost or

pricing data that, as of the date of agreement on the price of the contract (or another date agreed on between the parties), were inaccurate, incomplete, or noncurrent. If for purposes of the preceding sentence the parties agree on a date other than the date of agreement on the price of the contract, the date agreed on by the parties shall be as close to the date of agreement on the price of the contract as is practicable.

(b) **VALID DEFENSE.**—In determining for purposes of a contract price adjustment under a contract provision required by subsection (a) whether, and to what extent, a contract price was increased because the contractor (or a subcontractor) submitted defective cost or pricing data, it is a defense that the Federal Government did not rely on the defective data submitted by the contractor or subcontractor.

(c) **INVALID DEFENSES.**—It is not a defense to an adjustment of the price of a contract under a contract provision required by subsection (a) that—

(1) the price of the contract would not have been modified even if accurate, complete, and current cost or pricing data had been submitted by the contractor or subcontractor because the contractor or subcontractor—

(A) was the sole source of the property or services procured; or

(B) otherwise was in a superior bargaining position with respect to the property or services procured;

(2) the contracting officer should have known that the cost or pricing data in issue were defective even though the contractor or subcontractor took no affirmative action to bring the character of the data to the attention of the contracting officer;

(3) the contract was based on an agreement between the contractor and the Federal Government about the total cost of the contract and there was no agreement about the cost of each item procured under the contract; or

(4) the prime contractor or subcontractor did not submit a certification of cost or pricing data relating to the contract as required by section 3502(b) of this title.

(d) **OFFSETS.**—

(1) **WHEN ALLOWED.**—A contractor shall be allowed to offset an amount against the amount of a contract price adjustment under a contract provision required by subsection (a) if—

(A) the contractor certifies to the contracting officer (or to a designated representative of the contracting officer) that, to the best of the contractor's knowledge and belief, the contractor is entitled to the offset; and

(B) the contractor proves that the cost or pricing data were available before the date of agreement on the price of the contract (or price of the modification), or, if applicable, consistent with subsection (a)(2), another date agreed on by the parties, and that the data were not submitted as specified in section 3502(c) of this title before that date.

(2) **WHEN NOT ALLOWED.**—A contractor shall not be allowed to offset an amount otherwise authorized to be offset under paragraph (1) if—

(A) the certification under section 3502(b) of this title with respect to the cost or pricing data involved was known to be false when signed; or

(B) the Federal Government proves that, had the cost or pricing data referred to in paragraph (1)(B) been submitted to the Federal Government before date of agreement on the price of the contract (or price of the modification), or, if applicable, under subsection (a)(2), another date agreed on by the parties, the submission of the cost or pricing data would not have resulted in an increase in that price in the amount to be offset.

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3768.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
3506	41:254b(e).	June 30, 1949, ch. 288, title III, §304A(e), as added Pub. L. 103-355, title I, §1251(a)(2), Oct. 13, 1994, 108 Stat. 3282.

§ 3507. Interest and penalties for certain overpayments

(a) IN GENERAL.—If the Federal Government makes an overpayment to a contractor under a contract with an executive agency subject to this chapter and the overpayment was due to the submission by the contractor of defective cost or pricing data, the contractor shall be liable to the Federal Government—

(1) for interest on the amount of the overpayment, to be computed—

(A) for the period beginning on the date the overpayment was made to the contractor and ending on the date the contractor repays the amount of the overpayment to the Federal Government; and

(B) at the current rate prescribed by the Secretary of the Treasury under section 6621 of the Internal Revenue Code of 1986 (26 U.S.C. 6621); and

(2) if the submission of the defective data was a knowing submission, for an additional amount equal to the amount of the overpayment.

(b) LIABILITY NOT AFFECTED BY REFUSAL TO SUBMIT CERTIFICATION.—Any liability under this section of a contractor that submits cost or pricing data but refuses to submit the certification required by section 3502(b) of this title with respect to the cost or pricing data is not affected by the refusal to submit the certification.

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3769.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
3507	41:254b(f).	June 30, 1949, ch. 288, title III, §304A(f), as added Pub. L. 103-355, title I, §1251(a)(2), Oct. 13, 1994, 108 Stat. 3283.

§ 3508. Right to examine contractor records

For the purpose of evaluating the accuracy, completeness, and currency of cost or pricing

data required to be submitted by this chapter, an executive agency shall have the authority provided by section 4706(b)(2) of this title.

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3770.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
3508	41:254b(g).	June 30, 1949, ch. 288, title III, §304A(g), as added Pub. L. 103-355, title I, §1251(a)(2), Oct. 13, 1994, 108 Stat. 3283.

§ 3509. Notification of violations of Federal criminal law or overpayments

(a) DEFINITION.—In this section, the term “covered contract” means any contract in an amount greater than \$5,000,000 and more than 120 days in duration.

(b) FEDERAL ACQUISITION REGULATION.—The Federal Acquisition Regulation shall include, pursuant to FAR Case 2007-006 (as published at 72 Fed. Reg. 64019, November 14, 2007) or any follow-on FAR case, provisions that require timely notification by Federal contractors of violations of Federal criminal law or overpayments in connection with the award or performance of covered contracts or subcontracts, including those performed outside the United States and those for commercial products or commercial services.

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3770; Pub. L. 115-232, div. A, title VIII, §836(b)(14), Aug. 13, 2018, 132 Stat. 1864.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
3509	41:251 note.	Pub. L. 110-252, title VI, §§6102, 6103, June 30, 2008, 122 Stat. 2386, 2387.

In subsection (b), the words “shall include” are substituted for “shall be amended” and “to include” to reflect the permanence of the provision. The words “within 180 days after the date of the enactment of this Act” are omitted as obsolete.

Editorial Notes

AMENDMENTS

2018—Subsec. (b). 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.

CHAPTER 37—AWARDING OF CONTRACTS

Sec.

3701. Basis of award and rejection.

3702. Sealed bids.

3703. Competitive proposals.

3704. Post-award debriefings.

3705. Pre-award debriefings.

3706. Encouragement of alternative dispute resolution.

Sec.
3707. Antitrust violations.
3708. Protests.

§ 3701. Basis of award and rejection

(a) AWARD.—An executive agency shall evaluate sealed bids and competitive proposals, and award a contract, based solely on the factors specified in the solicitation.

(b) REJECTION.—All sealed bids or competitive proposals received in response to a solicitation may be rejected if the agency head determines that rejection is in the public interest.

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3770.)

HISTORICAL AND REVISION NOTES

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
3701(a)	41:253b(a).	June 30, 1949, ch. 288, title III, §303B(a), (b), as added Pub. L. 98-369, title VII, §2711(a)(2), July 18, 1984, 98 Stat. 1179; Pub. L. 103-355, title I, §1061(c)(1), Oct. 13, 1994, 108 Stat. 3267.
3701(b)	41:253b(b).	

Statutory Notes and Related Subsidiaries

USE OF LOWEST PRICE TECHNICALLY ACCEPTABLE SOURCE SELECTION PROCESS

Pub. L. 115-232, div. A, title VIII, §880, Aug. 13, 2018, 132 Stat. 1909, as amended by Pub. L. 116-92, div. A, title VIII, §806(a)(2), Dec. 20, 2019, 133 Stat. 1485, provided that:

“(a) STATEMENT OF POLICY.—It shall be the policy of the United States Government to avoid using lowest price technically acceptable source selection criteria in circumstances that would deny the Government the benefits of cost and technical tradeoffs in the source selection process.

“(b) REVISION OF FEDERAL ACQUISITION REGULATION.—Not later than 120 days after the date of the enactment of this Act [Aug. 13, 2018], the Federal Acquisition Regulation shall be revised to require that, for solicitations issued on or after the date that is 120 days after the date of the enactment of this Act, lowest price technically acceptable source selection criteria are used only in situations in which—

“(1) an executive agency is able to comprehensively and clearly describe the minimum requirements expressed in terms of performance objectives, measures, and standards that will be used to determine acceptability of offers;

“(2) the executive agency would realize no, or minimal, value from a contract proposal exceeding the minimum technical or performance requirements set forth in the request for proposal;

“(3) the proposed technical approaches will require no, or minimal, subjective judgment by the source selection authority as to the desirability of one offeror’s proposal versus a competing proposal;

“(4) the executive agency has a high degree of confidence that a review of technical proposals of offerors other than the lowest bidder would not result in the identification of factors that could provide value or benefit to the executive agency;

“(5) the contracting officer has included a justification for the use of a lowest price technically acceptable evaluation methodology in the contract file; and

“(6) the executive agency has determined that the lowest price reflects full life-cycle costs, including for operations and support.

“(c) AVOIDANCE OF USE OF LOWEST PRICE TECHNICALLY ACCEPTABLE SOURCE SELECTION CRITERIA IN CERTAIN PROCUREMENTS.—To the maximum extent practicable, the use of lowest price technically acceptable source selection criteria shall be avoided in the case of a procurement that is predominately for the acquisition of—

“(1) information technology services, cybersecurity services, systems engineering and technical assistance services, advanced electronic testing, audit or audit readiness services, health care services and records, telecommunications devices and services, or other knowledge-based professional services;

“(2) personal protective equipment; or

“(3) knowledge-based training or logistics services in contingency operations or other operations outside the United States, including in Afghanistan or Iraq.

“(d) DEFINITIONS.—In this section:

“(1) EXECUTIVE AGENCY.—The term ‘executive agency’ has the meaning given that term in section 102 of title 40, United States Code, except that the term does not include the Department of Defense.

“(2) CONTINGENCY OPERATION.—The term ‘contingency operation’ has the meaning given that term in section 101 of title 10, United States Code.

“(3) APPROPRIATE CONGRESSIONAL COMMITTEES.—The term ‘appropriate congressional committees’ means the Committee on Oversight and Government Reform [now Committee on Oversight and Reform] of the House of Representatives and the Committee on Homeland Security and Governmental Affairs of the Senate.”

CONGRESSIONAL STATEMENT OF PURPOSE

Pub. L. 98-577, title I, §101, Oct. 30, 1984, 98 Stat. 3066, provided that: “The purposes of this Act [see Tables for classification] are to—

“(1) eliminate procurement procedures and practices that unnecessarily inhibit full and open competition for contracts;

“(2) promote the use of contracting opportunities as a means to expand the industrial base of the United States in order to ensure adequate responsive capability of the economy to the increased demands of the Government in times of national emergency; and

“(3) foster opportunities for the increased participation in the competitive procurement process of small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals.”

Executive Documents

EX. ORD. NO. 12979. AGENCY PROCUREMENT PROTESTS

Ex. Ord. No. 12979, Oct. 25, 1995, 60 F.R. 55171, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to ensure effective and efficient expenditure of public funds and fair and expeditious resolution of protests to the award of Federal procurement contracts, it is hereby ordered as follows:

SECTION 1. Heads of executive departments and agencies (“agencies”) engaged in the procurement of supplies and services shall prescribe administrative procedures for the resolution of protests to the award of their procurement contracts as an alternative to protests in fora outside the procuring agencies. Procedures prescribed pursuant to this order shall:

(a) emphasize that whenever conduct of a procurement is contested, all parties should use their best efforts to resolve the matter with agency contracting officers;

(b) to the maximum extent practicable, provide for inexpensive, informal, procedurally simple, and expeditious resolution of protests, including, where appropriate and as permitted by law, the use of alternative dispute resolution techniques, third party neutrals, and another agency’s personnel;

(c) allow actual or prospective bidders or offerors whose direct economic interests would be affected by the award or failure to award the contract to request a review, at a level above the contracting officer, of any decision by a contracting officer that is alleged to have violated a statute or regulation and, thereby, caused prejudice to the protester; and

(d) except where immediate contract award or performance is justified for urgent and compelling reasons or is determined to be in the best interest of the United States, prohibit award or performance of the contract while a timely filed protest is pending before the agency. To allow for the withholding of a contract award or performance, the agency must have received notice of the protest within either 10 calendar days after the contract award or 5 calendar days after the bidder or offeror who is protesting the contract award was given the opportunity to be debriefed by the agency, whichever date is later.

SEC. 2. The Administrator for Federal Procurement Policy shall: (a) work with the heads of executive agencies to provide policy guidance and leadership necessary to implement provisions of this order; and

(b) review and evaluate agency experience and performance under this order, and report on any findings to the President within 2 years from the date of this order.

SEC. 3. The Administrator of General Services, the Secretary of Defense, and the Administrator of the National Aeronautics and Space Administration, in coordination with the Office of Federal Procurement Policy, shall amend the Federal Acquisition Regulation, 48 C.F.R. 1, within 180 days of the date of this order to further the purposes of this order.

WILLIAM J. CLINTON.

§ 3702. Sealed bids

(a) OPENING OF BIDS.—Sealed bids shall be opened publicly at the time and place stated in the solicitation.

(b) CRITERIA FOR AWARDED CONTRACT.—The executive agency shall evaluate the bids in accordance with section 3701(a) of this title without discussions with the bidders and, except as provided in section 3701(b) of this title, shall award a contract with reasonable promptness to the responsible source whose bid conforms to the solicitation and is most advantageous to the Federal Government, considering only price and the other price-related factors included in the solicitation.

(c) NOTICE OF AWARD.—The award of a contract shall be made by transmitting, in writing or by electronic means, notice of the award to the successful bidder. Within 3 days after the date of contract award, the executive agency shall notify, in writing or by electronic means, each bidder not awarded the contract that the contract has been awarded.

(Pub. L. 111–350, § 3, Jan. 4, 2011, 124 Stat. 3770.)

HISTORICAL AND REVISION NOTES

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
3702(a)	41:253b(c) (1st sentence).	June 30, 1949, ch. 288, title III, § 303B(c), as added Pub. L. 98–369, title VII, § 2711(a)(2), July 18, 1984, 98 Stat. 1179; Pub. L. 103–355, title I, §§ 1061(c)(2), 1063(a), Oct. 13, 1994, 108 Stat. 3267, 3268.
3702(b)	41:253b(c) (2d sentence).	
3702(a)	41:253b(c) (3d, last sentences).	

§ 3703. Competitive proposals

(a) EVALUATION AND AWARD.—An executive agency shall evaluate competitive proposals in accordance with section 3701(a) of this title and may award a contract—

(1) after discussions with the offerors, provided that written or oral discussions have

been conducted with all responsible offerors who submit proposals within the competitive range; or

(2) based on the proposals received and without discussions with the offerors (other than discussions conducted for the purpose of minor clarification), if, as required by section 3306(b)(2)(B)(i) of this title, the solicitation included a statement that proposals are intended to be evaluated, and award made, without discussions unless discussions are determined to be necessary.

(b) LIMIT ON NUMBER OF PROPOSALS.—If the contracting officer determines that the number of offerors that would otherwise be included in the competitive range under subsection (a)(1) exceeds the number at which an efficient competition can be conducted, the contracting officer may limit the number of proposals in the competitive range, in accordance with the criteria specified in the solicitation, to the greatest number that will permit an efficient competition among the offerors rated most highly in accordance with those criteria.

(c) CRITERIA FOR AWARDED CONTRACT.—Except as otherwise provided in section 3701(b) of this title, the executive agency shall award a contract with reasonable promptness to the responsible source whose proposal is most advantageous to the Federal Government, considering only cost or price and the other factors included in the solicitation.

(d) NOTICE OF AWARD.—The executive agency shall award the contract by transmitting, in writing or by electronic means, notice of the award to that source and, within 3 days after the date of contract award, shall notify, in writing or by electronic means, all other offerors of the rejection of their proposals.

(Pub. L. 111–350, § 3, Jan. 4, 2011, 124 Stat. 3771.)

HISTORICAL AND REVISION NOTES

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
3703(a)	41:253b(d)(1).	June 30, 1949, ch. 288, title III, § 303B(d), as added Pub. L. 98–369, title VII, § 2711(a)(2), July 18, 1984, 98 Stat. 1180; Pub. L. 103–355, title I, §§ 1061(c)(3), 1063(b), Oct. 13, 1994, 108 Stat. 3267, 3268; Pub. L. 104–106, title XLI, § 4103(b), Feb. 10, 1996, 110 Stat. 644.
3703(b)	41:253b(d)(2).	
3703(c)	41:253b(d)(3) (1st sentence).	
3703(d)	41:253b(d)(3) (last sentence).	

§ 3704. Post-award debriefings

(a) REQUEST FOR DEBRIEFING.—When a contract is awarded by the head of an executive agency on the basis of competitive proposals, an unsuccessful offeror, on written request received by the agency within 3 days after the date on which the unsuccessful offeror receives the notification of the contract award, shall be debriefed and furnished the basis for the selection decision and contract award.

(b) WHEN DEBRIEFING TO BE CONDUCTED.—The executive agency shall debrief the offeror within, to the maximum extent practicable, 5 days after receipt of the request by the executive agency.

(c) **INFORMATION TO BE PROVIDED.**—The debriefing shall include, at a minimum—

(1) the executive agency's evaluation of the significant weak or deficient factors in the offeror's offer;

(2) the overall evaluated cost and technical rating of the offer of the contractor awarded the contract and the overall evaluated cost and technical rating of the offer of the debriefed offeror;

(3) the overall ranking of all offers;

(4) a summary of the rationale for the award;

(5) in the case of a proposal that includes a commercial product that is an end item under the contract, the make and model of the item being provided in accordance with the offer of the contractor awarded the contract; and

(6) reasonable responses to relevant questions posed by the debriefed offeror as to whether source selection procedures set forth in the solicitation, applicable regulations, and other applicable authorities were followed by the executive agency.

(d) **INFORMATION NOT TO BE INCLUDED.**—The debriefing may not include point-by-point comparisons of the debriefed offeror's offer with other offers and may not disclose any information that is exempt from disclosure under section 552(b) of title 5.

(e) **INCLUSION OF STATEMENT IN SOLICITATION.**—Each solicitation for competitive proposals shall include a statement that information described in subsection (c) may be disclosed in post-award debriefings.

(f) **AFTER SUCCESSFUL PROTEST.**—If, within one year after the date of the contract award and as a result of a successful procurement protest, the executive agency seeks to fulfill the requirement under the protested contract either on the basis of a new solicitation of offers or on the basis of new best and final offers requested for that contract, the head of the executive agency shall make available to all offerors—

(1) the information provided in debriefings under this section regarding the offer of the contractor awarded the contract; and

(2) the same information that would have been provided to the original offerors.

(g) **SUMMARY TO BE INCLUDED IN FILE.**—The contracting officer shall include a summary of the debriefing in the contract file.

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3771; Pub. L. 115-232, div. A, title VIII, §836(b)(15), Aug. 13, 2018, 132 Stat. 1864.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
3704(a)	41:253b(e)(1) (1st sentence).	June 30, 1949, ch. 288, title III, §303B(e), as added Pub. L. 103-355, title I, §1064(2), Oct. 13, 1994, 108 Stat. 3268; Pub. L. 104-106, title XLI, §4104(b)(1), Feb. 10, 1996, 110 Stat. 645.
3704(b)	41:253b(e)(1) (last sentence).	
3704(c)	41:253b(e)(2).	
3704(d)	41:253b(e)(3).	
3704(e)	41:253b(e)(4).	
3704(f)	41:253b(e)(5).	

HISTORICAL AND REVISION NOTES—CONTINUED

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
3704(g)	41:253b(g) (related to 41:253b(e)).	June 30, 1949, ch. 288, title III, §303B(g) (related to §303B(e)), as added Pub. L. 104-106, title XLI, §4104(b)(3), Feb. 10, 1996, 110 Stat. 645.

Editorial Notes

AMENDMENTS

2018—Subsec. (c)(5). 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.

§ 3705. Pre-award debriefings

(a) **REQUEST FOR DEBRIEFING.**—When the contracting officer excludes an offeror submitting a competitive proposal from the competitive range (or otherwise excludes that offeror from further consideration prior to the final source selection decision), the excluded offeror may request in writing, within 3 days after the date on which the excluded offeror receives notice of its exclusion, a debriefing prior to award.

(b) **WHEN DEBRIEFING TO BE CONDUCTED.**—The contracting officer shall make every effort to debrief the unsuccessful offeror as soon as practicable but may refuse the request for a debriefing if it is not in the best interests of the Federal Government to conduct a debriefing at that time.

(c) **PRECONDITION FOR POST-AWARD DEBRIEFING.**—The contracting officer is required to debrief an excluded offeror in accordance with section 3704 of this title only if that offeror requested and was refused a pre-award debriefing under subsections (a) and (b).

(d) **INFORMATION TO BE PROVIDED.**—The debriefing conducted under this section shall include—

(1) the executive agency's evaluation of the significant elements in the offeror's offer;

(2) a summary of the rationale for the offeror's exclusion; and

(3) reasonable responses to relevant questions posed by the debriefed offeror as to whether source selection procedures set forth in the solicitation, applicable regulations, and other applicable authorities were followed by the executive agency.

(e) **INFORMATION NOT TO BE DISCLOSED.**—The debriefing conducted pursuant to this section may not disclose the number or identity of other offerors and shall not disclose information about the content, ranking, or evaluation of other offerors' proposals.

(f) **SUMMARY TO BE INCLUDED IN FILE.**—The contracting officer shall include a summary of the debriefing in the contract file.

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3772.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
3705(a)	41:253b(f)(1) (1st sentence).	June 30, 1949, ch. 288, title III, § 303B(f), (g) (related to § 303B(f)), as added Pub. L. 104-106, title XLI, § 4104(b)(3), Feb. 10, 1996, 110 Stat. 645.
3705(b)	41:253b(f)(1) (last sentence).	
3705(c)	41:253b(f)(2).	
3705(d)	41:253b(f)(3).	
3705(e)	41:253b(f)(4).	
3705(f)	41:253b(g) (related to 41:253b(f)).	

§ 3706. Encouragement of alternative dispute resolution

The Federal Acquisition Regulation shall include a provision encouraging the use of alternative dispute resolution techniques to provide informal, expeditious, and inexpensive procedures for an offeror to consider using before filing a protest, prior to the award of a contract, of the exclusion of the offeror from the competitive range (or otherwise from further consideration) for that contract.

(Pub. L. 111-350, § 3, Jan. 4, 2011, 124 Stat. 3773.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
3706	41:253b(h).	June 30, 1949, ch. 288, title III, § 303B(h), as added Pub. L. 104-106, title XLI, § 4104(b)(3), Feb. 10, 1996, 110 Stat. 645.

§ 3707. Antitrust violations

If the agency head considers that a bid or proposal evidences a violation of the antitrust laws, the agency head shall refer the bid or proposal to the Attorney General for appropriate action.

(Pub. L. 111-350, § 3, Jan. 4, 2011, 124 Stat. 3773.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
3707	41:253b(i).	June 30, 1949, ch. 288, title III, § 303B(i), formerly § 303B(e), as added Pub. L. 98-369, title VII, § 2711(a)(2), July 18, 1984, 98 Stat. 1180; redesignated as § 303B(f), Pub. L. 103-355, title I, § 1064(1), Oct. 13, 1994, 108 Stat. 3268; redesignated as § 303B(i), Pub. L. 104-106, title XLI, § 4104(b)(2), Feb. 10, 1996, 110 Stat. 645.

§ 3708. Protests**(a) PROTEST FILE.—**

(1) ESTABLISHMENT AND ACCESS.—If, in the case of a solicitation for a contract issued by, or an award or proposed award of a contract by, the head of an executive agency, a protest is filed pursuant to the procedures in subchapter V of chapter 35 of title 31, and an actual or prospective offeror requests, a file of the protest shall be established by the procuring activity and reasonable access shall be provided to actual or prospective offerors.

(2) REDACTED INFORMATION.—Information exempt from disclosure under section 552 of title

5 may be redacted in a file established pursuant to paragraph (1) unless an applicable protective order provides otherwise.

(b) AGENCY ACTIONS ON PROTESTS.—If, in connection with a protest, the head of an executive agency determines that a solicitation, proposed award, or award does not comply with the requirements of law or regulation, the head of the executive agency may—

(1) take any action set out in subparagraphs (A) to (F) of subsection (b)(1) of section 3554 of title 31; and

(2) pay costs described in paragraph (1) of section 3554(c) of title 31 within the limits referred to in paragraph (2) of section 3554(c).

(Pub. L. 111-350, § 3, Jan. 4, 2011, 124 Stat. 3773.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
3708(a)	41:253b(k).	June 30, 1949, ch. 288, title III, § 303B(k), formerly § 303B(h), as added Pub. L. 103-355, title I, § 1065, Oct. 13, 1994, 108 Stat. 3269; redesignated as § 303B(k), Pub. L. 104-106, title XLI, § 4104(b)(2), Feb. 10, 1996, 110 Stat. 645; Pub. L. 104-106, title XLI, § 5607(c), Feb. 10, 1996, 110 Stat. 701, as amended Pub. L. 104-201, title X, § 1074(b)(7) (less effective date), Sept. 23, 1996, 110 Stat. 2660.
3708(b)	41:253b(l).	June 30, 1949, ch. 288, title III, § 303B(l), formerly § 303B(i), as added Pub. L. 103-355, title I, § 1066, Oct. 13, 1994, 108 Stat. 3269; redesignated as § 303B(l), Pub. L. 104-106, title XLI, § 4104(b)(2), Feb. 10, 1996, 110 Stat. 645.

CHAPTER 39—SPECIFIC TYPES OF CONTRACTS

Sec. 3901.	Contracts awarded using procedures other than sealed-bid procedures.
3902.	Severable services contracts for periods crossing fiscal years.
3903.	Multiyear contracts.
3904.	Contract authority for severable services contracts and multiyear contracts.
3905.	Cost contracts.
3906.	Cost-reimbursement contracts.

Statutory Notes and Related Subsidiaries

SEPARABILITY

Act June 30, 1949, ch. 288, title VI, § 604, formerly title V, § 504, 63 Stat. 403, renumbered by act Sept. 5, 1950, ch. 849, § 6(a), (b), 64 Stat. 583, provided that: “If any provision of this Act [see Tables for classification], or the application thereof to any person or circumstances, is held invalid, the remainder of this Act, and the application of such provision to other persons or circumstances, shall not be affected thereby.”

PROHIBITION ON CERTAIN TELECOMMUNICATIONS AND VIDEO SURVEILLANCE SERVICES OR EQUIPMENT

Pub. L. 115-232, div. A, title VIII, § 889, Aug. 13, 2018, 132 Stat. 1917, as amended by Pub. L. 116-283, div. A, title X, § 1081(d)(5), Jan. 1, 2021, 134 Stat. 3874, provided that:

“(a) PROHIBITION ON USE OR PROCUREMENT.—(1) The head of an executive agency may not—

“(A) procure or obtain or extend or renew a contract to procure or obtain any equipment, system, or

service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system; or

“(B) enter into a contract (or extend or renew a contract) with an entity that uses any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system.

“(2) Nothing in paragraph (1) shall be construed to—

“(A) prohibit the head of an executive agency from procuring with an entity to provide a service that connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements; or

“(B) cover telecommunications equipment that cannot route or redirect user data traffic or permit visibility into any user data or packets that such equipment transmits or otherwise handles.

“(b) PROHIBITION ON LOAN AND GRANT FUNDS.—(1) The head of an executive agency may not obligate or expend loan or grant funds to procure or obtain, extend or renew a contract to procure or obtain, or enter into a contract (or extend or renew a contract) to procure or obtain the equipment, services, or systems described in subsection (a).

“(2) In implementing the prohibition in paragraph (1), heads of executive agencies administering loan, grant, or subsidy programs, including the heads of the Federal Communications Commission, the Department of Agriculture, the Department of Homeland Security, the Small Business Administration, and the Department of Commerce, shall prioritize available funding and technical support to assist affected businesses, institutions and organizations as is reasonably necessary for those affected entities to transition from covered communications equipment and services, to procure replacement equipment and services, and to ensure that communications service to users and customers is sustained.

“(3) Nothing in this subsection shall be construed to—

“(A) prohibit the head of an executive agency from procuring with an entity to provide a service that connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements; or

“(B) cover telecommunications equipment that cannot route or redirect user data traffic or permit visibility into any user data or packets that such equipment transmits or otherwise handles.

“(c) EFFECTIVE DATES.—The prohibition under subsection (a)(1)(A) shall take effect one year after the date of the enactment of this Act [Aug. 13, 2018], and the prohibitions under subsections (a)(1)(B) and (b)(1) shall take effect two years after the date of the enactment of this Act.

“(d) WAIVER AUTHORITY.—

“(1) EXECUTIVE AGENCIES.—The head of an executive agency may, on a one-time basis, waive the requirements under subsection (a) with respect to an entity that requests such a waiver. The waiver may be provided, for a period of not more than two years after the effective dates described in subsection (c), if the entity seeking the waiver—

“(A) provides a compelling justification for the additional time to implement the requirements under such subsection, as determined by the head of the executive agency; and

“(B) submits to the head of the executive agency, who shall not later than 30 days thereafter submit to the appropriate congressional committees, a full and complete laydown of the presences of covered telecommunications or video surveillance equipment or services in the entity’s supply chain and a phase-out plan to eliminate such covered telecommunications or video surveillance equipment or services from the entity’s systems.

“(2) DIRECTOR OF NATIONAL INTELLIGENCE.—The Director of National Intelligence may provide a waiver

on a date later than the effective dates described in subsection (c) if the Director determines the waiver is in the national security interests of the United States.

“(f) DEFINITIONS.—In this section:

“(1) APPROPRIATE CONGRESSIONAL COMMITTEES.—The term ‘appropriate congressional committees’ means—

“(A) the Committee on Banking, Housing, and Urban Affairs, the Committee on Foreign Relations, and the Committee on Homeland Security and Governmental Affairs of the Senate; and

“(B) the Committee on Financial Services, the Committee on Foreign Affairs, and the Committee on Oversight and Government Reform [now Committee on Oversight and Reform] of the House of Representatives.

“(2) COVERED FOREIGN COUNTRY.—The term ‘covered foreign country’ means the People’s Republic of China.

“(3) COVERED TELECOMMUNICATIONS EQUIPMENT OR SERVICES.—The term ‘covered telecommunications equipment or services’ means any of the following:

“(A) Telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of such entities).

“(B) For the purpose of public safety, security of government facilities, physical security surveillance of critical infrastructure, and other national security purposes, video surveillance and telecommunications equipment produced by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of such entities).

“(C) Telecommunications or video surveillance services provided by such entities or using such equipment.

“(D) Telecommunications or video surveillance equipment or services produced or provided by an entity that the Secretary of Defense, in consultation with the Director of the National Intelligence or the Director of the Federal Bureau of Investigation, reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of a covered foreign country.

“(4) EXECUTIVE AGENCY.—The term ‘executive agency’ has the meaning given the term in section 133 of title 41, United States Code.”

[Pub. L. 116-283, div. A, title X, §1081(d), Jan. 1, 2021, 134 Stat. 3873, provided that the amendment made by section 1081(d)(5) of Pub. L. 116-283 to section 889 of Pub. L. 115-232, set out above, is effective as of Aug. 13, 2018, and as if included in Pub. L. 115-232.]

SHARE-IN-SAVINGS CONTRACTS

Act June 30, 1949, ch. 288, title III, §317, as added Pub. L. 107-347, title II, §210(b), Dec. 17, 2002, 116 Stat. 2934, provided that:

“(a) AUTHORITY TO ENTER INTO SHARE-IN-SAVINGS CONTRACTS.—(1) The head of an executive agency may enter into a share-in-savings contract for information technology (as defined in section 11101(6) of title 40, United States Code) in which the Government awards a contract to improve mission-related or administrative processes or to accelerate the achievement of its mission and share with the contractor in savings achieved through contract performance.

“(2)(A) Except as provided in subparagraph (B), a share-in-savings contract shall be awarded for a period of not more than five years.

“(B) A share-in-savings contract may be awarded for a period greater than five years, but not more than 10 years, if the head of the agency determines in writing prior to award of the contract that—

“(i) the level of risk to be assumed and the investment to be undertaken by the contractor is likely to inhibit the government from obtaining the needed information technology competitively at a fair and reasonable price if the contract is limited in duration to a period of five years or less; and

“(ii) usage of the information technology to be acquired is likely to continue for a period of time sufficient to generate reasonable benefit for the government.

“(3) Contracts awarded pursuant to the authority of this section shall, to the maximum extent practicable, be performance-based contracts that identify objective outcomes and contain performance standards that will be used to measure achievement and milestones that must be met before payment is made.

“(4) Contracts awarded pursuant to the authority of this section shall include a provision containing a quantifiable baseline that is to be the basis upon which a savings share ratio is established that governs the amount of payment a contractor is to receive under the contract. Before commencement of performance of such a contract, the senior procurement executive of the agency shall determine in writing that the terms of the provision are quantifiable and will likely yield value to the Government.

“(5)(A) The head of the agency may retain savings realized through the use of a share-in-savings contract under this section that are in excess of the total amount of savings paid to the contractor under the contract, but may not retain any portion of such savings that is attributable to a decrease in the number of civilian employees of the Federal Government performing the function. Except as provided in subparagraph (B), savings shall be credited to the appropriation or fund against which charges were made to carry out the contract and shall be used for information technology.

“(B) Amounts retained by the agency under this subsection shall—

“(i) without further appropriation, remain available until expended; and

“(ii) be applied first to fund any contingent liabilities associated with share-in-savings procurements that are not fully funded.

“(b) CANCELLATION AND TERMINATION.—(1) If funds are not made available for the continuation of a share-in-savings contract entered into under this section in a subsequent fiscal year, the contract shall be canceled or terminated. The costs of cancellation or termination may be paid out of—

“(A) appropriations available for the performance of the contract;

“(B) appropriations available for acquisition of the information technology procured under the contract, and not otherwise obligated; or

“(C) funds subsequently appropriated for payments of costs of cancellation or termination, subject to the limitations in paragraph (3).

“(2) The amount payable in the event of cancellation or termination of a share-in-savings contract shall be negotiated with the contractor at the time the contract is entered into.

“(3)(A) Subject to subparagraph (B), the head of an executive agency may enter into share-in-savings contracts under this section in any given fiscal year even if funds are not made specifically available for the full costs of cancellation or termination of the contract if funds are available and sufficient to make payments with respect to the first fiscal year of the contract and the following conditions are met regarding the funding of cancellation and termination liability:

“(i) The amount of unfunded contingent liability for the contract does not exceed the lesser of—

“(I) 25 percent of the estimated costs of a cancellation or termination; or

“(II) \$5,000,000.

“(ii) Unfunded contingent liability in excess of \$1,000,000 has been approved by the Director of the Office of Management and Budget or the Director's designee.

“(B) The aggregate number of share-in-savings contracts that may be entered into under subparagraph (A) by all executive agencies to which this chapter applies in a fiscal year may not exceed 5 in each of fiscal years 2003, 2004, and 2005.

“(c) DEFINITIONS.—In this section:

“(1) The term ‘contractor’ means a private entity that enters into a contract with an agency.

“(2) The term ‘savings’ means—

“(A) monetary savings to an agency; or

“(B) savings in time or other benefits realized by the agency, including enhanced revenues (other than enhanced revenues from the collection of fees, taxes, debts, claims, or other amounts owed the Federal Government).

“(3) The term ‘share-in-savings contract’ means a contract under which—

“(A) a contractor provides solutions for—

“(i) improving the agency's mission-related or administrative processes; or

“(ii) accelerating the achievement of agency missions; and

“(B) the head of the agency pays the contractor an amount equal to a portion of the savings derived by the agency from—

“(i) any improvements in mission-related or administrative processes that result from implementation of the solution; or

“(ii) acceleration of achievement of agency missions.

“(d) TERMINATION.—No share-in-savings contracts may be entered into under this section after September 30, 2005.”

Executive Documents

EX. ORD. NO. 13496. NOTIFICATION OF EMPLOYEE RIGHTS UNDER FEDERAL LABOR LAWS

Ex. Ord. No. 13496, Jan. 30, 2009, 74 F.R. 6107, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 101 *et seq.*, and in order to ensure the economical and efficient administration and completion of Government contracts, it is hereby ordered that:

SECTION 1. *Policy.* This order is designed to promote economy and efficiency in Government procurement. When the Federal Government contracts for goods or services, it has a proprietary interest in ensuring that those contracts will be performed by contractors whose work will not be interrupted by labor unrest. The attainment of industrial peace is most easily achieved and workers' productivity is enhanced when workers are well informed of their rights under Federal labor laws, including the National Labor Relations Act (Act), 29 U.S.C. 151 *et seq.* As the Act recognizes, “encouraging the practice and procedure of collective bargaining and . . . protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection” will “eliminate the causes of certain substantial obstructions to the free flow of commerce” and “mitigate and eliminate these obstructions when they have occurred.” 29 U.S.C. 151. Relying on contractors whose employees are informed of such rights under Federal labor laws facilitates the efficient and economical completion of the Federal Government's contracts.

SEC. 2. *Contract Clause.* Except in contracts exempted in accordance with section 3 of this order, all Government contracting departments and agencies shall, to the extent consistent with law, include the following provisions in every Government contract, other than collective bargaining agreements as defined in 5 U.S.C. 7103(a)(8) and purchases under the simplified acquisition threshold as defined in the Office of Federal Procurement Policy Act, 41 U.S.C. 403.

“1. During the term of this contract, the contractor agrees to post a notice, of such size and in such form, and containing such content as the Secretary of Labor shall prescribe, in conspicuous places in and about its plants and offices where employees covered by the Na-

tional Labor Relations Act engage in activities relating to the performance of the contract, including all places where notices to employees are customarily posted both physically and electronically. The notice shall include the information contained in the notice published by the Secretary of Labor in the Federal Register (Secretary's Notice).

"2. The contractor will comply with all provisions of the Secretary's Notice, and related rules, regulations, and orders of the Secretary of Labor.

"3. In the event that the contractor does not comply with any of the requirements set forth in paragraphs (1) or (2) above, this contract may be cancelled, terminated, or suspended in whole or in part, and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in or adopted pursuant to Executive Order [number as provided by the Federal Register [13496]] of [insert new date [Jan. 30, 2009]]. Such other sanctions or remedies may be imposed as are provided in Executive Order [number as provided by the Federal Register [13496]] of [insert new date [Jan. 30, 2009]], or by rule, regulation, or order of the Secretary of Labor, or as are otherwise provided by law.

"4. The contractor will include the provisions of paragraphs (1) through (3) above in every subcontract entered into in connection with this contract (unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 3 of Executive Order [number as provided by the Federal Register [13496]] of [insert new date [Jan. 30, 2009]]) so that such provisions will be binding upon each subcontractor. The contractor will take such action with respect to any such subcontract as may be directed by the Secretary of Labor as a means of enforcing such provisions, including the imposition of sanctions for non-compliance: Provided, however, that if the contractor becomes involved in litigation with a subcontractor, or is threatened with such involvement, as a result of such direction, the contractor may request the United States to enter into such litigation to protect the interests of the United States."

SEC. 3. Administration.

(a) The Secretary of Labor (Secretary) shall be responsible for the administration and enforcement of this order. The Secretary shall adopt such rules and regulations and issue such orders as are necessary and appropriate to achieve the purposes of this order.

(b) Within 120 days of the effective date of this order, the Secretary shall initiate a rulemaking to prescribe the size, form, and content of the notice to be posted by a contractor under paragraph 1 of the contract clause described in section 2 of this order. Such notice shall describe the rights of employees under Federal labor laws, consistent with the policy set forth in section 1 of this order.

(c) Whenever the Secretary finds that an act of Congress, clarification of existing law by the courts or the National Labor Relations Board, or other circumstances make modification of the contractual provisions set out in subsection (a) of this section necessary to achieve the purposes of this order, the Secretary promptly shall issue such rules, regulations, or orders as are needed to cause the substitution or addition of appropriate contractual provisions in Government contracts thereafter entered into.

SEC. 4. Exemptions. (a) If the Secretary finds that the application of any of the requirements of this order would not serve the purposes of this order or would impair the ability of the Government to procure goods or services on an economical and efficient basis, the Secretary may exempt a contracting department or agency or group of departments or agencies from the requirements of any or all of the provisions of this order with respect to a particular contract or subcontract or any class of contracts or subcontracts.

(b) The Secretary may, if the Secretary finds that special circumstances require an exemption in order to serve the national interest, exempt a contracting department or agency from the requirements of any or all

of the provisions of section 2 of this order with respect to a particular contract or subcontract or class of contracts or subcontracts.

SEC. 5. Investigation.

(a) The Secretary may investigate any Government contractor, subcontractor, or vendor to determine whether the contractual provisions required by section 2 of this order have been violated.

Such investigations shall be conducted in accordance with procedures established by the Secretary.

(b) The Secretary shall receive and investigate complaints by employees of a Government contractor or subcontractor, where such complaints allege a failure to perform or a violation of the contractual provisions required by section 2 of this order.

SEC. 6. Compliance.

(a) The Secretary, or any agency or officer in the executive branch lawfully designated by rule, regulation, or order of the Secretary, may hold such hearings, public or private, regarding compliance with this order as the Secretary may deem advisable.

(b) The Secretary may hold hearings, or cause hearings to be held, in accordance with subsection (a) of this section, prior to imposing, ordering, or recommending the imposition of sanctions under this order. Neither an order for cancellation, termination, or suspension of any contract or debarment of any contractor from further Government contracts under section 7(b) of this order nor the inclusion of a contractor on a published list of noncomplying contractors under section 7(c) of this order shall be carried out without affording the contractor an opportunity for a hearing.

SEC. 7. Remedies. In accordance with such rules, regulations, or orders as the Secretary may issue or adopt, the Secretary may:

(a) after consulting with the contracting department or agency, direct that department or agency to cancel, terminate, suspend, or cause to be cancelled, terminated, or suspended, any contract, or any portion or portions thereof, for failure of the contractor to comply with the contractual provisions required by section 2 of this order; contracts may be cancelled, terminated, or suspended absolutely, or continuance of contracts may be conditioned upon future compliance: Provided, that before issuing a directive under this subsection, the Secretary shall provide the head of the contracting department or agency an opportunity to offer written objections to the issuance of such a directive, which objections shall include a complete statement of reasons for the objections, among which reasons shall be a finding that completion of the contract is essential to the agency's mission: And provided further, that no directive shall be issued by the Secretary under this subsection so long as the head of the contracting department or agency, or his or her designee, continues to object to the issuance of such directive;

(b) after consulting with each affected contracting department or agency, provide that one or more contracting departments or agencies shall refrain from entering into further contracts, or extensions or other modifications of existing contracts, with any noncomplying contractor, until such contractor has satisfied the Secretary that such contractor has complied with and will carry out the provisions of this order: Provided, that before issuing a directive under this subsection, the Secretary shall provide the head of each contracting department or agency an opportunity to offer written objections to the issuance of such a directive, which objections shall include a complete statement of reasons for the objections, among which reasons shall be a finding that further contracts or extensions or other modifications of existing contracts with the noncomplying contractor are essential to the agency's mission: And provided further, that no directive shall be issued by the Secretary under this subsection so long as the head of a contracting department or agency, or his or her designee, continues to object to the issuance of such directive; and

(c) publish, or cause to be published, the names of contractors that have, in the judgment of the Sec-

retary, failed to comply with the provisions of this order or of related rules, regulations, and orders of the Secretary.

SEC. 8. *Reports.* Whenever the Secretary invokes section 7(a) or 7(b) of this order, the contracting department or agency shall report to the Secretary the results of the action it has taken within such time as the Secretary shall specify.

SEC. 9. *Cooperation.* Each contracting department and agency shall cooperate with the Secretary and provide such information and assistance as the Secretary may require in the performance of the Secretary's functions under this order.

SEC. 10. *Sufficiency of Remedies.* If the Secretary finds that the authority vested in the Secretary by sections 5 through 9 of this order is not sufficient to effectuate the purposes of this order, the Secretary shall develop recommendations on how better to effectuate those purposes.

SEC. 11. *Delegation.* The Secretary may, in accordance with law, delegate any function or duty of the Secretary under this order to any officer in the Department of Labor or to any other officer in the executive branch of the Government, with the consent of the head of the department or agency in which that officer serves.

SEC. 12. *Implementation.* To the extent permitted by law, the Federal Acquisition Regulatory Council (FAR Council) shall take whatever action is required to implement in the Federal Acquisition Regulation (FAR) the provisions of this order and any related rules, regulations, or orders issued by the Secretary under this order and shall amend the FAR to require each solicitation of offers for a contract to include a provision that implements section 2 of this order.

SEC. 13. *Revocation of Prior Order and Actions.* Executive Order 13201 of February 17, 2001, is revoked. The heads of executive departments and agencies shall, to the extent permitted by law, revoke expeditiously any orders, rules, regulations, guidelines, or policies implementing or enforcing Executive Order 13201.

SEC. 14. *Severability.* If any provision of this order, or the application of such provision to any person or circumstance, is held to be invalid, the remainder of this order and the application of the provisions of such to any person or circumstances shall not be affected thereby.

SEC. 15. *General Provisions.*

(a) Nothing in this order shall be construed to impair or otherwise affect:

- (i) authority granted by law to a department, agency, or the head thereof; or
- (ii) functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

SEC. 16. *Effective Date.* This order shall become effective immediately, and shall apply to contracts resulting from solicitations issued on or after the effective date of the rule promulgated by the Secretary pursuant to section 3(b) of this order.

BARACK OBAMA.

EX. ORD. NO. 13502. USE OF PROJECT LABOR AGREEMENTS FOR FEDERAL CONSTRUCTION PROJECTS

Ex. Ord. No. 13502, Feb. 6, 2009, 74 F.R. 6985, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 101 *et seq.*, and in order to promote the efficient administration and completion of Federal construction projects, it is hereby ordered that:

SECTION 1. *Policy.* (a) Large-scale construction projects pose special challenges to efficient and timely procurement by the Federal Government. Construction employers typically do not have a permanent workforce, which makes it difficult for them to predict labor costs when bidding on contracts and to ensure a steady supply of labor on contracts being performed. Challenges also arise due to the fact that construction projects typically involve multiple employers at a single location. A labor dispute involving one employer can delay the entire project. A lack of coordination among various employers, or uncertainty about the terms and conditions of employment of various groups of workers, can create frictions and disputes in the absence of an agreed-upon resolution mechanism. These problems threaten the efficient and timely completion of construction projects undertaken by Federal contractors. On larger projects, which are generally more complex and of longer duration, these problems tend to be more pronounced.

(b) The use of a project labor agreement may prevent these problems from developing by providing structure and stability to large-scale construction projects, thereby promoting the efficient and expeditious completion of Federal construction contracts. Accordingly, it is the policy of the Federal Government to encourage executive agencies to consider requiring the use of project labor agreements in connection with large-scale construction projects in order to promote economy and efficiency in Federal procurement.

SEC. 2. *Definitions.*

(a) The term "labor organization" as used in this order means a labor organization as defined in 29 U.S.C. 152(5).

(b) The term "construction" as used in this order means construction, rehabilitation, alteration, conversion, extension, repair, or improvement of buildings, highways, or other real property.

(c) The term "large-scale construction project" as used in this order means a construction project where the total cost to the Federal Government is \$25 million or more.

(d) The term "executive agency" as used in this order has the same meaning as in 5 U.S.C. 105, but excludes the Government Accountability Office.

(e) The term "project labor agreement" as used in this order means a pre-hire collective bargaining agreement with one or more labor organizations that establishes the terms and conditions of employment for a specific construction project and is an agreement described in 29 U.S.C. 158(f).

SEC. 3. (a) In awarding any contract in connection with a large-scale construction project, or obligating funds pursuant to such a contract, executive agencies may, on a project-by-project basis, require the use of a project labor agreement by a contractor where use of such an agreement will (i) advance the Federal Government's interest in achieving economy and efficiency in Federal procurement, producing labor-management stability, and ensuring compliance with laws and regulations governing safety and health, equal employment opportunity, labor and employment standards, and other matters, and (ii) be consistent with law.

(b) If an executive agency determines under subsection (a) that the use of a project labor agreement will satisfy the criteria in clauses (i) and (ii) of that subsection, the agency may, if appropriate, require that every contractor or subcontractor on the project agree, for that project, to negotiate or become a party to a project labor agreement with one or more appropriate labor organizations.

SEC. 4. Any project labor agreement reached pursuant to this order shall:

(a) bind all contractors and subcontractors on the Construction project through the inclusion of appropriate specifications in all relevant solicitation provisions and contract documents;

(b) allow all contractors and subcontractors to compete for contracts and subcontracts without regard to whether they are otherwise parties to collective bargaining agreements;

(c) contain guarantees against strikes, lockouts, and similar job disruptions;

(d) set forth effective, prompt, and mutually binding procedures for resolving labor disputes arising during the project labor agreement;

(e) provide other mechanisms for labor-management cooperation on matters of mutual interest and concern, including productivity, quality of work, safety, and health; and

(f) fully conform to all statutes, regulations, and Executive Orders.

SEC. 5. This order does not require an executive agency to use a project labor agreement on any construction project, nor does it preclude the use of a project labor agreement in circumstances not covered by this order, including leasehold arrangements and projects receiving Federal financial assistance. This order also does not require contractors or subcontractors to enter into a project labor agreement with any particular labor organization.

SEC. 6. Within 120 days of the date of this order, the Federal Acquisition Regulatory Council (FAR Council), to the extent permitted by law, shall take whatever action is required to amend the Federal Acquisition Regulation to implement the provisions of this order.

SEC. 7. The Director of OMB, in consultation with the Secretary of Labor and with other officials as appropriate, shall provide the President within 180 days of this order, recommendations about whether broader use of project labor agreements, with respect to both construction projects undertaken under Federal contracts and construction projects receiving Federal financial assistance, would help to promote the economical, efficient, and timely completion of such projects.

SEC. 8. *Revocation of Prior Orders, Rules, and Regulations.* Executive Order 13202 of February 17, 2001, and Executive Order 13208 of April 6, 2001, are revoked. The heads of executive agencies shall, to the extent permitted by law, revoke expeditiously any orders, rules, or regulations implementing Executive Orders 13202 and 13208.

SEC. 9. *Severability.* If any provision of this order, or the application of such provision to any person or circumstance, is held to be invalid, the remainder of this order and the application of the provisions of such to any person or circumstance shall not be affected thereby.

SEC. 10. *General.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) authority granted by law to an executive department, agency, or the head thereof; or

(ii) functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

SEC. 11. *Effective Date.* This order shall be effective immediately and shall apply to all solicitations for contracts issued on or after the effective date of the action taken by the FAR Council under section 6 of this order.

BARACK OBAMA.

EX. ORD. NO. 13981. PROTECTING THE UNITED STATES FROM CERTAIN UNMANNED AIRCRAFT SYSTEMS

Ex. Ord. No. 13981, Jan. 18, 2021, 86 F.R. 6821, provided: By the authority vested in me as President by the Constitution and the laws of the United States of America,

I, DONALD J. TRUMP, President of the United States of America, find that additional actions are necessary to ensure the security of Unmanned Aircraft Systems (UAS) owned, operated, and controlled by the

Federal Government; to secure the integrity of American infrastructure, including America's National Airspace System (NAS); to protect our law enforcement and warfighters; and to maintain and expand our domestic industrial base capabilities.

Accordingly, I hereby order:

SECTION 1. *Policy.* UAS have tremendous potential to support public safety and national security missions and are increasingly being used by Federal, State, and local governments. UAS are used, for example, to assist law enforcement and support natural disaster relief efforts. Reliance on UAS and components manufactured by our adversaries, however, threatens our national and economic security.

United States Government operations involving UAS require accessing, collecting, and maintaining data, which could reveal sensitive information. The use of UAS and critical components manufactured and developed by foreign adversaries, or by persons under their control, may allow this sensitive information to be accessed by or transferred to foreign adversaries. Furthermore, the manufacturing of UAS involves combining several critical components, including advanced manufacturing techniques, artificial intelligence, microelectronic components, and multi-spectral sensors. The Nation's capability to produce UAS and certain critical UAS components domestically is critical for national defense and the security and strength of our defense industrial base.

It is the policy of the United States, therefore, to prevent the use of taxpayer dollars to procure UAS that present unacceptable risks and are manufactured by, or contain software or critical electronic components from, foreign adversaries, and to encourage the use of domestically produced UAS.

SEC. 2. *Reviewing Federal Government Authority to Limit Government Procurement of Covered UAS.* (a) The heads of all executive departments and agencies (agencies) shall review their respective authorities to determine whether, and to what extent consistent with applicable law, they could cease:

(i) directly procuring or indirectly procuring through a third party, such as a contractor, a covered UAS;

(ii) providing Federal financial assistance (e.g., through award of a grant) that may be used to procure a covered UAS;

(iii) entering into, or renewing, a contract, order, or other commitment for the procurement of a covered UAS; or

(iv) otherwise providing Federal funding for the procurement of a covered UAS.

(b) After conducting the review described in subsection (a) of this section, the heads of all agencies shall each submit a report to the Director of the Office of Management and Budget identifying any authority to take the actions outlined in subsections (a)(i) through (iv) of this section.

SEC. 3. *Reviewing Federal Government Use of UAS.* (a) Within 60 days of the date of this order [Jan. 18, 2021], the heads of all agencies shall each submit a report to the Director of National Intelligence and the Director of the Office of Science and Technology Policy describing the manufacturer, model, and any relevant security protocols for all UAS currently owned or operated by their respective agency, or controlled by their agency through a third party, such as a contractor, that are manufactured by foreign adversaries or have significant components that are manufactured by foreign adversaries.

(b) Within 180 days of the date of this order, the Director of National Intelligence, in consultation with the Secretary of Defense, the Attorney General, the Secretary of Homeland Security, the Director of the Office of Science and Technology Policy, and the heads of other agencies, as appropriate, shall review the reports required by subsection (a) of this section and submit a report to the President assessing the security risks posed by the existing Federal UAS fleet and outlining potential steps that could be taken to mitigate these risks, including, if warranted, discontinuing all Federal

use of covered UAS and the expeditious removal of UAS from Federal service.

SEC. 4. *Restricting Use of UAS On or Over Critical Infrastructure or Other Sensitive Sites.* Within 270 days of the date of this order, the Administrator of the Federal Aviation Administration (FAA) shall propose regulations pursuant to section 2209 of the FAA Extension, Safety, and Security Act of 2016 (Public Law 114-190) [49 U.S.C. 44802 note].

SEC. 5. *Budget.* (a) The heads of all agencies shall consider the replacement of covered UAS to be a priority when developing budget proposals and planning for the use of funds.

(b) The Director of the Office of Management and Budget shall work with the heads of all agencies to identify possible sources of funding to replace covered UAS in the Federal fleet in future submissions of the President's Budget request.

SEC. 6. *Definitions.* For purposes of this order, the following definitions shall apply:

(a) The term “adversary country” means the Democratic People's Republic of Korea, the Islamic Republic of Iran, the People's Republic of China, the Russian Federation, or, as determined by the Secretary of Commerce, any other foreign nation, foreign area, or foreign non-government entity engaging in long-term patterns or serious instances of conduct significantly adverse to the national or economic security of the United States.

(b) The term “covered UAS” means any UAS that:

(i) is manufactured, in whole or in part, by an entity domiciled in an adversary country;

(ii) uses critical electronic components installed in flight controllers, ground control system processors, radios, digital transmission devices, cameras, or gimbals manufactured, in whole or in part, in an adversary country;

(iii) uses operating software (including cell phone or tablet applications, but not cell phone or tablet operating systems) developed, in whole or in part, by an entity domiciled in an adversary country;

(iv) uses network connectivity or data storage located outside the United States, or administered by any entity domiciled in an adversary country; or

(v) contains hardware and software components used for transmitting photographs, videos, location information, flight paths, or any other data collected by the UAS manufactured by an entity domiciled in an adversary country.

(c) The term “critical electronic component” means any electronic device that stores, manipulates, or transfers digital data. The term critical electronic component does not include, for example, passive electronics such as resistors, and non-data transmitting motors, batteries, and wiring.

(d) The term “entity” means a partnership, association, trust, joint venture, corporation, government, group, subgroup, other organization, or person.

(e) The term “Intelligence Community” has the same meaning set forth for that term in section 3003(4) of title 50, United States Code.

(f) The term “National Airspace System” (NAS) means the common network of United States airspace; air navigation facilities, equipment, and services; airports or landing areas; aeronautical charts, information, and services; related rules, regulations, and procedures; technical information; and manpower and material. The term also includes system components shared jointly by the Departments of Defense, Transportation, and Homeland Security.

(g) The term “Unmanned Aircraft Systems” (UAS) means any unmanned aircraft, and the associated elements that are required for the pilot or system operator to operate safely and efficiently in the NAS, including communication links, the components that control the unmanned aircraft, and all critical electronic components. The term UAS does not include any separate communication device, such as a cellular phone or tablet, designed to perform independently of a UAS system, which may be incorporated into the operation of a UAS.

SEC. 7. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

DONALD J. TRUMP.

EX. ORD. NO. 14063. USE OF PROJECT LABOR AGREEMENTS FOR FEDERAL CONSTRUCTION PROJECTS

Ex. Ord. No. 14063, Feb. 4, 2022, 87 F.R. 7363, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 101 *et seq.*, and in order to promote economy and efficiency in the administration and completion of Federal construction projects, it is hereby ordered that:

SECTION 1. *Policy.* (a) Large-scale construction projects pose special challenges to efficient and timely procurement by the Federal Government. Construction employers typically do not have a permanent workforce, which makes it difficult to predict labor costs when bidding on contracts and to ensure a steady supply of labor on contracts being performed. Challenges also arise because construction projects typically involve multiple employers at a single location, and a labor dispute involving one employer can delay the entire project. A lack of coordination among various employers, or uncertainty about the terms and conditions of employment of various groups of workers, can create friction and disputes in the absence of an agreed-upon resolution mechanism. These problems threaten the efficient and timely completion of construction projects undertaken by Federal contractors. On large-scale projects, which are generally more complex and of longer duration, these problems tend to be more pronounced.

(b) Project labor agreements are often effective in preventing these problems from developing because they provide structure and stability to large-scale construction projects. Such agreements avoid labor-related disruptions on projects by using dispute-resolution processes to resolve worksite disputes and by prohibiting work stoppages, including strikes and lockouts. They secure the commitment of all stakeholders on a construction site that the project will proceed efficiently without unnecessary interruptions. They also advance the interests of project owners, contractors, and subcontractors, including small businesses. For these reasons, owners and contractors in both the public and private sector routinely use project labor agreements, thereby reducing uncertainties in large-scale construction projects. The use of project labor agreements is fully consistent with the promotion of small business interests.

(c) Accordingly, it is the policy of the Federal Government for agencies to use project labor agreements in connection with large-scale construction projects to promote economy and efficiency in Federal procurement.

SEC. 2. *Definitions.* For purposes of this order:

(a) “Labor organization” means a labor organization as defined in 29 U.S.C. 152(5) of which building and construction employees are members, as described in 29 U.S.C. 158(f).

(b) “Construction” means construction, reconstruction, rehabilitation, modernization, alteration, conversion, extension, repair, or improvement of buildings, structures, highways, or other real property.

(c) “Large-scale construction project” means a Federal construction project within the United States for which the total estimated cost of the construction contract to the Federal Government is \$35 million or more. The Federal Acquisition Regulatory Council (FAR Council), in consultation with the Council of Economic Advisers, may adjust this threshold based on inflation using the process at 41 U.S.C. 1908.

(d) “Agency” means an executive department or agency, including an independent establishment subject to the Federal Property and Administrative Services Act, 40 U.S.C. 102(4)(A).

(e) “Project labor agreement” means a pre-hire collective bargaining agreement with one or more labor organizations that establishes the terms and conditions of employment for a specific construction project and is an agreement described in 29 U.S.C. 158(f).

SEC. 3. *Project Labor Agreement Presumption.* Subject to sections 5 and 6 of this order, in awarding any contract in connection with a large-scale construction project, or obligating funds pursuant to such a contract, agencies shall require every contractor or subcontractor engaged in construction on the project to agree, for that project, to negotiate or become a party to a project labor agreement with one or more appropriate labor organizations.

SEC. 4. *Requirements of Project Labor Agreements.* Any project labor agreement reached pursuant to this order shall:

(a) bind all contractors and subcontractors on the construction project through the inclusion of appropriate specifications in all relevant solicitation provisions and contract documents;

(b) allow all contractors and subcontractors on the construction project to compete for contracts and subcontracts without regard to whether they are otherwise parties to collective bargaining agreements;

(c) contain guarantees against strikes, lockouts, and similar job disruptions;

(d) set forth effective, prompt, and mutually binding procedures for resolving labor disputes arising during the term of the project labor agreement;

(e) provide other mechanisms for labor-management cooperation on matters of mutual interest and concern, including productivity, quality of work, safety, and health; and

(f) fully conform to all statutes, regulations, Executive Orders, and Presidential Memoranda.

SEC. 5. *Exceptions Authorized by Agencies.* A senior official within an agency may grant an exception from the requirements of section 3 of this order for a particular contract by, no later than the solicitation date, providing a specific written explanation of why at least one of the following circumstances exists with respect to that contract:

(a) Requiring a project labor agreement on the project would not advance the Federal Government’s interests in achieving economy and efficiency in Federal procurement. Such a finding shall be based on the following factors:

(i) The project is of short duration and lacks operational complexity;

(ii) The project will involve only one craft or trade;

(iii) The project will involve specialized construction work that is available from only a limited number of contractors or subcontractors;

(iv) The agency’s need for the project is of such an unusual and compelling urgency that a project labor agreement would be impracticable; or

(v) The project implicates other similar factors deemed appropriate in regulations or guidance issued pursuant to section 8 of this order.

(b) Based on an inclusive market analysis, requiring a project labor agreement on the project would substantially reduce the number of potential bidders so as to frustrate full and open competition.

(c) Requiring a project labor agreement on the project would otherwise be inconsistent with statutes, regulations, Executive Orders, or Presidential Memoranda.

SEC. 6. *Reporting.* (a) To the extent permitted by law and consistent with national security and executive branch confidentiality interests, agencies shall publish, on a centralized public website, data showing the use of project labor agreements on large-scale construction projects, as well as descriptions of the exceptions granted under section 5 of this order.

(b) On a quarterly basis, agencies shall report to the Office of Management and Budget (OMB) on their use of project labor agreements on large-scale construction projects and on the exceptions granted under section 5 of this order.

SEC. 7. Nothing in this order precludes an agency from requiring the use of a project labor agreement in circumstances not covered by this order, including projects where the total cost to the Federal Government is less than that for a large-scale construction project, or projects receiving any form of Federal financial assistance (including loans, loan guarantees, revolving funds, tax credits, tax credit bonds, and cooperative agreements). This order also does not require contractors or subcontractors to enter into a project labor agreement with any particular labor organization.

SEC. 8. *Regulations and Implementation.* (a) Within 120 days of the date of this order [Feb. 4, 2022], the FAR Council, to the extent permitted by law, shall propose regulations implementing the provisions of this order. The FAR Council shall consider and evaluate public comments on the proposed regulations and shall promptly issue a final rule, to the extent permitted by law.

(b) The Director of OMB shall, to the extent permitted by law, issue guidance to implement the requirements of sections 5 and 6 of this order.

SEC. 9. *Contracting Officer Training.* Within 90 days of the date of this order, the Secretary of Defense, the Secretary of Labor, and the Director of OMB shall coordinate in designing a training strategy for agency contracting officers to enable those officers to effectively implement this order. Within 180 days of the date of the publication of proposed regulations, the Secretary of Defense, the Secretary of Labor, and the Director of OMB shall provide a report to the Assistant to the President for Economic Policy and Director of the National Economic Council on the contents of the training strategy.

SEC. 10. *Revocation of Prior Orders, Rules, and Regulations.* Executive Order 13502 of February 6, 2009 (Use of Project Labor Agreements for Federal Construction Projects) [set out above], is revoked as of the effective date of the final regulations issued by the FAR Council under section 8(a) of this order. Upon Executive Order 13502’s revocation, the heads of agencies shall consider, to the extent permitted by law, revoking any orders, rules, or regulations implementing Executive Order 13502.

SEC. 11. *Severability.* If any provision of this order, or the application of such provision to any person or circumstance, is held to be invalid, the remainder of this order and its application to any other person or circumstance shall not be affected thereby.

SEC. 12. *Effective Date.* This order shall be effective immediately and shall apply to all solicitations for contracts issued on or after the effective date of the final regulations issued by the FAR Council under section 8(a) of this order. For solicitations issued between the date of this order and the effective date of the final regulations issued by the FAR Council under section 8(a) of this order, or solicitations that have already been issued and are outstanding as of the date of this order, agencies are strongly encouraged, to the extent permitted by law, to comply with this order.

SEC. 13. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

J.R. BIDEN, JR.

§ 3901. Contracts awarded using procedures other than sealed-bid procedures

(a) **AUTHORIZED TYPES.**—Except as provided in section 3905 of this title, contracts awarded after using procedures other than sealed-bid procedures may be of any type which in the opinion of the agency head will promote the best interests of the Federal Government.

(b) **REQUIRED WARRANTY.**—

(1) **CONTENT.**—Every contract awarded after using procedures other than sealed-bid procedures shall contain a suitable warranty, as determined by the agency head, by the contractor that no person or selling agency has been employed or retained to solicit or secure the contract on an agreement or understanding for a commission, percentage, brokerage, or contingent fee, except for bona fide employees or bona fide established commercial or selling agencies the contractor maintains to secure business.

(2) **REMEDY FOR BREACH OR VIOLATION.**—For the breach or violation of the warranty, the Federal Government may annul the contract without liability or deduct from the contract price or consideration the full amount of the commission, percentage, brokerage, or contingent fee.

(3) **NONAPPLICATION.**—Paragraph (1) does not apply to a contract for an amount that is not greater than the simplified acquisition threshold or to a contract for the acquisition of commercial products or commercial services.

(Pub. L. 111–350, § 3, Jan. 4, 2011, 124 Stat. 3774; Pub. L. 115–232, div. A, title VIII, § 836(b)(16), Aug. 13, 2018, 132 Stat. 1864.)

HISTORICAL AND REVISION NOTES

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
3901	41:254(a).	June 30, 1949, ch. 288, title III, § 304(a), 63 Stat. 395; Pub. L. 98–369, div. B, title VII, § 2714(a)(3)(A), (B), July 18, 1984, 98 Stat. 1184; Pub. L. 103–355, title IV, § 4103(c), title VIII, § 8204(b), Oct. 13, 1994, 108 Stat. 3341, 3396.

In subsection (b)(2), the words “in its discretion” are omitted as unnecessary.

Editorial Notes

AMENDMENTS

2018—Subsec. (b)(3). 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.

§ 3902. Severable services contracts for periods crossing fiscal years

(a) **AUTHORITY TO ENTER INTO CONTRACT.**—The head of an executive agency may enter into a contract for the procurement of severable services for a period that begins in one fiscal year and ends in the next fiscal year if (without regard to any option to extend the period of the contract) the contract period does not exceed one year.

(b) **OBLIGATION OF FUNDS.**—Funds made available for a fiscal year may be obligated for the total amount of a contract entered into under the authority of this section.

(Pub. L. 111–350, § 3, Jan. 4, 2011, 124 Stat. 3774.)

HISTORICAL AND REVISION NOTES

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
3902	41:253l.	June 30, 1949, ch. 288, title III, § 303L, as added Pub. L. 103–355, title I, § 1073, Oct. 13, 1994, 108 Stat. 3271, as amended Pub. L. 104–106, title XLIII, § 4321(a)(1), Feb. 10, 1996, 110 Stat. 671.

Statutory Notes and Related Subsidiaries

SEVERABLE SERVICES AND MULTIYEAR CONTRACT AUTHORITY OF JUDICIAL ENTITIES

Pub. L. 113–76, div. E, title III, § 306, Jan. 17, 2014, 128 Stat. 203, provided that: “The Supreme Court of the United States, the Federal Judicial Center, and the United States Sentencing Commission are hereby authorized, now and hereafter, to enter into contracts for the acquisition of severable services for a period that begins in one fiscal year and ends in the next fiscal year and to enter into contracts for multiple years for the acquisition of property and services, to the same extent as executive agencies under the authority of 41 U.S.C. sections 3902 and 3903, respectively.”

§ 3903. Multiyear contracts

(a) **DEFINITION.**—In this section, a multiyear contract is a contract for the purchase of property or services for more than one, but not more than 5, program years.

(b) **AUTHORITY TO ENTER INTO CONTRACT.**—An executive agency may enter into a multiyear contract for the acquisition of property or services if—

(1) funds are available and obligated for the contract, for the full period of the contract or for the first fiscal year in which the contract is in effect, and for the estimated costs associated with a necessary termination of the contract; and

(2) the executive agency determines that—

(A) the need for the property or services is reasonably firm and continuing over the period of the contract; and

(B) a multiyear contract will serve the best interests of the Federal Government by encouraging full and open competition or promoting economy in administration, performance, and operation of the agency’s programs.

(c) **TERMINATION CLAUSE.**—A multiyear contract entered into under the authority of this section shall include a clause that provides that the contract shall be terminated if funds are not made available for the continuation of the contract in a fiscal year covered by the contract. Funds available for paying termination costs shall remain available for that purpose until the costs associated with termination of the contract are paid.

(d) **CANCELLATION CEILING NOTICE.**—Before a contract described in subsection (b) that contains a clause setting forth a cancellation ceiling in excess of \$10,000,000 may be awarded, the executive agency shall give written notification of the proposed contract and of the proposed cancellation ceiling for that contract to Congress. The contract may not be awarded until the end of the 30-day period beginning on the date of the notification.

(e) **CONTINGENCY CLAUSE FOR APPROPRIATION OF FUNDS.**—A multiyear contract may provide that performance under the contract after the first year of the contract is contingent on the appropriation of funds and (if the contract does so provide) that a cancellation payment shall be made to the contractor if the funds are not appropriated.

(f) **OTHER LAW NOT AFFECTED.**—This section does not modify or affect any other provision of law that authorizes multiyear contracts.

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3774.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
3903(a)	41:254c(d) (1st sentence).	June 30, 1949, ch. 288, title III, §304B, as added Pub. L. 103-355, title I, §1072, Oct. 13, 1994, 108 Stat. 3270.
3903(b)	41:254c(a).	
3903(c)	41:254c(b).	
3903(d)	41:254c(c).	
3903(e)	41:254c(d) (last sentence).	
3903(f)	41:254c(e).	

§ 3904. Contract authority for severable services contracts and multiyear contracts

(a) **COMPTROLLER GENERAL.**—The Comptroller General may use available funds to enter into contracts for the procurement of severable services for a period that begins in one fiscal year and ends in the next fiscal year and to enter into multiyear contracts for the acquisition of property and nonaudit-related services to the same extent as executive agencies under sections 3902 and 3903 of this title.

(b) **LIBRARY OF CONGRESS.**—The Library of Congress may use available funds to enter into contracts for the lease or procurement of severable services for a period that begins in one fiscal year and ends in the next fiscal year and to enter into multiyear contracts for the acquisition of property and services pursuant to sections 3902 and 3903 of this title.

(c) **CHIEF ADMINISTRATIVE OFFICER OF THE HOUSE OF REPRESENTATIVES.**—The Chief Administrative Officer of the House of Representatives may enter into—

(1) contracts for the procurement of severable services for a period that begins in one fiscal year and ends in the next fiscal year to

the same extent as the head of an executive agency under the authority of section 3902 of this title; and

(2) multiyear contracts for the acquisitions of property and nonaudit-related services to the same extent as executive agencies under the authority of section 3903 of this title.

(d) **CONGRESSIONAL BUDGET OFFICE.**—The Congressional Budget Office may use available funds to enter into contracts for the procurement of severable services for a period that begins in one fiscal year and ends in the next fiscal year and may enter into multiyear contracts for the acquisition of property and services to the same extent as executive agencies under the authority of sections 3902 and 3903 of this title.

(e) **SECRETARY AND SERGEANT AT ARMS AND DOORKEEPER OF THE SENATE.**—Subject to regulations prescribed by the Committee on Rules and Administration of the Senate, the Secretary and the Sergeant at Arms and Doorkeeper of the Senate may enter into—

(1) contracts for the procurement of severable services for a period that begins in one fiscal year and ends in the next fiscal year to the same extent and under the same conditions as the head of an executive agency under the authority of section 3902 of this title; and

(2) multiyear contracts for the acquisition of property and services to the same extent and under the same conditions as executive agencies under the authority of section 3903 of this title.

(f) **CAPITOL POLICE.**—The United States Capitol Police may enter into—

(1) contracts for the procurement of severable services for a period that begins in one fiscal year and ends in the next fiscal year to the same extent as the head of an executive agency under the authority of section 3902 of this title; and

(2) multiyear contracts for the acquisitions of property and nonaudit-related services to the same extent as executive agencies under the authority of section 3903 of this title.

(g) **ARCHITECT OF THE CAPITOL.**—The Architect of the Capitol may enter into—

(1) contracts for the procurement of severable services for a period that begins in one fiscal year and ends in the next fiscal year to the same extent as the head of an executive agency under the authority of section 3902 of this title; and

(2) multiyear contracts for the acquisitions of property and nonaudit-related services to the same extent as executive agencies under the authority of section 3903 of this title.

(h) **SECRETARY OF THE SMITHSONIAN INSTITUTION.**—The Secretary of the Smithsonian Institution may enter into—

(1) contracts for the procurement of severable services for a period that begins in one fiscal year and ends in the next fiscal year under the authority of section 3902 of this title; and

(2) multiyear contracts for the acquisition of property and services under the authority of section 3903 of this title.

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3775.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
3904(a)	41:2531-1.	Pub. L. 105-18, title II, § 7004, June 12, 1997, 111 Stat. 192.
3904(b)	41:2531-2.	Pub. L. 106-57, title II, § 207, Sept. 29, 1999, 113 Stat. 423.
3904(c)	41:2531-3.	Pub. L. 106-554, § 1(a)(2) [title I, §§ 101, 110], Dec. 21, 2000, 114 Stat. 2763A-100, 2763A-108.
3904(d)	41:2531-4.	Pub. L. 108-7, div. H, title I, §§ 5, 1002, 1202, Feb. 20, 2003, 117 Stat. 350, 357, 373.
3904(e)	41:2531-5.	
3904(f)	41:2531-6.	Pub. L. 108-72, § 4, Aug. 15, 2003, 117 Stat. 889.
3904(g)	41:2531-7.	
3904(h)	41:2531-8.	

In subsections (a)–(c) and (e)–(h), the words “procurement of severable services” are substituted for “acquisition of severable services” for consistency with 41:2531, restated as section 3902 of the revised title.

In subsection (c), the words “During fiscal year 2001 and any succeeding fiscal year” are omitted as obsolete.

In subsection (d), the words “Beginning on December 21, 2000, and hereafter” are omitted as obsolete.

In subsection (e), the text of 41:2531-5(b) is omitted as obsolete.

In subsection (f), the text of 41:2531-6(b) is omitted as obsolete.

In subsection (g), the text of 41:2531-7(b) is omitted as obsolete.

In subsection (h), the text of 41:2531-8(b) is omitted as obsolete.

§ 3905. Cost contracts

(a) **COST-PLUS-A-PERCENTAGE-OF-COST CONTRACTS DISALLOWED.**—The cost-plus-a-percentage-of-cost system of contracting shall not be used.

(b) **COST-PLUS-A-FIXED-FEE CONTRACTS.**—

(1) **IN GENERAL.**—Except as provided in paragraphs (2) and (3), the fee in a cost-plus-a-fixed-fee contract shall not exceed 10 percent of the estimated cost of the contract, not including the fee, as determined by the agency head at the time of entering into the contract.

(2) **EXPERIMENTAL, DEVELOPMENTAL, OR RESEARCH WORK.**—The fee in a cost-plus-a-fixed-fee contract for experimental, developmental, or research work shall not exceed 15 percent of the estimated cost of the contract, not including the fee.

(3) **ARCHITECTURAL OR ENGINEERING SERVICES.**—The fee in a cost-plus-a-fixed-fee contract for architectural or engineering services relating to any public works or utility project may include the contractor’s costs and shall not exceed 6 percent of the estimated cost, not including the fee, as determined by the agency head at the time of entering into the contract, of the project to which the fee applies.

(c) **NOTIFICATION.**—All cost and cost-plus-a-fixed-fee contracts shall provide for advance notification by the contractor to the procuring agency of any subcontract on a cost-plus-a-fixed-fee basis and of any fixed-price subcontract or purchase order which exceeds in dollar amount either the simplified acquisition threshold or 5 percent of the total estimated cost of the prime contract.

(d) **RIGHT TO AUDIT.**—A procuring agency, through any authorized representative thereof, has the right to inspect the plans and to audit

the books and records of a prime contractor or subcontractor engaged in the performance of a cost or cost-plus-a-fixed-fee contract.

(Pub. L. 111-350, § 3, Jan. 4, 2011, 124 Stat. 3776.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
3905(a)	41:254(b) (1st sentence words before 1st comma).	June 30, 1949, ch. 288, title III, § 304(b), 63 Stat. 395; July 12, 1952, ch. 703, § 1(m), 66 Stat. 594; Pub. L. 103-355, title I, § 1071, title IV, § 4402(c), title X, § 10005(e), Oct. 13, 1994, 108 Stat. 3270, 3349, 3408.
3905(b)	41:254(b) (1st sentence words after 1st comma).	
3905(c)	41:254(b) (last sentence words before semicolon).	
3905(d)	41:254(b) (last sentence words after semicolon).	

§ 3906. Cost-reimbursement contracts

(a) **DEFINITION.**—In this section, the term “executive agency” has the same meaning given in section 133 of this title.

(b) **REGULATIONS ON THE USE OF COST-REIMBURSEMENT CONTRACTS.**—The Federal Acquisition Regulation shall address the use of cost-reimbursement contracts.

(c) **CONTENT.**—The regulations promulgated under subsection (b) shall include guidance regarding—

(1) when and under what circumstances cost-reimbursement contracts are appropriate;

(2) the acquisition plan findings necessary to support a decision to use cost-reimbursement contracts; and

(3) the acquisition workforce resources necessary to award and manage cost-reimbursement contracts.

(d) **ANNUAL REPORT.**—

(1) **IN GENERAL.**—The Director of the Office of Management and Budget shall submit an annual report to Congressional committees identified in subsection (e) on the use of cost-reimbursement contracts and task or delivery orders by all executive agencies.

(2) **CONTENTS.**—The report shall include—

(A) the total number and value of contracts awarded and orders issued during the covered fiscal year;

(B) the total number and value of cost-reimbursement contracts awarded and orders issued during the covered fiscal year; and

(C) an assessment of the effectiveness of the regulations promulgated pursuant to subsection (b) in ensuring the appropriate use of cost-reimbursement contracts.

(3) **TIME REQUIREMENTS.**—

(A) **DEADLINE.**—The report shall be submitted no later than March 1 and shall cover the fiscal year ending September 30 of the prior year.

(B) **LIMITATION.**—The report shall be submitted from March 1, 2009, until March 1, 2014.

(e) **CONGRESSIONAL COMMITTEES.**—The report required by subsection (d) shall be submitted to—

(1) the Committee on Oversight and Government Reform of the House of Representatives;
 (2) the Committee on Homeland Security and Governmental Affairs of the Senate;
 (3) the Committees on Appropriations of the House of Representatives and the Senate; and
 (4) in the case of the Department of Defense and the Department of Energy, the Committees on Armed Services of the Senate and the House of Representatives.

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3777.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
3906	41:254 note.	Pub. L. 110-417, [div. A], title VIII, §864(a), (b), (d), (e), (f)(2), (g), Oct. 14, 2008, 122 Stat. 4549.

In subsection (b), the words “Not later than 270 days after the date of the enactment of this Act” are omitted because of section 6(f) of the bill. The words “shall address” are substituted for “shall be revised to address” to reflect the permanence of the provision.

In subsection (d), the words “Subject to subsection (f)” are omitted as unnecessary.

Statutory Notes and Related Subsidiaries

CHANGE OF NAME

Committee on Oversight and Government Reform of House of Representatives changed to Committee on Oversight and Reform of House of Representatives by House Resolution No. 6, One Hundred Sixteenth Congress, Jan. 9, 2019.

AMENDMENT OF FEDERAL ACQUISITION REGULATION

Pub. L. 111-350, §6(f)(5), Jan. 4, 2011, 124 Stat. 3855, provided that: “The Federal Acquisition Regulation shall be amended to meet the requirements of section 3906(b) of title 41, United States Code, not later than 270 days after October 14, 2008.”

CHAPTER 41—TASK AND DELIVERY ORDER CONTRACTS

Sec.	
4101.	Definitions.
4102.	Authorities or responsibilities not affected.
4103.	General authority.
4104.	Guidance on use of task and delivery order contracts.
4105.	Advisory and assistance services.
4106.	Orders.

§ 4101. Definitions

In this chapter:

(1) **DELIVERY ORDER CONTRACT.**—The term “delivery order contract” means a contract for property that—

(A) does not procure or specify a firm quantity of property (other than a minimum or maximum quantity); and

(B) provides for the issuance of orders for the delivery of property during the period of the contract.

(2) **TASK ORDER CONTRACT.**—The term “task order contract” means a contract for services that—

(A) does not procure or specify a firm quantity of services (other than a minimum or maximum quantity); and

(B) provides for the issuance of orders for the performance of tasks during the period of the contract.

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3778.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
4101	41:253k.	June 30, 1949, ch. 288, title III, §303K, as added Pub. L. 103-355, title I, §1054(a), Oct. 13, 1994, 108 Stat. 3265.

§ 4102. Authorities or responsibilities not affected

This chapter does not modify or supersede, and is not intended to impair or restrict, authorities or responsibilities under sections 1101 to 1104 of title 40.

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3778.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
4102	41:253h note.	Pub. L. 103-355, §1054(b), Oct. 13, 1994, 108 Stat. 3265.

The text of section 1054(b)(1) of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355, 41:253h note) is omitted as obsolete.

§ 4103. General authority

(a) **AUTHORITY TO AWARD.**—Subject to the requirements of this section, section 4106 of this title, and other applicable law, the head of an executive agency may enter into a task or delivery order contract for procurement of services or property.

(b) **SOLICITATION.**—The solicitation for a task or delivery order contract shall include—

(1) the period of the contract, including the number of options to extend the contract and the period for which the contract may be extended under each option;

(2) the maximum quantity or dollar value of the services or property to be procured under the contract; and

(3) a statement of work, specifications, or other description that reasonably describes the general scope, nature, complexity, and purposes of the services or property to be procured under the contract.

(c) **APPLICABILITY OF RESTRICTION ON USE OF NONCOMPETITIVE PROCEDURES.**—The head of an executive agency may use procedures other than competitive procedures to enter into a task or delivery order contract under this section only if an exception in section 3304(a) of this title applies to the contract and the use of those procedures is approved in accordance with section 3304(e) of this title.

(d) **SINGLE AND MULTIPLE CONTRACT AWARDS.**—

(1) **EXERCISE OF AUTHORITY.**—The head of an executive agency may exercise the authority provided in this section—

(A) to award a single task or delivery order contract; or

(B) if the solicitation states that the head of the executive agency has the option to do so, to award separate task or delivery order contracts for the same or similar services or property to 2 or more sources.

(2) **DETERMINATION NOT REQUIRED.**—No determination under section 3303 of this title is re-

quired for an award of multiple task or delivery order contracts under paragraph (1)(B).

(3) SINGLE SOURCE AWARD FOR TASK OR DELIVERY ORDER CONTRACTS EXCEEDING \$100,000,000.—

(A) WHEN SINGLE AWARDS ARE ALLOWED.—No task or delivery order contract in an amount estimated to exceed \$100,000,000 (including all options) may be awarded to a single source unless the head of the executive agency determines in writing that—

(i) the task or delivery orders expected under the contract are so integrally related that only a single source can reasonably perform the work;

(ii) the contract provides only for firm, fixed price task orders or delivery orders for—

(I) products for which unit prices are established in the contract; or

(II) services for which prices are established in the contract for the specific tasks to be performed;

(iii) only one source is qualified and capable of performing the work at a reasonable price to the Federal Government; or

(iv) because of exceptional circumstances, it is necessary in the public interest to award the contract to a single source.

(B) NOTIFICATION OF CONGRESS.—The head of the executive agency shall notify Congress within 30 days after any determination under subparagraph (A)(iv).

(4) REGULATIONS.—Regulations implementing this subsection shall establish—

(A) a preference for awarding, to the maximum extent practicable, multiple task or delivery order contracts for the same or similar services or property under paragraph (1)(B); and

(B) criteria for determining when award of multiple task or delivery order contracts would not be in the best interest of the Federal Government.

(e) CONTRACT MODIFICATIONS.—A task or delivery order may not increase the scope, period, or maximum value of the task or delivery order contract under which the order is issued. The scope, period, or maximum value of the contract may be increased only by modification of the contract.

(f) INAPPLICABILITY TO CONTRACTS FOR ADVISORY AND ASSISTANCE SERVICES.—Except as otherwise specifically provided in section 4105 of this title, this section does not apply to a task or delivery order contract for the acquisition of advisory and assistance services (as defined in section 1105(g) of title 31).

(g) RELATIONSHIP TO OTHER CONTRACTING AUTHORITY.—Nothing in this section may be construed to limit or expand any authority of the head of an executive agency or the Administrator of General Services to enter into schedule, multiple award, or task or delivery order contracts under any other provision of law.

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3778.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
4103	41:253h.	June 30, 1949, ch. 288, title III, §303H, as added Pub. L. 103-355, title I, §1054(a), Oct. 13, 1994, 108 Stat. 3261; Pub. L. 110-181, title VIII, §843(b)(1), Jan. 28, 2008, 122 Stat. 238.

In subsection (a), the words “(as defined in section 253k of this title)” are omitted as unnecessary.

§ 4104. Guidance on use of task and delivery order contracts

(a) GUIDANCE IN FEDERAL ACQUISITION REGULATION.—The Federal Acquisition Regulation issued in accordance with sections 1121(b) and 1303(a)(1) of this title shall provide guidance to agencies on the appropriate use of task and delivery order contracts in accordance with this chapter and chapter 245 of title 10.

(b) CONTENT OF REGULATIONS.—The regulations issued pursuant to subsection (a) at a minimum shall provide specific guidance on—

(1) the appropriate use of Government-wide and other multiagency contracts entered into in accordance with this chapter and chapter 245 of title 10; and

(2) steps that agencies should take in entering into and administering multiple award task and delivery order contracts to ensure compliance with the requirement in—

(A) section 11312 of title 40 for capital planning and investment control in purchases of information technology products and services;

(B) section 4106(c) of this title and section 3406(c) of title 10 to ensure that all contractors are afforded a fair opportunity to be considered for the award of task and delivery orders; and

(C) section 4106(e) of this title and section 3406(e) of title 10 for a statement of work in each task or delivery order issued that clearly specifies all tasks to be performed or property to be delivered under the order.

(c) FEDERAL SUPPLY SCHEDULES PROGRAM.—The Administrator for Federal Procurement Policy shall consult with the Administrator of General Services to assess the effectiveness of the multiple awards schedule program of the General Services Administration referred to in section 152(3) of this title that is administered as the Federal Supply Schedules program. The assessment shall include examination of—

(1) the administration of the program by the Administrator of General Services; and

(2) the ordering and program practices followed by Federal customer agencies in using schedules established under the program.

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3780; Pub. L. 117-81, div. A, title XVII, §1702(h)(14), 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>
4104	41:253h note.	Pub. L. 106-65, div. A, title VIII, §804, Oct. 5, 1999, 113 Stat. 704.

In this section, the text of section 804(d) of the National Defense Authorization Act for Fiscal Year 2000 (Pub. L. 106-65, 41:253h note) is omitted as obsolete.

In subsection (a), the words “Not later than 180 days after the date of the enactment of this Act” and “be revised to” are omitted as obsolete.

In subsection (b)(1), the words “this chapter and sections 2304a to 2304d of title 10” are substituted for “the provisions of law referred to in that subsection” for clarity.

Editorial Notes

AMENDMENTS

2021—Subsecs. (a), (b)(1). Pub. L. 117-81, §1702(h)(14)(A), (B)(i), substituted “chapter 245” for “sections 2304a to 2304d”.

Subsec. (b)(2)(B). Pub. L. 117-81, §1702(h)(14)(B)(ii), substituted “section 3406(c)” for “section 2304c(b)”.

Subsec. (b)(2)(C). Pub. L. 117-81, §1702(h)(14)(B)(iii), substituted “section 3406(e)” for “section 2304c(c)”.

§ 4105. Advisory and assistance services

(a) DEFINITION.—In this section, the term “advisory and assistance services” has the same meaning given that term in section 1105(g) of title 31.

(b) AUTHORITY TO AWARD.—

(1) IN GENERAL.—Subject to the requirements of this section, section 4106 of this title, and other applicable law, the head of an executive agency may enter into a task order contract for procurement of advisory and assistance services.

(2) ONLY UNDER THIS SECTION.—The head of an executive agency may enter into a task order contract for advisory and assistance services only under this section.

(c) CONTRACT PERIOD.—The period of a task order contract entered into under this section, including all periods of extensions of the contract under options, modifications, or otherwise, may not exceed 5 years unless a longer period is specifically authorized in a law that is applicable to the contract.

(d) CONTENT OF NOTICE.—The notice required by section 1708 of this title and section 8(e) of the Small Business Act (15 U.S.C. 637(e)) shall reasonably and fairly describe the general scope, magnitude, and duration of the proposed task order contract in a manner that would reasonably enable a potential offeror to decide whether to request the solicitation and consider submitting an offer.

(e) REQUIRED CONTENT OF SOLICITATION AND CONTRACT.—

(1) SOLICITATION.—The solicitation shall include the information (regarding services) described in section 4103(b) of this title.

(2) CONTRACT.—A task order contract entered into under this section shall contain the same information that is required by paragraph (1) to be included in the solicitation of offers for that contract.

(f) MULTIPLE AWARDS.—

(1) AUTHORITY TO MAKE MULTIPLE AWARDS.—On the basis of one solicitation, the head of an executive agency may award separate task order contracts under this section for the same or similar services to 2 or more sources if the solicitation states that the head of the executive agency has the option to do so.

(2) CONTENT OF SOLICITATION.—In the case of a task order contract for advisory and assistance services to be entered into under this section, if the contract period is to exceed 3 years and the contract amount is estimated to exceed \$10,000,000 (including all options), the solicitation shall—

(A) provide for a multiple award authorized under paragraph (1); and

(B) include a statement that the head of the executive agency may also elect to award only one task order contract if the head of the executive agency determines in writing that only one of the offerors is capable of providing the services required at the level of quality required.

(3) NONAPPLICATION.—Paragraph (2) does not apply in the case of a solicitation for which the head of the executive agency concerned determines in writing that, because the services required under the contract are unique or highly specialized, it is not practicable to award more than one contract.

(g) CONTRACT MODIFICATIONS.—

(1) INCREASE IN SCOPE, PERIOD, OR MAXIMUM VALUE OF CONTRACT ONLY BY MODIFICATION OF CONTRACT.—A task order may not increase the scope, period, or maximum value of the task order contract under which the order is issued. The scope, period, or maximum value of the contract may be increased only by modification of the contract.

(2) USE OF COMPETITIVE PROCEDURES.—Unless use of procedures other than competitive procedures is authorized by an exception in section 3304(a) of this title and approved in accordance with section 3304(e) of this title, competitive procedures shall be used for making such a modification.

(3) NOTICE.—Notice regarding the modification shall be provided in accordance with section 1708 of this title and section 8(e) of the Small Business Act (15 U.S.C. 637(e)).

(h) CONTRACT EXTENSIONS.—

(1) WHEN CONTRACT MAY BE EXTENDED.—Notwithstanding the limitation on the contract period set forth in subsection (c) or in a solicitation or contract pursuant to subsection (f), a contract entered into by the head of an executive agency under this section may be extended on a sole-source basis for a period not exceeding 6 months if the head of the executive agency determines that—

(A) the award of a follow-on contract has been delayed by circumstances that were not reasonably foreseeable at the time the initial contract was entered into; and

(B) the extension is necessary to ensure continuity of the receipt of services pending the award of, and commencement of performance under, the follow-on contract.

(2) LIMIT OF ONE EXTENSION.—A task order contract may be extended under paragraph (1) only once and only in accordance with the limitations and requirements of this subsection.

(i) INAPPLICABILITY TO CERTAIN CONTRACTS.—This section does not apply to a contract for the acquisition of property or services that includes

acquisition of advisory and assistance services if the head of the executive agency entering into the contract determines that, under the contract, advisory and assistance services are necessarily incident to, and not a significant component of, the contract.

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3780.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
4105(a)	41:253i(i).	June 30, 1949, ch. 288, title III, §303I, as added Pub. L. 103-355, title I, §1054(a), Oct. 13, 1994, 108 Stat. 3262.
4105(b)	41:253i(a).	Pub. L. 109-364, div. A, title VIII, §834(b), (c) (related to (b)), Oct. 17, 2006, 120 Stat. 2333.
4105(c)(1)	41:253i(b).	
4105(c)(2)	41:253i note.	
4105(d)	41:253i(c).	
4105(e)	41:253i(d).	
4105(f)	41:253i(e).	
4105(g)	41:253i(f).	
4105(h)	41:253i(g).	
4105(i)	41:253i(h).	

In subsection (b)(1), the words “(as defined in section 253k of this title)” are omitted as unnecessary.

In subsection (c)(2)(C), the words “Committee on Oversight and Government Reform” are substituted for “Committee on Government Reform” on authority of Rule X(1)(m) of the Rules of the House of Representatives, adopted by House Resolution No. 6 (110th Congress, January 5, 2007).

SENATE REVISION AMENDMENT

Senate amendment to the bill effectively struck out subsec. (c)(2) and redesignated subsec. (c)(1) as (c). See S. Amdt. 4726 (111th Cong.), 156 Cong. Rec. 18683 (2010).

§ 4106. Orders

(a) APPLICATION.—This section applies to task and delivery order contracts entered into under sections 4103 and 4105 of this title.

(b) ACTIONS NOT REQUIRED FOR ISSUANCE OF ORDERS.—The following actions are not required for issuance of a task or delivery order under a task or delivery order contract:

(1) A separate notice for the order under section 1708 of this title or section 8(e) of the Small Business Act (15 U.S.C. 637(e)).

(2) Except as provided in subsection (c), a competition (or a waiver of competition approved in accordance with section 3304(e) of this title) that is separate from that used for entering into the contract.

(c) MULTIPLE AWARD CONTRACTS.—When multiple contracts are awarded under section 4103(d)(1)(B) or 4105(f) of this title, all contractors awarded the contracts shall be provided a fair opportunity to be considered, pursuant to procedures set forth in the contracts, for each task or delivery order in excess of the micro-purchase threshold under section 1902 of this title that is to be issued under any of the contracts, unless—

(1) the executive agency’s need for the services or property ordered is of such unusual urgency that providing the opportunity to all of those contractors would result in unacceptable delays in fulfilling that need;

(2) only one of those contractors is capable of providing the services or property required at the level of quality required because the

services or property ordered are unique or highly specialized;

(3) the task or delivery order should be issued on a sole-source basis in the interest of economy and efficiency because it is a logical follow-on to a task or delivery order already issued on a competitive basis; or

(4) it is necessary to place the order with a particular contractor to satisfy a minimum guarantee.

(d) ENHANCED COMPETITION FOR ORDERS IN EXCESS OF \$5,000,000.—In the case of a task or delivery order in excess of \$5,000,000, the requirement to provide all contractors a fair opportunity to be considered under subsection (c) is not met unless all such contractors are provided, at a minimum—

(1) a notice of the task or delivery order that includes a clear statement of the executive agency’s requirements;

(2) a reasonable period of time to provide a proposal in response to the notice;

(3) disclosure of the significant factors and subfactors, including cost or price, that the executive agency expects to consider in evaluating such proposals, and their relative importance;

(4) in the case of an award that is to be made on a best value basis, a written statement documenting—

(A) the basis for the award; and

(B) the relative importance of quality and price or cost factors; and

(5) an opportunity for a post-award debriefing consistent with the requirements of section 3704 of this title.

(e) STATEMENT OF WORK.—A task or delivery order shall include a statement of work that clearly specifies all tasks to be performed or property to be delivered under the order.

(f) PROTESTS.—

(1) PROTEST NOT AUTHORIZED.—A protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order except for—

(A) a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued; or

(B) a protest of an order valued in excess of \$10,000,000.

(2) JURISDICTION OVER PROTESTS.—Notwithstanding section 3556 of title 31, the Comptroller General shall have exclusive jurisdiction of a protest authorized under paragraph (1)(B).

(g) TASK AND DELIVERY ORDER OMBUDSMAN.—

(1) APPOINTMENT OR DESIGNATION AND RESPONSIBILITIES.—The head of each executive agency who awards multiple task or delivery order contracts under section 4103(d)(1)(B) or 4105(f) of this title shall appoint or designate a task and delivery order ombudsman who shall be responsible for reviewing complaints from the contractors on those contracts and ensuring that all of the contractors are afforded a fair opportunity to be considered for task or delivery orders when required under subsection (c).

(2) WHO IS ELIGIBLE.—The task and delivery order ombudsman shall be a senior agency official who is independent of the contracting officer for the contracts and may be the executive agency's advocate for competition.

(Pub. L. 111–350, §3, Jan. 4, 2011, 124 Stat. 3782; Pub. L. 111–383, div. A, title X, §1075(f)(5)(B), Jan. 7, 2011, 124 Stat. 4376; Pub. L. 112–81, div. A, title VIII, §813, Dec. 31, 2011, 125 Stat. 1491; Pub. L. 114–260, §2, Dec. 14, 2016, 130 Stat. 1361; Pub. L. 114–328, div. A, title VIII, §835(b), Dec. 23, 2016, 130 Stat. 2285; Pub. L. 116–92, div. A, title VIII, §826, Dec. 20, 2019, 133 Stat. 1491.)

AMENDMENT NOT SHOWN IN TEXT

This section was derived from section 253j of former Title 41, Public Contracts, which was amended by Pub. L. 110–181, div. A, title VIII, §843(b)(2)(C), Jan. 28, 2008, 122 Stat. 239, to add subsec. (e), from which subsec. (f) of this section was derived, prior to being repealed and reenacted as this section by Pub. L. 111–350, §§3, 7(b), Jan. 4, 2011, 124 Stat. 3677, 3855. The directory language of section 843(b)(2)(C) of Pub. L. 110–181 was amended by Pub. L. 111–383, div. A, title X, §1075(f)(5)(B), Jan. 7, 2011, 124 Stat. 4376. 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 843(b)(2)(C) of Pub. L. 110–181 was amended by striking “paragraph (1)” and inserting “subparagraph (A)”.

HISTORICAL AND REVISION NOTES

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
4106(a)	41:253j(g).	June 30, 1949, ch. 288, title III, §303J, as added Pub. L. 103–355, title I, §1054(a), Oct. 13, 1994, 108 Stat. 3264; Pub. L. 110–181, div. A, title VIII, §843(b)(2), Jan. 28, 2008, 122 Stat. 238.
4106(b)	41:253j(a).	
4106(c)	41:253j(b).	
4106(d)	41:253j(d).	
4106(e)	41:253j(c).	
4106(f)	41:253j(e).	
4106(g)	41:253j(f).	

In subsection (g)(2), the words “advocate for competition” are substituted for “competition advocate” for consistency with section 1705 of the revised title.

Editorial Notes

AMENDMENTS

2019—Subsec. (c). Pub. L. 116–92 substituted “the micro-purchase threshold under section 1902 of this title” for “\$2,500” in introductory provisions.

2016—Subsec. (f)(3). Pub. L. 114–260 and Pub. L. 114–328 amended subsec. (f) identically by striking out par. (3). Text read as follows: “Paragraph (1)(B) and paragraph (2) of this subsection shall not be in effect after September 30, 2016.”

2011—Subsec. (f)(3). Pub. L. 112–81 amended par. (3) generally. Prior to amendment, text read as follows: “This subsection shall be in effect for three years, beginning on the date that is 120 days after January 28, 2008.”

Statutory Notes and Related Subsidiaries

POSTAWARD EXPLANATIONS FOR UNSUCCESSFUL OFFERORS FOR CERTAIN CONTRACTS

Pub. L. 116–92, div. A, title VIII, §874, Dec. 20, 2019, 133 Stat. 1527, provided that: “Not later than 180 days after

the date of the enactment of this Act [Dec. 20, 2019], the Federal Acquisition Regulation shall be revised to require that with respect to an offer for a task order or delivery order in an amount greater than the simplified acquisition threshold (as defined in section 134 of title 41, United States Code) and less than or equal to \$5,500,000 issued under an indefinite delivery-indefinite quantity contract, the contracting officer for such contract shall, upon written request from an unsuccessful offeror, provide a brief explanation as to why such offeror was unsuccessful that includes a summary of the rationale for the award and an evaluation of the significant weak or deficient factors in the offeror's offer.”

CHAPTER 43—ALLOWABLE COSTS

Sec.

4301.	Definitions.
4302.	Adjustment of threshold amount of covered contract.
4303.	Effect of submission of unallowable costs.
4304.	Specific costs not allowable.
4305.	Required regulations.
4306.	Applicability of regulations to subcontractors.
4307.	Contractor certification.
4308.	Penalties for submission of cost known to be unallowable.
4309.	Burden of proof on contractor.
4310.	Proceeding costs not allowable.

§ 4301. Definitions

In this chapter:

(1) COMPENSATION.—The term “compensation”, for a fiscal year, means the total amount of wages, salary, bonuses, and deferred compensation for the fiscal year, whether paid, earned, or otherwise accruing, as recorded in an employer's cost accounting records for the fiscal year.

(2) COVERED CONTRACT.—The term “covered contract” means a contract for an amount in excess of \$500,000 that is entered into by an executive agency, except that the term does not include a fixed-price contract without cost incentives or any firm fixed-price contract for the purchase of commercial products or commercial services.

(3) FISCAL YEAR.—The term “fiscal year” means a fiscal year established by a contractor for accounting purposes.

(4) SENIOR EXECUTIVE.—The term “senior executive”, with respect to a contractor, means the 5 most highly compensated employees in management positions at each home office and each segment of the contractor.

(Pub. L. 111–350, §3, Jan. 4, 2011, 124 Stat. 3784; Pub. L. 115–232, div. A, title VIII, §836(b)(17), Aug. 13, 2018, 132 Stat. 1864.)

HISTORICAL AND REVISION NOTES

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
4301(1)	41:256(m)(1).	June 30, 1949, ch. 288, title III, §306(m), as added Pub. L. 105–85, title VIII, §808(b)(2), Nov. 18, 1997, 111 Stat. 1836; Pub. L. 105–261, title VIII, §804(b), Oct. 17, 1998, 112 Stat. 2083.
4301(2)	41:256(l)(1).	June 30, 1949, ch. 288, title III, §306(l)(1), as added Pub. L. 100–700, §8(a)(1), Nov. 19, 1988, 102 Stat. 4634; Pub. L. 103–355, title II, §2151, Oct. 13, 1994, 108 Stat. 3315.
4301(3)	41:256(m)(3).	

HISTORICAL AND REVISION NOTES—CONTINUED

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
4301(4)	41:256(m)(2).	

Editorial Notes

AMENDMENTS

2018—Par. (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.

§ 4302. Adjustment of threshold amount of covered contract

Effective on October 1 of each year that is divisible by 5, the amount set forth in section 4301(2) of this title shall be adjusted to the equivalent amount in constant fiscal year 1994 dollars. An adjusted amount that is not evenly divisible by \$50,000 shall be rounded to the nearest multiple of \$50,000. If an amount is evenly divisible by \$25,000 but is not evenly divisible by \$50,000, the amount shall be rounded to the next higher multiple of \$50,000.

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3784.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
4302	41:256(l)(2).	June 30, 1949, ch. 288, title III, §306(l)(2), as added Pub. L. 100-700, §8(a)(1), Nov. 19, 1988, 102 Stat. 4634; Pub. L. 103-355, title II, §2151, Oct. 13, 1994, 108 Stat. 3315.

§ 4303. Effect of submission of unallowable costs

(a) INDIRECT COST THAT VIOLATES FEDERAL ACQUISITION REGULATION COST PRINCIPLE.—An executive agency shall require that a covered contract provide that if the contractor submits to the executive agency a proposal for settlement of indirect costs incurred by the contractor for any period after those costs have been accrued and if that proposal includes the submission of a cost that is unallowable because the cost violates a cost principle in the Federal Acquisition Regulation or an executive agency supplement to the Federal Acquisition Regulation, the cost shall be disallowed.

(b) PENALTY FOR VIOLATION OF COST PRINCIPLE.—

(1) UNALLOWABLE COST IN PROPOSAL.—If the executive agency determines that a cost submitted by a contractor in its proposal for settlement is expressly unallowable under a cost principle referred to in subsection (a) that defines the allowability of specific selected costs, the executive agency shall assess a penalty against the contractor in an amount equal to—

(A) the amount of the disallowed cost allocated to covered contracts for which a proposal for settlement of indirect costs has been submitted; plus

(B) interest (to be computed based on provisions in the Federal Acquisition Regulation) to compensate the Federal Government for the use of the amount which a contractor has been paid in excess of the amount to which the contractor was entitled.

(2) COST DETERMINED TO BE UNALLOWABLE BEFORE PROPOSAL SUBMITTED.—If the executive agency determines that a proposal for settlement of indirect costs submitted by a contractor includes a cost determined to be unallowable in the case of that contractor before the submission of that proposal, the executive agency shall assess a penalty against the contractor in an amount equal to 2 times the amount of the disallowed cost allocated to covered contracts for which a proposal for settlement of indirect costs has been submitted.

(c) WAIVER OF PENALTY.—The Federal Acquisition Regulation shall provide for a penalty under subsection (b) to be waived in the case of a contractor’s proposal for settlement of indirect costs when—

(1) the contractor withdraws the proposal before the formal initiation of an audit of the proposal by the Federal Government and re-submits a revised proposal;

(2) the amount of unallowable costs subject to the penalty is insignificant; or

(3) the contractor demonstrates, to the contracting officer’s satisfaction, that—

(A) it has established appropriate policies and personnel training and an internal control and review system that provide assurances that unallowable costs subject to penalties are precluded from being included in the contractor’s proposal for settlement of indirect costs; and

(B) the unallowable costs subject to the penalty were inadvertently incorporated into the proposal.

(d) APPLICABILITY OF CONTRACT DISPUTES PROCEDURE.—An action of an executive agency under subsection (a) or (b)—

(1) shall be considered a final decision for the purposes of section 7103 of this title; and

(2) is appealable in the manner provided in section 7104(a) of this title.

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3784.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
4303(a)	41:256(a).	June 30, 1949, ch. 288, title III, §306(a)-(d), as added Pub. L. 100-700, §8(a)(1), Nov. 19, 1988, 102 Stat. 4634; Pub. L. 103-355, title II, §2151, Oct. 13, 1994, 108 Stat. 3309.
4303(b)	41:256(b).	
4303(c)	41:256(c).	
4303(d)	41:256(d).	

In subsection (a), the words “(referred to in section 421(c)(1) of this title)” are omitted as unnecessary.

§ 4304. Specific costs not allowable

(a) SPECIFIC COSTS.—The following costs are not allowable under a covered contract:

(1) Costs of entertainment, including amusement, diversion, and social activities, and any costs directly associated with those costs (such as tickets to shows or sports events, meals, lodging, rentals, transportation, and gratuities).

(2) Costs incurred to influence (directly or indirectly) legislative action on any matter pending before Congress, a State legislature, or a legislative body of a political subdivision of a State.

(3) Costs incurred in defense of any civil or criminal fraud proceeding or similar proceeding (including filing of any false certification) brought by the Federal Government where the contractor is found liable or had pleaded *nolo contendere* to a charge of fraud or similar proceeding (including filing of a false certification).

(4) Payments of fines and penalties resulting from violations of, or failure to comply with, Federal, State, local, or foreign laws and regulations, except when incurred as a result of compliance with specific terms and conditions of the contract or specific written instructions from the contracting officer authorizing in advance those payments in accordance with applicable provisions of the Federal Acquisition Regulation.

(5) Costs of membership in any social, dining, or country club or organization.

(6) Costs of alcoholic beverages.

(7) Contributions or donations, regardless of the recipient.

(8) Costs of advertising designed to promote the contractor or its products.

(9) Costs of promotional items and memorabilia, including models, gifts, and souvenirs.

(10) Costs for travel by commercial aircraft that exceed the amount of the standard commercial fare.

(11) Costs incurred in making any payment (commonly known as a “golden parachute payment”) that is—

(A) in an amount in excess of the normal severance pay paid by the contractor to an employee on termination of employment; and

(B) paid to the employee contingent on, and following, a change in management control over, or ownership of, the contractor or a substantial portion of the contractor’s assets.

(12) Costs of commercial insurance that protects against the costs of the contractor for correction of the contractor’s own defects in materials or workmanship.

(13) Costs of severance pay paid by the contractor to foreign nationals employed by the contractor under a service contract performed outside the United States, to the extent that the amount of severance pay paid in any case exceeds the amount paid in the industry involved under the customary or prevailing practice for firms in that industry providing similar services in the United States, as determined under the Federal Acquisition Regulation.

(14) Costs of severance pay paid by the contractor to a foreign national employed by the contractor under a service contract performed

in a foreign country if the termination of the employment of the foreign national is the result of the closing of, or the curtailment of activities at, a Federal Government facility in that country at the request of the government of that country.

(15) Costs incurred by a contractor or subcontractor, or personal service¹ contractor in connection with any criminal, civil, or administrative proceeding commenced by the Federal Government or a State, to the extent provided in section 4310 of this title.

(16)² Costs of compensation of any contractor employee for a fiscal year, regardless of the contract funding source, to the extent that such compensation exceeds \$625,000 adjusted annually for the U.S. Bureau of Labor Statistics Employment Cost Index for total compensation for private industry workers, by occupational and industry group not seasonally adjusted, except that the executive agency may establish exceptions for positions in the science, technology, engineering, mathematics, medical, and cybersecurity fields and other fields requiring unique areas of expertise upon a determination that such exceptions are needed to ensure that the executive agency has continued access to needed skills and capabilities.

(16)² Costs of compensation of contractor and subcontractor employees for a fiscal year, regardless of the contract funding source, to the extent that such compensation exceeds \$487,000 per year, adjusted annually to reflect the change in the Employment Cost Index for all workers, as calculated by the Bureau of Labor Statistics, except that the head of an executive agency may establish one or more narrowly targeted exceptions for scientists, engineers, or other specialists upon a determination that such exceptions are needed to ensure that the executive agency has continued access to needed skills and capabilities.

(b) WAIVER OF SEVERANCE PAY RESTRICTIONS FOR FOREIGN NATIONALS.—

(1) EXECUTIVE AGENCY DETERMINATION.—Pursuant to the Federal Acquisition Regulation and subject to the availability of appropriations, an executive agency, in awarding a covered contract, may waive the application of paragraphs (13) and (14) of subsection (a) to that contract if the executive agency determines that—

(A) the application of those provisions to that contract would adversely affect the continuation of a program, project, or activity that provides significant support services for employees of the executive agency posted outside the United States;

(B) the contractor has taken (or has established plans to take) appropriate actions within the contractor’s control to minimize the amount and number of incidents of the payment of severance pay by the contractor to employees under the contract who are foreign nationals; and

(C) the payment of severance pay is necessary to comply with a law that is gen-

¹ So in original. Probably should be “services”.

² So in original. Two pars. (16) have been enacted.

erally applicable to a significant number of businesses in the country in which the foreign national receiving the payment performed services under the contract or is necessary to comply with a collective bargaining agreement.

(2) **SOLICITATION TO INCLUDE STATEMENT ABOUT WAIVER.**—An executive agency shall include in the solicitation for a covered contract a statement indicating—

(A) that a waiver has been granted under paragraph (1) for the contract; or

(B) whether the executive agency will consider granting a waiver and, if the executive agency will consider granting a waiver, the criteria to be used in granting the waiver.

(3) **DETERMINATION TO BE MADE BEFORE CONTRACT AWARDED.**—An executive agency shall make the final determination whether to grant a waiver under paragraph (1) with respect to a covered contract before award of the contract.

(c) **ESTABLISHMENT OF DEFINITIONS, EXCLUSIONS, LIMITATIONS, AND QUALIFICATIONS.**—The provisions of the Federal Acquisition Regulation implementing this chapter may establish appropriate definitions, exclusions, limitations, and qualifications. A submission by a contractor of costs that are incurred by the contractor and that are claimed to be allowable under Department of Energy management and operating contracts shall be considered a proposal for settlement of indirect costs incurred by the contractor for any period after those costs have been accrued.

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3785; Pub. L. 113-66, div. A, title VIII, §811(b), Dec. 26, 2013, 127 Stat. 806; Pub. L. 113-67, div. A, title VII, §702(a)(1), Dec. 26, 2013, 127 Stat. 1189; Pub. L. 114-261, §1(b)(2)(B), Dec. 14, 2016, 130 Stat. 1363.)

HISTORICAL AND REVISION NOTES

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
4304	41:256(e).	June 30, 1949, ch. 288, title III, §306(e), as added Pub. L. 100-700, §8(a)(1), Nov. 19, 1988, 102 Stat. 4634; Pub. L. 103-355, title II, §2151, Oct. 13, 1994, 108 Stat. 3310; Pub. L. 105-85, title VIII, §808(b)(1), Nov. 18, 1997, 111 Stat. 1836.

Editorial Notes

AMENDMENTS

2016—Subsec. (a)(15). Pub. L. 114-261 inserted “or subcontractor, or personal service contractor” after “contractor”.

2013—Subsec. (a)(16). Pub. L. 113-66 and Pub. L. 113-67 amended par. (16) generally. Prior to amendment, par. (16) read as follows: “Costs of compensation of senior executives of contractors for a fiscal year, regardless of the contract funding source, to the extent that the compensation exceeds the benchmark compensation amount determined applicable for the fiscal year by the Administrator under section 1127 of this title.” See Effective Date of 2013 Amendment notes below.

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 2013 AMENDMENT

Pub. L. 113-67, div. A, title VII, §702(c), Dec. 26, 2013, 127 Stat. 1189, provided that: “This section [amending this section and former section 2324 of Title 10, Armed Forces, repealing section 1127 of this title, and enacting provisions set out as a note under this section] and the amendments made by this section shall apply only with respect to costs of compensation incurred under contracts entered into on or after the date that is 180 days after the date of the enactment of this Act [Dec. 26, 2013].”

Pub. L. 113-66, div. A, title VIII, §811(d), Dec. 26, 2013, 127 Stat. 806, provided that: “The amendments made by this section [amending this section and former section 2324 of Title 10, Armed Forces, and repealing section 1127 of this title] shall apply with respect to costs of compensation incurred under contracts entered into on or after the date that is 180 days after the date of the enactment of this Act [Dec. 26, 2013].”

REPORTS

Pub. L. 113-67, div. A, title VII, §702(d), Dec. 26, 2013, 127 Stat. 1189, provided that:

“(1) **IN GENERAL.**—Not later than 60 days after the end of each fiscal year, the Director of the Office of Management and Budget shall submit a report on contractor compensation to—

“(A) the Committee on Armed Services of the Senate;

“(B) the Committee on Armed Services of the House of Representatives;

“(C) the Committee on Homeland Security and Governmental Affairs of the Senate;

“(D) the Committee on Oversight and Government Reform [now Committee on Oversight and Reform] of the House of Representatives;

“(E) the Committee on Appropriations of the Senate; and

“(F) the Committee on Appropriations of the House of Representatives.

“(2) **ELEMENTS.**—The report required under paragraph (1) shall include—

“(A) the total number of contractor employees, by executive agency, in the narrowly targeted exception positions described under subsection (a) during the preceding fiscal year;

“(B) the taxpayer-funded compensation amounts received by each contractor employee in a narrowly targeted exception position during such fiscal year; and

“(C) the duties and services performed by contractor employees in the narrowly targeted exception positions during such fiscal year.”

REVISION OF COST PRINCIPLE RELATING TO ENTERTAINMENT, GIFT, AND RECREATION COSTS FOR CONTRACTOR EMPLOYEES

Pub. L. 103-355, title II, §2192, Oct. 13, 1994, 108 Stat. 3315, provided that:

“(a) **COSTS NOT ALLOWABLE.**—(1) The costs of gifts or recreation for employees of a contractor or members of their families that are provided by the contractor to improve employee morale or performance or for any other purpose are not allowable under a covered contract unless, within 120 days after the date of the enactment of this Act [Oct. 13, 1994], the Federal Acquisition Regulatory Council prescribes amendments to the Federal Acquisition Regulation specifying circumstances under which such costs are allowable under a covered contract.

“(2) Not later than 90 days after the date of the enactment of this Act, the Federal Acquisition Regulatory Council shall amend the cost principle in the Federal Acquisition Regulation that is set out in section 31.205-14 of title 48, Code of Federal Regulations, relating to unallowability of entertainment costs—

“(A) by inserting in the cost principle a statement that costs made specifically unallowable under that

cost principle are not allowable under any other cost principle; and

“(B) by striking out ‘(but see 31.205-1 and 31.205-13)’.

“(b) DEFINITIONS.—In this section:

“(1) The term ‘employee’ includes officers and directors of a contractor.

“(2) The term ‘covered contract’ has the meaning given such term in section 2324(l) of title 10, United States Code (as amended by section 2101(c) [2101(d)]), and section 306(l) of the Federal Property and Administrative Services Act of 1949 (as added by section 2151) [see 41 U.S.C. 4301(2)].

“(c) EFFECTIVE DATE.—Any amendments to the Federal Acquisition Regulation made pursuant to subsection (a) shall apply with respect to costs incurred after the date on which the amendments made by section 2101 apply (as provided in section 10001 [set out as an Effective Date of 1994 Amendment note under section 2302 of Title 10, Armed Forces]) or the date on which the amendments made by section 2151 apply (as provided in section 10001), whichever is later.”

Executive Documents

EX. ORD. NO. 13494. ECONOMY IN GOVERNMENT CONTRACTING

Ex. Ord. No. 13494, Jan. 30, 2009, 74 F.R. 6101, as amended by Ex. Ord. No. 13517, §2, Oct. 30, 2009, 74 F.R. 57239, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 101 *et seq.*, it is hereby ordered that:

SECTION 1. To promote economy and efficiency in Government contracting, certain costs that are not directly related to the contractors’ provision of goods and services to the Government shall be unallowable for payment, thereby directly reducing Government expenditures. This order is also consistent with the policy of the United States to remain impartial concerning any labor-management dispute involving Government contractors. This order does not restrict the manner in which recipients of Federal funds may expend those funds.

SEC. 2. It is the policy of the executive branch in procuring goods and services that, to ensure the economical and efficient administration of Government contracts, contracting departments and agencies, when they enter into, receive proposals for, or make disbursements pursuant to a contract as to which certain costs are treated as unallowable, shall treat as unallowable the costs of any activities undertaken to persuade employees—whether employees of the recipient of the Federal disbursements or of any other entity—to exercise or not to exercise, or concerning the manner of exercising, the right to organize and bargain collectively through representatives of the employees’ own choosing. Such unallowable costs shall be excluded from any billing, claim, proposal, or disbursement applicable to any such Federal Government contract.

SEC. 3. Contracting departments and agencies shall treat as allowable costs incurred in maintaining satisfactory relations between the contractor and its employees (other than the costs of any activities undertaken to persuade employees to exercise or not to exercise, or concerning the manner of exercising, the right to organize and bargain collectively), including costs of labor management committees, employee publications, and other related activities. See 48 C.F.R. 31.205-21.

SEC. 4. Examples of costs unallowable under section 2 of this order include the costs of the following activities, when they are undertaken to persuade employees to exercise or not to exercise, or concern the manner of exercising, rights to organize and bargain collectively:

- (a) preparing and distributing materials;
- (b) hiring or consulting legal counsel or consultants;
- (c) holding meetings (including paying the salaries of the attendees at meetings held for this purpose); and

(d) planning or conducting activities by managers, supervisors, or union representatives during work hours.

SEC. 5. Within 150 days of the effective date of this order, the Federal Acquisition Regulatory Council (FAR Council) shall adopt such rules and regulations and issue such orders as are deemed necessary and appropriate to carry out this order. Such rules, regulations, and orders shall minimize the costs of compliance for contractors and shall not interfere with the ability of contractors to engage in advocacy through activities for which they do not claim reimbursement.

SEC. 6. Each contracting department or agency shall cooperate with the FAR Council and provide such information and assistance as the FAR Council may require in the performance of its functions under this order.

SEC. 7. (a) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(b) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

SEC. 8. This order shall become effective immediately, and shall apply to contracts resulting from solicitations issued on or after the effective date of the action taken by the FAR Council under section 5 of this order.

BARACK OBAMA.

§ 4305. Required regulations

(a) IN GENERAL.—The Federal Acquisition Regulation shall contain provisions on the allowability of contractor costs. Those provisions shall define in detail and in specific terms the costs that are unallowable, in whole or in part, under covered contracts.

(b) SPECIFIC ITEMS.—The regulations shall, at a minimum, clarify the cost principles applicable to contractor costs of the following:

- (1) Air shows.
- (2) Membership in civic, community, and professional organizations.
- (3) Recruitment.
- (4) Employee morale and welfare.
- (5) Actions to influence (directly or indirectly) executive branch action on regulatory and contract matters (other than costs incurred in regard to contract proposals pursuant to solicited or unsolicited bids).
- (6) Community relations.
- (7) Dining facilities.
- (8) Professional and consulting services, including legal services.
- (9) Compensation.
- (10) Selling and marketing.
- (11) Travel.
- (12) Public relations.
- (13) Hotel and meal expenses.
- (14) Expense of corporate aircraft.
- (15) Company-furnished automobiles.
- (16) Advertising.
- (17) Conventions.

(c) ADDITIONAL REQUIREMENTS.—

(1) WHEN QUESTIONED COSTS MAY BE RESOLVED.—The Federal Acquisition Regulation shall require that a contracting officer not resolve any questioned costs until the contracting officer has obtained—

(A) adequate documentation of those costs; and

(B) the opinion of the contract auditor on the allowability of those costs.

(2) **PRESENCE OF CONTRACT AUDITOR.**—The Federal Acquisition Regulation shall provide that, to the maximum extent practicable, a contract auditor be present at any negotiation or meeting with the contractor regarding a determination of the allowability of indirect costs of the contractor.

(3) **SETTLEMENT TO REFLECT AMOUNT OF INDIVIDUAL QUESTIONED COSTS.**—The Federal Acquisition Regulation shall require that all categories of costs designated in the report of a contract auditor as questioned with respect to a proposal for settlement be resolved in a manner so that the amount of the individual questioned costs that are paid will be reflected in the settlement.

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3787.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
4305(a)	41:256(f)(1) (1st, 2d sentences).	June 30, 1949, ch. 288, title III, §306(f), as added Pub. L. 100-700, §8(a)(1), Nov. 19, 1988, 102 Stat. 4634; Pub. L. 103-355, title II, §2151, Oct. 13, 1994, 108 Stat. 3312.
4305(b)	41:256(f)(1) (last sentence).	
4305(c)	41:256(f)(2)–(4).	

§ 4306. Applicability of regulations to subcontractors

The regulations referred to in sections 4304 and 4305(a) and (b) of this title shall require prime contractors of a covered contract, to the maximum extent practicable, to apply the provisions of those regulations to all subcontractors of the covered contract.

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3788.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
4306	41:256(g).	June 30, 1949, ch. 288, title III, §306(g), as added Pub. L. 100-700, §8(a)(1), Nov. 19, 1988, 102 Stat. 4634; Pub. L. 103-355, title II, §2151, Oct. 13, 1994, 108 Stat. 3313.

§ 4307. Contractor certification

(a) **CONTENT AND FORM.**—A proposal for settlement of indirect costs applicable to a covered contract shall include a certification by an official of the contractor that, to the best of the certifying official's knowledge and belief, all indirect costs included in the proposal are allowable. The certification shall be in a form prescribed in the Federal Acquisition Regulation.

(b) **WAIVER.**—An executive agency may, in an exceptional case, waive the requirement for certification under subsection (a) in the case of a contract if the agency—

(1) determines that it would be in the interest of the Federal Government to waive the certification; and

(2) states in writing the reasons for the determination and makes the determination available to the public.

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3788.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
4307	41:256(h).	June 30, 1949, ch. 288, title III, §306(h), as added Pub. L. 100-700, §8(a)(1), Nov. 19, 1988, 102 Stat. 4634; Pub. L. 103-355, title II, §2151, Oct. 13, 1994, 108 Stat. 3313.

§ 4308. Penalties for submission of cost known to be unallowable

The submission to an executive agency of a proposal for settlement of costs for any period after those costs have been accrued that includes a cost that is expressly specified by statute or regulation as being unallowable, with the knowledge that the cost is unallowable, is subject to section 287 of title 18 and section 3729 of title 31.

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3788.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
4308	41:256(i).	June 30, 1949, ch. 288, title III, §306(i), as added Pub. L. 100-700, §8(a)(1), Nov. 19, 1988, 102 Stat. 4634; Pub. L. 103-355, title II, §2151, Oct. 13, 1994, 108 Stat. 3313.

§ 4309. Burden of proof on contractor

In a proceeding before a board of contract appeals, the United States Court of Federal Claims, or any other Federal court in which the reasonableness of indirect costs for which a contractor seeks reimbursement from the Federal Government is in issue, the burden of proof is on the contractor to establish that those costs are reasonable.

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3788.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
4309	41:256(j).	June 30, 1949, ch. 288, title III, §306(j), as added Pub. L. 100-700, §8(a)(1), Nov. 19, 1988, 102 Stat. 4634; Pub. L. 103-355, title II, §2151, Oct. 13, 1994, 108 Stat. 3313.

§ 4310. Proceeding costs not allowable

(a) **DEFINITIONS.**—In this section:

(1) **COSTS.**—The term “costs”, with respect to a proceeding, means all costs incurred by a contractor, subcontractor, or personal services contractor, whether before or after the commencement of the proceeding, including—

(A) administrative and clerical expenses;

(B) the cost of legal services, including legal services performed by an employee of the contractor, subcontractor, or personal services contractor;

(C) the cost of the services of accountants and consultants retained by the contractor, subcontractor, or personal services contractor; and

(D) the pay of directors, officers, and employees of the contractor, subcontractor, or

personal services contractor for time devoted by those directors, officers, and employees to the proceeding.

(2) **PENALTY.**—The term “penalty” does not include restitution, reimbursement, or compensatory damages.

(3) **PROCEEDING.**—The term “proceeding” includes an investigation.

(b) **IN GENERAL.**—Except as otherwise provided in this section, costs incurred by a contractor, subcontractor, or personal services contractor in connection with a criminal, civil, or administrative proceeding commenced by the Federal Government, by a State, or by a contractor, subcontractor, or personal services contractor or grantee employee submitting a complaint under section 4712 of this title are not allowable as reimbursable costs under a covered contract, subcontract, or personal services contract if the proceeding—

(1) relates to a violation of, or failure to comply with, a Federal or State statute or regulation or to any other activity described in section 4712(a)(1) of this title; and

(2) results in a disposition described in subsection (c).

(c) **COVERED DISPOSITIONS.**—A disposition referred to in subsection (b)(2) is any of the following:

(1) In a criminal proceeding, a conviction (including a conviction pursuant to a plea of nolo contendere) by reason of the violation or failure referred to in subsection (b).

(2) In a civil or administrative proceeding involving an allegation of fraud or similar misconduct, a determination of contractor, subcontractor, or personal services contractor liability on the basis of the violation or failure referred to in subsection (b).

(3) In any civil or administrative proceeding, the imposition of a monetary penalty or an order to take corrective action under section 4712 of this title by reason of the violation or failure referred to in subsection (b).

(4) A final decision to do any of the following, by reason of the violation or failure referred to in subsection (b):

(A) Debar or suspend the contractor, subcontractor, or personal services contractor.

(B) Rescind or void the contract, subcontract, or personal services contract.

(C) Terminate the contract, subcontract, or personal services contract for default.

(5) A disposition of the proceeding by consent or compromise if the disposition could have resulted in a disposition described in paragraph (1), (2), (3), or (4).

(d) **COSTS ALLOWED BY SETTLEMENT AGREEMENT IN PROCEEDING COMMENCED BY FEDERAL GOVERNMENT.**—In the case of a proceeding referred to in subsection (b) that is commenced by the Federal Government and is resolved by consent or compromise pursuant to an agreement entered into by a contractor, subcontractor, or personal services contractor and the Federal Government, the costs incurred by the contractor, subcontractor, or personal services contractor in connection with the proceeding that are otherwise not allowable as reimbursable

costs under subsection (b) may be allowed to the extent specifically provided in that agreement.

(e) **COSTS SPECIFICALLY AUTHORIZED BY EXECUTIVE AGENCY IN PROCEEDING COMMENCED BY STATE.**—In the case of a proceeding referred to in subsection (b) that is commenced by a State, the executive agency that awarded the covered contract, subcontract, or personal services contract involved in the proceeding may allow the costs incurred by the contractor, subcontractor, or personal services contractor in connection with the proceeding as reimbursable costs if the executive agency determines, in accordance with the Federal Acquisition Regulation, that the costs were incurred as a result of—

(1) a specific term or condition of the contract, subcontract, or personal services contract; or

(2) specific written instructions of the executive agency.

(f) **OTHER ALLOWABLE COSTS.**—

(1) **IN GENERAL.**—Except as provided in paragraph (3), costs incurred by a contractor, subcontractor, or personal services contractor in connection with a criminal, civil, or administrative proceeding commenced by the Federal Government or a State in connection with a covered contract, subcontract, or personal services contract may be allowed as reimbursable costs under the contract, subcontract, or personal services contract if the costs are not disallowable under subsection (b), but only to the extent provided in paragraph (2).

(2) **AMOUNT OF ALLOWABLE COSTS.**—

(A) **MAXIMUM AMOUNT ALLOWED.**—The amount of the costs allowable under paragraph (1) in any case may not exceed the amount equal to 80 percent of the amount of the costs incurred, to the extent that the costs are determined to be otherwise allowable and allocable under the Federal Acquisition Regulation.

(B) **CONTENT OF REGULATIONS.**—Regulations issued for the purpose of subparagraph (A) shall provide for appropriate consideration of the complexity of procurement litigation, generally accepted principles governing the award of legal fees in civil actions involving the Federal Government as a party, and other factors as may be appropriate.

(3) **WHEN OTHERWISE ALLOWABLE COSTS ARE NOT ALLOWABLE.**—In the case of a proceeding referred to in paragraph (1), contractor, subcontractor, or personal services contractor costs otherwise allowable as reimbursable costs under this subsection are not allowable if—

(A) the proceeding involves the same contractor, subcontractor, or personal services contractor misconduct alleged as the basis of another criminal, civil, or administrative proceeding; and

(B) the costs of the other proceeding are not allowable under subsection (b).

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3789; Pub. L. 112-239, div. A, title VIII, §828(d), Jan. 2, 2013, 126 Stat. 1841; Pub. L. 114-261, §1(b)(2)(A), Dec. 14, 2016, 130 Stat. 1362.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
4310(a)	41:256(k)(6).	June 30, 1949, ch. 288, title III, § 306(k), as added Pub. L. 100-700, § 8(a)(1), Nov. 19, 1988, 102 Stat. 4634; Pub. L. 103-355, title II, § 2151, Oct. 13, 1994, 108 Stat. 3313.
4310(b)	41:256(k)(1).	
4310(c)	41:256(k)(2).	
4310(d)	41:256(k)(3).	
4310(e)	41:256(k)(4).	
4310(f)	41:256(k)(5).	

Editorial Notes

AMENDMENTS

2016—Pub. L. 114-261, §1(b)(2)(A)(i), (ii), inserted “, subcontractor, or personal services contractor” after “contractor” and “, subcontract, or personal services contract” after “contract” wherever appearing.

Subsec. (b)(1). Pub. L. 114-261, §1(b)(2)(A)(iii), inserted “or to any other activity described in section 4712(a)(1) of this title” after “statute or regulation”.

2013—Subsec. (b). Pub. L. 112-239, §828(d)(1), substituted “commenced by the Federal Government, by a State, or by a contractor or grantee employee submitting a complaint under section 4712 of this title” for “commenced by the Federal Government or a State”.

Subsec. (c)(3). Pub. L. 112-239, §828(d)(2), substituted “the imposition of a monetary penalty or an order to take corrective action under section 4712 of this title” for “the imposition of a monetary penalty”.

CHAPTER 45—CONTRACT FINANCING

Sec.	
4501.	Authority of executive agency.
4502.	Payment.
4503.	Security for advance payments.
4504.	Conditions for progress payments.
4505.	Payments for commercial products and commercial services.
4506.	Action in case of fraud.

Editorial Notes

AMENDMENTS

2018—Pub. L. 115-232, div. A, title VIII, §836(b)(18)(B)(ii), Aug. 13, 2018, 132 Stat. 1864, substituted “Payments for commercial products and commercial services” for “Payments for commercial items” in item 4505.

§ 4501. Authority of executive agency

An executive agency may—

(1) make advance, partial, progress or other payments under contracts for property or services made by the agency; and

(2) insert in solicitations for procurement of property or services a provision limiting to small business concerns advance or progress payments.

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3790.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
4501	41:255(a).	June 30, 1949, ch. 288, title III, § 305(a), 63 Stat. 396; July 12, 1952, ch. 703, §1(m), 66 Stat. 594; Pub. L. 85-800, §4, Aug. 28, 1958, 72 Stat. 966; Pub. L. 103-355, title II, §2051(a)(2), (c), Oct. 13, 1994, 108 Stat. 3304.

Statutory Notes and Related Subsidiaries

RELATIONSHIP TO PROMPT PAYMENT REQUIREMENTS

Pub. L. 103-355, title II, §2051(f), Oct. 13, 1994, 108 Stat. 3306, provided that: “The amendments made by this section [see Tables for classification] are not intended to impair or modify procedures required by the provisions of chapter 39 of title 31, United States Code, and the regulations issued pursuant to such provisions of law (as such procedures are in effect on the date of the enactment of this Act [Oct. 13, 1994]), except that the Government may accept payment terms offered by a contractor offering a commercial item.”

§ 4502. Payment

(a) BASIS FOR PAYMENT.—When practicable, payments under section 4501 of this title shall be made on any of the following bases:

(1) Performance measured by objective, quantifiable methods such as delivery of acceptable items, work measurement, or statistical process controls.

(2) Accomplishment of events defined in the program management plan.

(3) Other quantifiable measures of results.

(b) PAYMENT AMOUNT.—Payments made under section 4501 of this title may not exceed the unpaid contract price.

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3791.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
4502(a)	41:255(b).	June 30, 1949, ch. 288, title III, § 305(b), as added Pub. L. 103-355, title II, § 2051(b), Oct. 13, 1994, 108 Stat. 3304.
4502(b)	41:255(c).	June 30, 1949, ch. 288, title III, § 305(c), 63 Stat. 396; July 12, 1952, ch. 703, §1(m), 66 Stat. 594; Pub. L. 85-800, §4, Aug. 28, 1958, 72 Stat. 966; Pub. L. 103-355, title II, §2051(a)(3), (5), Oct. 13, 1994, 108 Stat. 3304.

§ 4503. Security for advance payments

Advance payments under section 4501 of this title may be made only on adequate security and a determination by the agency head that to do so would be in the public interest. The security may be in the form of a lien in favor of the Federal Government on the property contracted for, on the balance in an account in which the payments are deposited, and on such of the property acquired for performance of the contract as the parties may agree. This lien shall be paramount to all other liens and is effective immediately upon the first advancement of funds without filing, notice, or any other action by the Federal Government.

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3791.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
4503	41:255(d).	June 30, 1949, ch. 288, title III, § 305(d), 63 Stat. 396; July 12, 1952, ch. 703, §1(m), 66 Stat. 594; Pub. L. 85-800, §4, Aug. 28, 1958, 72 Stat. 966; Pub. L. 103-355, title II, §2051(a)(4), (5), (d), Oct. 13, 1994, 108 Stat. 3304.

§ 4504. Conditions for progress payments

(a) **PAYMENT COMMENSURATE WITH WORK.**—The executive agency shall ensure that a payment for work in progress (including materials, labor, and other items) under a contract of an executive agency that provides for those payments is commensurate with the work accomplished that meets standards established under the contract. The contractor shall provide information and evidence the executive agency determines is necessary to permit the executive agency to carry out this subsection.

(b) **LIMITATION.**—The executive agency shall ensure that progress payments referred to in subsection (a) are not made for more than 80 percent of the work accomplished under the contract as long as the executive agency has not made the contractual terms, specifications, and price definite.

(c) **APPLICATION.**—This section applies to a contract in an amount greater than \$25,000.

(Pub. L. 111-350, § 3, Jan. 4, 2011, 124 Stat. 3791.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
4504	41:255(e).	June 30, 1949, ch. 288, title III, § 305(e), as added Pub. L. 103-355, title II, § 2051(e), Oct. 13, 1994, 108 Stat. 3304, as amended Pub. L. 104-106, title XLIII, § 4321(a)(4), Feb. 10, 1996, 110 Stat. 671.

§ 4505. Payments for commercial products and commercial services

(a) **TERMS AND CONDITIONS FOR PAYMENTS.**—Payments under section 4501 of this title for commercial products or commercial services may be made under terms and conditions that the head of the executive agency determines are appropriate or customary in the commercial marketplace and are in the best interests of the Federal Government.

(b) **SECURITY FOR PAYMENTS.**—The head of the executive agency shall obtain adequate security for the payments. If the security is in the form of a lien in favor of the Federal Government, the lien is paramount to all other liens and is effective immediately on the first payment, without filing, notice, or other action by the Federal Government.

(c) **LIMITATION ON ADVANCE PAYMENTS.**—Advance payments made under section 4501 of this title for commercial products or commercial services may include payments, in a total amount not more than 15 percent of the contract price, in advance of any performance of work under the contract.

(d) **NONAPPLICATION OF CERTAIN CONDITIONS.**—The conditions of sections 4503 and 4504 of this title need not be applied if they would be inconsistent, as determined by the head of the executive agency, with commercial terms and conditions pursuant to this section.

(Pub. L. 111-350, § 3, Jan. 4, 2011, 124 Stat. 3791; Pub. L. 115-232, div. A, title VIII, § 836(b)(18)(A), (B)(i), Aug. 13, 2018, 132 Stat. 1864.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
4505	41:255(f).	June 30, 1949, ch. 288, title III, § 305(f), as added Pub. L. 103-355, title II, § 2051(e), Oct. 13, 1994, 108 Stat. 3304, as amended Pub. L. 104-106, title XLIII, § 4321(a)(4), Feb. 10, 1996, 110 Stat. 671.

Editorial Notes**AMENDMENTS**

2018—Pub. L. 115-232, § 836(b)(18)(B)(i), substituted “Payments for commercial products and commercial services” for “Payments for commercial items” in section catchline.

Subsecs. (a), (c). Pub. L. 115-232, § 836(b)(18)(A), 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.

§ 4506. Action in case of fraud

(a) **DEFINITION.**—In this section, the term “remedy coordination official”, with respect to an executive agency, means the individual or entity in that executive agency who coordinates within that executive agency the administration of criminal, civil, administrative, and contractual remedies resulting from investigations of fraud or corruption related to procurement activities.

(b) **RECOMMENDATION TO REDUCE OR SUSPEND PAYMENTS.**—In any case in which the remedy coordination official of an executive agency finds that there is substantial evidence that the request of a contractor for advance, partial, or progress payment under a contract awarded by that executive agency is based on fraud, the remedy coordination official shall recommend that the executive agency reduce or suspend further payments to that contractor.

(c) **REDUCTION OR SUSPENSION OF PAYMENTS.**—The head of an executive agency receiving a recommendation under subsection (b) in the case of a contractor’s request for payment under a contract shall determine whether there is substantial evidence that the request is based on fraud. On making an affirmative determination, the head of the executive agency may reduce or suspend further payments to the contractor under the contract.

(d) **EXTENT OF REDUCTION OR SUSPENSION.**—The extent of any reduction or suspension of payments by an executive agency under subsection (c) on the basis of fraud shall be reasonably commensurate with the anticipated loss to the Federal Government resulting from the fraud.

(e) **WRITTEN JUSTIFICATION.**—A written justification for each decision of the head of an executive agency whether to reduce or suspend payments under subsection (c), and for each recommendation received by the executive agency

in connection with the decision, shall be prepared and be retained in the files of the executive agency.

(f) NOTICE.—The head of each executive agency shall prescribe procedures to ensure that, before the head of the executive agency decides to reduce or suspend payments in the case of a contractor under subsection (c), the contractor is afforded notice of the proposed reduction or suspension and an opportunity to submit matters to the executive agency in response to the proposed reduction or suspension.

(g) REVIEW.—Not later than 180 days after the date on which the head of an executive agency reduces or suspends payments to a contractor under subsection (c), the remedy coordination official of the executive agency shall—

(1) review the determination of fraud on which the reduction or suspension is based; and

(2) transmit a recommendation to the head of the executive agency whether the suspension or reduction should continue.

(h) REPORT.—The head of each executive agency who receives recommendations made by the remedy coordination official of the executive agency to reduce or suspend payments under subsection (c) during a fiscal year shall prepare for that year a report that contains the recommendations, the actions taken on the recommendations and the reasons for those actions, and an assessment of the effects of those actions on the Federal Government. The report shall be available to any Member of Congress on request.

(i) RESTRICTION ON DELEGATION.—The head of an executive agency may not delegate responsibilities under this section to an individual in a position below level IV of the Executive Schedule.

(Pub. L. 111-350, § 3, Jan. 4, 2011, 124 Stat. 3792.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
4506	41:255(g).	June 30, 1949, ch. 288, title III, § 305(g), as added Pub. L. 103-355, title II, § 2051(e), Oct. 13, 1994, 108 Stat. 3305, as amended Pub. L. 104-106, title XLIII, § 4321(a)(4), Feb. 10, 1996, 110 Stat. 671.

CHAPTER 47—MISCELLANEOUS

<i>Sec.</i>	
4701.	Determinations and decisions.
4702.	Prohibition on release of contractor proposals.
4703.	Validation of proprietary data restrictions.
4704.	Prohibition of contractors limiting subcontractor sales directly to Federal Government.
4705.	Protection of contractor employees from reprisal for disclosure of certain information.
4706.	Examination of facilities and records of contractor.
4707.	Remission of liquidated damages.
4708.	Payment of reimbursable indirect costs in cost-type research and development contracts with educational institutions.
4709.	Implementation of electronic commerce capability.

<i>Sec.</i>	
4710.	Limitations on tiering of subcontractors.
4711.	Linking of award and incentive fees to acquisition outcomes.
4712.	Enhancement of contractor protection from reprisal for disclosure of certain information.
4713.	Authorities relating to mitigating supply chain risks in the procurement of covered articles.
4714.	Prohibition on criminal history inquiries by contractors prior to conditional offer.

Editorial Notes

AMENDMENTS

2019—Pub. L. 116-92, div. A, title XI, § 1123(a)(2), Dec. 20, 2019, 133 Stat. 1612, added item 4714.

2018—Pub. L. 115-390, title II, § 203(b), Dec. 21, 2018, 132 Stat. 5192, added item 4713.

2016—Pub. L. 114-261, § 1(a)(3)(B), Dec. 14, 2016, 130 Stat. 1362, added item 4712 and struck out former item 4712 ‘‘Pilot program for enhancement of contractor protection from reprisal for disclosure of certain information’’.

2013—Pub. L. 112-239, div. A, title VIII, § 828(a)(2), Jan. 2, 2013, 126 Stat. 1840, added item 4712.

§ 4701. Determinations and decisions

(a) INDIVIDUAL OR CLASS DETERMINATIONS AND DECISIONS AUTHORIZED.—

(1) IN GENERAL.—Determinations and decisions required to be made under this division by the head of an executive agency or provided in this division or chapters 1 to 11 of title 40 to be made by the Administrator of General Services or other agency head may be made for an individual purchase or contract or, except for determinations or decisions made under sections 3105, 3301, 3303 to 3305, 3306(a)–(e), and 3308, chapter 37, and section 4702 of this title or to the extent expressly prohibited by another law, for a class of purchases or contracts.

(2) DELEGATION.—Except as provided in section 3304(a)(7) of this title, and except as provided in section 121(d)(1) and (2) of title 40 with respect to the Administrator of General Services, the agency head, in the discretion and subject to the direction of the agency head, may delegate powers provided by this division or chapters 1 to 11 of title 40, including the making of determinations and decisions described in paragraph (1), to other officers or officials of the agency.

(3) FINALITY.—The determinations and decisions are final.

(b) WRITTEN FINDINGS.—

(1) BASIS FOR CERTAIN DETERMINATIONS.—Each determination or decision under section 3901, 3905, 4503, or 4706(d)(2)(B) of this title shall be based on a written finding by the individual making the determination or decision. A finding under section 4503 or 4706(d)(2)(B) shall set out facts and circumstances that support the determination or decision.

(2) FINALITY.—Each finding referred to in paragraph (1) is final.

(3) MAINTAINING COPIES OF FINDINGS.—The head of an executive agency shall maintain for a period of not less than 6 years a copy of each finding referred to in paragraph (1) that is made by an individual in that executive agen-

cy. The period begins on the date of the determination or decision to which the finding relates.

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3793.)

HISTORICAL AND REVISION NOTES

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
4701	41:257.	June 30, 1949, ch. 288, title III, §307, 63 Stat. 396; Pub. L. 85-800, §5, Aug. 28, 1958, 72 Stat. 967; Pub. L. 89-343, §§3, 4, Nov. 8, 1965, 79 Stat. 1303; Pub. L. 98-369, title VII, §2714(a)(4), July 18, 1984, 98 Stat. 1184; Pub. L. 104-106, title XLIII, §4321(e)(6), Feb. 10, 1996, 110 Stat. 675; Pub. L. 104-316, title I, §121(c), Oct. 19, 1996, 110 Stat. 3836.
	41:262.	June 30, 1949, ch. 288, title III, §312, as added Pub. L. 103-355, title I, §1553, Oct. 13, 1994, 108 Stat. 3300.

§ 4702. Prohibition on release of contractor proposals

(a) DEFINITION.—In this section, the term “proposal” means a proposal, including a technical, management, or cost proposal, submitted by a contractor in response to the requirements of a solicitation for a competitive proposal.

(b) PROHIBITION.—A proposal in the possession or control of an executive agency may not be made available to any person under section 552 of title 5.

(c) NONAPPLICATION.—Subsection (b) does not apply to a proposal that is set forth or incorporated by reference in a contract entered into between the agency and the contractor that submitted the proposal.

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3794.)

HISTORICAL AND REVISION NOTES

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
4702(a)	41:253b(m)(3).	June 30, 1949, ch. 288, title III, §303B(m), as added Pub. L. 104-201, title VIII, §821(b), Sept. 23, 1996, 110 Stat. 2609.
4702(b)	41:253b(m)(1).	
4702(c)	41:253b(m)(2).	

In subsection (b), the words “Except as provided in paragraph (2)” are omitted as unnecessary.

§ 4703. Validation of proprietary data restrictions

(a) CONTRACT THAT PROVIDES FOR DELIVERY OF TECHNICAL DATA.—A contract for property or services entered into by an executive agency that provides for the delivery of technical data shall provide that—

(1) a contractor or subcontractor at any tier shall be prepared to furnish to the contracting officer a written justification for any restriction the contractor or subcontractor asserts on the right of the Federal Government to use the data; and

(2) the contracting officer may review the validity of a restriction the contractor or subcontractor asserts under the contract on the right of the Federal Government to use technical data furnished to the Federal Government under the contract if the contracting of-

ficer determines that reasonable grounds exist to question the current validity of the asserted restriction and that the continued adherence to the asserted restriction by the Federal Government would make it impracticable to procure the item competitively at a later time.

(b) CHALLENGE OF RESTRICTION.—If after a review the contracting officer determines that a challenge to the asserted restriction is warranted, the contracting officer shall provide written notice to the contractor or subcontractor asserting the restriction. The notice shall state—

(1) the grounds for challenging the asserted restriction; and

(2) the requirement for a response within 60 days justifying the current validity of the asserted restriction.

(c) ADDITIONAL TIME FOR RESPONSES.—If a contractor or subcontractor asserting a restriction subject to this section submits to the contracting officer a written request showing the need for additional time to comply with the requirement to justify the current validity of the asserted restriction, the contracting officer shall provide appropriate additional time to adequately permit the justification to be submitted.

(d) MULTIPLE CHALLENGES.—If a party asserting a restriction receives notices of challenges to restrictions on technical data from more than one contracting officer, and notifies each contracting officer of the existence of more than one challenge, the contracting officer initiating the earliest challenge, after consultation with the party asserting the restriction and the other contracting officers, shall formulate a schedule of responses to each of the challenges that will afford the party asserting the restriction with an equitable opportunity to respond to each challenge.

(e) DECISION ON VALIDITY OF ASSERTED RESTRICTION.—

(1) NO RESPONSE SUBMITTED.—The contracting officer shall issue a decision pertaining to the validity of the asserted restriction if the contractor or subcontractor does not submit a response under subsection (b).

(2) RESPONSE SUBMITTED.—Within 60 days of receipt of a justification submitted in response to the notice provided pursuant to subsection (b), a contracting officer shall issue a decision or notify the party asserting the restriction of the time within which a decision will be issued.

(f) CLAIM DEEMED CLAIM WITHIN CHAPTER 71.—A claim pertaining to the validity of the asserted restriction that is submitted in writing to a contracting officer by a contractor or subcontractor at any tier is deemed to be a claim within the meaning of chapter 71 of this title.

(g) FINAL DISPOSITION OF CHALLENGE.—

(1) CHALLENGE IS SUSTAINED.—If the contracting officer's challenge to the restriction on the right of the Federal Government to use technical data is sustained on final disposition—

(A) the restriction is cancelled; and

(B) if the asserted restriction is found not to be substantially justified, the contractor

or subcontractor, as appropriate, is liable to the Federal Government for payment of the cost to the Federal Government of reviewing the asserted restriction and the fees and other expenses (as defined in section 2412(d)(2)(A) of title 28) incurred by the Federal Government in challenging the asserted restriction, unless special circumstances would make the payment unjust.

(2) CHALLENGE NOT SUSTAINED.—If the contracting officer's challenge to the restriction on the right of the Federal Government to use technical data is not sustained on final disposition, the Federal Government—

(A) continues to be bound by the restriction; and

(B) is liable for payment to the party asserting the restriction for fees and other expenses (as defined in section 2412(d)(2)(A) of title 28) incurred by the party asserting the restriction in defending the asserted restriction if the challenge by the Federal Government is found not to be made in good faith.

(Pub. L. 111-350, § 3, Jan. 4, 2011, 124 Stat. 3794.)

HISTORICAL AND REVISION NOTES

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
4703(a)	41:253d(a).	June 30, 1949, ch. 288, title III, § 303D, formerly § 303E, as added Pub. L. 98-577, title II, § 203(a), Oct. 30, 1984, 98 Stat. 3071; renumbered § 303D, Pub. L. 99-145, title XIII, § 1304(c)(4)(A), Nov. 8, 1985, 99 Stat. 742.
4703(b)	41:253d(b).	
4703(c)	41:253d(c) (1st sentence).	
4703(d)	41:253d(c) (last sentence).	
4703(e)	41:253d(d).	
4703(f)	41:253d(e).	
4703(g)	41:253d(f).	

§ 4704. Prohibition of contractors limiting subcontractor sales directly to Federal Government

(a) CONTRACT RESTRICTIONS.—Each contract for the purchase of property or services made by an executive agency shall provide that the contractor will not—

(1) enter into an agreement with a subcontractor under the contract that has the effect of unreasonably restricting sales by the subcontractor directly to the Federal Government of any item or process (including computer software) made or furnished by the subcontractor under the contract (or any follow-on production contract); or

(2) otherwise act to restrict unreasonably the ability of a subcontractor to make sales described in paragraph (1) to the Federal Government.

(b) RIGHTS UNDER LAW PRESERVED.—This section does not prohibit a contractor from asserting rights it otherwise has under law.

(c) INAPPLICABILITY TO CERTAIN CONTRACTS.—This section does not apply to a contract for an amount that is not greater than the simplified acquisition threshold.

(d) INAPPLICABILITY WHEN GOVERNMENT TREATED SIMILARLY TO OTHER PURCHASERS.—An agree-

ment between the contractor in a contract for the acquisition of commercial products or commercial services and a subcontractor under the contract that restricts sales by the subcontractor directly to persons other than the contractor may not be considered to unreasonably restrict sales by that subcontractor to the Federal Government in violation of the provision included in the contract pursuant to subsection (a) if the agreement does not result in the Federal Government being treated differently with regard to the restriction than any other prospective purchaser of the commercial products or commercial services from that subcontractor.

(Pub. L. 111-350, § 3, Jan. 4, 2011, 124 Stat. 3795; Pub. L. 115-232, div. A, title VIII, § 836(b)(19), Aug. 13, 2018, 132 Stat. 1864.)

HISTORICAL AND REVISION NOTES

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
4704(a)	41:253g(a).	June 30, 1949, ch. 288, title III, § 303G(a), (b), formerly § 303H, as added Pub. L. 98-577, title II, § 206(a), Oct. 30, 1984, 98 Stat. 3073; renumbered § 303G, Pub. L. 99-145, title XIII, § 1304(c)(4)(A), Nov. 8, 1985, 99 Stat. 742.
4704(b)	41:253g(b).	
4704(c)	41:253g(c).	June 30, 1949, ch. 288, title III, § 303G(c), as added Pub. L. 103-355, title IV, § 4103(b), Oct. 13, 1994, 108 Stat. 3341.
4704(d)	41:253g(d).	June 30, 1949, ch. 288, title III, § 303G(d), as added Pub. L. 103-355, title VIII, § 8204(a), Oct. 13, 1994, 108 Stat. 3396.

Editorial Notes

AMENDMENTS

2018—Subsec. (d). Pub. L. 115-232 substituted “commercial products or commercial services” for “commercial items” in two places.

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.

§ 4705. Protection of contractor employees from reprisal for disclosure of certain information

(a) DEFINITIONS.—In this section:

(1) CONTRACT.—The term “contract” means a contract awarded by the head of an executive agency.

(2) CONTRACTOR.—The term “contractor” means a person awarded a contract with an executive agency.

(3) INSPECTOR GENERAL.—The term “Inspector General” means an Inspector General appointed under chapter 4 of title 5.

(b) PROHIBITION OF REPRISALS.—An employee of a contractor may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a Member of Congress or an authorized official of an executive agency or the Department of Justice information relating to a

substantial violation of law related to a contract (including the competition for, or negotiation of, a contract).

(c) **INVESTIGATION OF COMPLAINTS.**—An individual who believes that the individual has been subjected to a reprisal prohibited by subsection (b) may submit a complaint to the Inspector General of the executive agency. Unless the Inspector General determines that the complaint is frivolous, the Inspector General shall investigate the complaint and, on completion of the investigation, submit a report of the findings of the investigation to the individual, the contractor concerned, and the head of the agency. If the executive agency does not have an Inspector General, the duties of the Inspector General under this section shall be performed by an official designated by the head of the executive agency.

(d) **REMEDY AND ENFORCEMENT AUTHORITY.**—

(1) **ACTIONS CONTRACTOR MAY BE ORDERED TO TAKE.**—If the head of an executive agency determines that a contractor has subjected an individual to a reprisal prohibited by subsection (b), the head of the executive agency may take one or more of the following actions:

(A) **ABATEMENT.**—Order the contractor to take affirmative action to abate the reprisal.

(B) **REINSTATEMENT.**—Order the contractor to reinstate the individual to the position that the individual held before the reprisal, together with the compensation (including back pay), employment benefits, and other terms and conditions of employment that would apply to the individual in that position if the reprisal had not been taken.

(C) **PAYMENT.**—Order the contractor to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that the complainant reasonably incurred for, or in connection with, bringing the complaint regarding the reprisal, as determined by the head of the executive agency.

(2) **ENFORCEMENT ORDER.**—When a contractor fails to comply with an order issued under paragraph (1), the head of the executive agency shall file an action for enforcement of the order in the United States district court for a district in which the reprisal was found to have occurred. In an action brought under this paragraph, the court may grant appropriate relief, including injunctive relief and compensatory and exemplary damages.

(3) **REVIEW OF ENFORCEMENT ORDER.**—A person adversely affected or aggrieved by an order issued under paragraph (1) may obtain review of the order's conformance with this subsection, and regulations issued to carry out this section, in the United States court of appeals for a circuit in which the reprisal is alleged in the order to have occurred. A petition seeking review must be filed no more than 60 days after the head of the agency issues the order. Review shall conform to chapter 7 of title 5.

(e) **SCOPE OF SECTION.**—This section does not—

(1) authorize the discharge of, demotion of, or discrimination against an employee for a

disclosure other than a disclosure protected by subsection (b); or

(2) modify or derogate from a right or remedy otherwise available to the employee.

(f) **FOUR-YEAR SUSPENSION OF EFFECTIVENESS WHILE PILOT PROGRAM IS IN EFFECT.**—While section 4712¹ of this title is in effect, this section shall not be in effect.

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3796; Pub. L. 112-239, div. A, title VIII, §828(c), Jan. 2, 2013, 126 Stat. 1841; Pub. L. 117-286, §4(b)(72), Dec. 27, 2022, 136 Stat. 4351.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
4705(a)	41:265(e).	June 30, 1949, ch. 288, title III, §315, as added Pub. L. 103-355, title VI, §6006, Oct. 13, 1994, 108 Stat. 3365; Pub. L. 104-106, title XLIII, §4321(e)(8), Feb. 10, 1996, 110 Stat. 675.
4705(b)	41:265(a).	
4705(c)	41:265(b).	
4705(d)	41:265(c).	
4705(e)	41:265(d).	

In subsection (d)(2), the word “contractor” is substituted for “person” for clarity and for consistency with subsection (d)(1).

Editorial Notes

REFERENCES IN TEXT

Section 4712 of this title, referred to in subsec. (f), formerly referred to a pilot program in the section catchline and contained a subsec. (i) which provided that section 4712 would be in effect for a specified four-year period. The section catchline was amended and subsec. (i) was struck out by Pub. L. 114-261, §1(a)(3)(A), Dec. 14, 2016, 130 Stat. 1362.

AMENDMENTS

2022—Subsec. (a)(3), Pub. L. 117-286 substituted “chapter 4 of title 5.” for “the Inspector General Act of 1978 (5 U.S.C. App.).”

2013—Subsec. (f), Pub. L. 112-239 added subsec. (f).

§ 4706. Examination of facilities and records of contractor

(a) **DEFINITION.**—In this section, the term “records” includes books, documents, accounting procedures and practices, and other data, regardless of type and regardless of whether the items are in written form, in the form of computer data, or in any other form.

(b) **AGENCY AUTHORITY.**—

(1) **INSPECTION OF PLANT AND AUDIT OF RECORDS.**—The head of an executive agency, acting through an authorized representative, may inspect the plant and audit the records of—

(A) a contractor performing a cost-reimbursement, incentive, time-and-materials, labor-hour, or price-redeterminable contract, or any combination of those contracts, the executive agency makes under this division; and

(B) a subcontractor performing a cost-reimbursement, incentive, time-and-materials, labor-hour, or price-redeterminable subcontract, or any combination of those sub-

¹ See References in Text note below.

contracts, under a contract referred to in subparagraph (A).

(2) EXAMINATION OF RECORDS.—The head of an executive agency, acting through an authorized representative, may, for the purpose of evaluating the accuracy, completeness, and currency of certified cost or pricing data required to be submitted pursuant to chapter 35 of this title with respect to a contract or subcontract, examine all records of the contractor or subcontractor related to—

- (A) the proposal for the contract or subcontract;
- (B) the discussions conducted on the proposal;
- (C) pricing of the contract or subcontract; or
- (D) performance of the contract or subcontract.

(c) SUBPOENA POWER.—

(1) AUTHORITY TO REQUIRE THE PRODUCTION OF RECORDS.—The Inspector General of an executive agency appointed under section 403 or 415 of title 5 or, on request of the head of an executive agency, the Director of the Defense Contract Audit Agency (or any successor agency) of the Department of Defense or the Inspector General of the General Services Administration may require by subpoena the production of records of a contractor, access to which is provided for that executive agency by subsection (b).

(2) ENFORCEMENT OF SUBPOENA.—A subpoena under paragraph (1), in the case of contumacy or refusal to obey, is enforceable by order of an appropriate United States district court.

(3) AUTHORITY NOT DELEGABLE.—The authority provided by paragraph (1) may not be delegated.

(4) REPORT.—In the year following a year in which authority provided in paragraph (1) is exercised for an executive agency, the head of the executive agency shall submit to the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Oversight and Government Reform of the House of Representatives a report on the exercise of the authority during the preceding year and the reasons why the authority was exercised in any instance.

(d) AUTHORITY OF COMPTROLLER GENERAL.—

(1) IN GENERAL.—Except as provided in paragraph (2), each contract awarded after using procedures other than sealed bid procedures shall provide that the Comptroller General and representatives of the Comptroller General may examine records of the contractor, or any of its subcontractors, that directly pertain to, and involve transactions relating to, the contract or subcontract and to interview any current employee regarding the transactions.

(2) EXCEPTION FOR FOREIGN CONTRACTOR OR SUBCONTRACTOR.—Paragraph (1) does not apply to a contract or subcontract with a foreign contractor or foreign subcontractor if the executive agency concerned determines, with the concurrence of the Comptroller General or the designee of the Comptroller General, that applying paragraph (1) to the contract or sub-

contract would not be in the public interest. The concurrence of the Comptroller General or the designee is not required when—

(A) the contractor or subcontractor is—

- (i) the government of a foreign country or an agency of that government; or
- (ii) precluded by the laws of the country involved from making its records available for examination; and

(B) the executive agency determines, after taking into account the price and availability of the property and services from United States sources, that the public interest would be best served by not applying paragraph (1).

(3) ADDITIONAL RECORDS NOT REQUIRED.—

Paragraph (1) does not require a contractor or subcontractor to create or maintain a record that the contractor or subcontractor does not maintain in the ordinary course of business or pursuant to another law.

(e) LIMITATION ON AUDITS RELATING TO INDIRECT COSTS.—An executive agency may not perform an audit of indirect costs under a contract, subcontract, or modification before or after entering into the contract, subcontract, or modification when the contracting officer determines that the objectives of the audit can reasonably be met by accepting the results of an audit that was conducted by another department or agency of the Federal Government within one year preceding the date of the contracting officer's determination.

(f) EXPIRATION OF AUTHORITY.—The authority of an executive agency under subsection (b) and the authority of the Comptroller General under subsection (d) shall expire 3 years after final payment under the contract or subcontract.

(g) INAPPLICABILITY TO CERTAIN CONTRACTS.—This section does not apply to the following contracts:

(1) Contracts for utility services at rates not exceeding those established to apply uniformly to the public, plus any applicable reasonable connection charge.

(2) A contract or subcontract that is not greater than the simplified acquisition threshold.

(h) ELECTRONIC FORM ALLOWED.—This section does not preclude a contractor from duplicating or storing original records in electronic form.

(i) ORIGINAL RECORDS NOT REQUIRED.—An executive agency shall not require a contractor or subcontractor to provide original records in an audit carried out pursuant to this section if the contractor or subcontractor provides photographic or electronic images of the original records and meets the following requirements:

(1) PRESERVATION PROCEDURES ESTABLISHED.—The contractor or subcontractor has established procedures to ensure that the imaging process preserves the integrity, reliability, and security of the original records.

(2) INDEXING SYSTEM MAINTAINED.—The contractor or subcontractor maintains an effective indexing system to permit timely and convenient access to the imaged records.

(3) ORIGINAL RECORDS RETAINED.—The contractor or subcontractor retains the original

records for a minimum of one year after imaging to permit periodic validation of the imaging systems.

(Pub. L. 111–350, §3, Jan. 4, 2011, 124 Stat. 3797; Pub. L. 117–286, §4(b)(73), Dec. 27, 2022, 136 Stat. 4351.)

HISTORICAL AND REVISION NOTES

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
4706(a)	41:254d(i).	June 30, 1949, ch. 288, title III, §304C(a)(1), (b), (g)–(i), as added Pub. L. 103–355, title II, §2251(a), Oct. 13, 1994, 108 Stat. 3318, 3320.
4706(b)(1)	41:254d(a)(1).	June 30, 1949, ch. 288, title III, §304C(a)(2), as added Pub. L. 103–355, title II, §2251(a), Oct. 13, 1994, 108 Stat. 3318; Pub. L. 104–106, title XLIII, §4321(e)(5), Feb. 10, 1996, 110 Stat. 675.
4706(b)(2)	41:254d(a)(2).	
4706(c)	41:254d(b).	June 30, 1949, ch. 288, title III, §304C(c), as added Pub. L. 103–355, title II, §2251(a), Oct. 13, 1994, 108 Stat. 3319; Pub. L. 110–417, title VIII, §871(a), Oct. 14, 2008, 122 Stat. 4555.
4706(d)	41:254d(c).	
4706(e)	41:254d(d).	June 30, 1949, ch. 288, title III, §304C(d), as added Pub. L. 103–355, title II, §2251(a), Oct. 13, 1994, 108 Stat. 3319; Pub. L. 104–201, title VIII, §808(b), Sept. 23, 1996, 110 Stat. 2607.
4706(f)	41:254d(e).	June 30, 1949, ch. 288, title III, §304C(f), as added and amended Pub. L. 103–355, title II, §2251(a), title IV, §4103(d), Oct. 13, 1994, 108 Stat. 3320, 3341.
4706(g)	41:254d(f).	
4706(h)	41:254d(g).	
4706(i)	41:254d(h).	

In subsection (c)(4), the words “Committee on Oversight and Government Reform” are substituted for “Committee on Government Operations” on authority of section 1(a)(6) of Public Law 104–14 (2 U.S.C. note prec. 21), Rule X(1)(h) of the Rules of the House of Representatives, adopted by House Resolution No. 5 (106th Congress, January 6, 1999), and Rule X(1)(m) of the Rules of the House of Representatives, adopted by House Resolution No. 6 (110th Congress, January 5, 2007). The words “Committee on Homeland Security and Governmental Affairs” are substituted for “Committee on Governmental Affairs” on authority of Senate Resolution No. 445 (108th Congress, October 9, 2004).

Editorial Notes

AMENDMENTS

2022—Subsec. (c)(1). Pub. L. 117–286 substituted “section 403 or 415 of title 5” for “section 3 or 8G of the Inspector General Act of 1978 (5 U.S.C. App.)”.

Statutory Notes and Related Subsidiaries

CHANGE OF NAME

Committee on Oversight and Government Reform of House of Representatives changed to Committee on Oversight and Reform of House of Representatives by House Resolution No. 6, One Hundred Sixteenth Congress, Jan. 9, 2019.

§ 4707. Remission of liquidated damages

When a contract made on behalf of the Federal Government by the head of a Federal agency, or by an authorized officer of the agency, includes a provision for liquidated damages for delay, the Secretary of the Treasury on recommendation of the head of the agency may remit any part of

the damages as the Secretary of the Treasury believes is just and equitable.

(Pub. L. 111–350, §3, Jan. 4, 2011, 124 Stat. 3799.)

HISTORICAL AND REVISION NOTES

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
4707	41:256a.	Sept. 5, 1950, ch. 849, §10(a), 64 Stat. 591; Pub. L. 104–316, title II, §202(u), Oct. 19, 1996, 110 Stat. 3845.

§ 4708. Payment of reimbursable indirect costs in cost-type research and development contracts with educational institutions

A cost-type research and development contract (including a grant) with a university, college, or other educational institution may provide for payment of reimbursable indirect costs on the basis of predetermined fixed-percentage rates applied to the total of the reimbursable direct costs incurred or to an element of the total of the reimbursable direct costs incurred.

(Pub. L. 111–350, §3, Jan. 4, 2011, 124 Stat. 3799.)

HISTORICAL AND REVISION NOTES

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
4708	41:254a.	Pub. L. 87–638, Sept. 5, 1962, 76 Stat. 437.

The words “On and after September 5, 1962” are omitted as obsolete.

§ 4709. Implementation of electronic commerce capability

(a) **ROLE OF HEAD OF EXECUTIVE AGENCY.**—The head of each executive agency shall implement the electronic commerce capability required by section 2301 of this title. In implementing the capability, the head of an executive agency shall consult with the Administrator.

(b) **PROGRAM MANAGER.**—The head of each executive agency shall designate a program manager to implement the electronic commerce capability for the agency. The program manager reports directly to an official at a level not lower than the senior procurement executive designated for the agency under section 1702(c) of this title.

(Pub. L. 111–350, §3, Jan. 4, 2011, 124 Stat. 3800.)

HISTORICAL AND REVISION NOTES

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
4709	41:252c.	June 30, 1949, ch. 288, title III, §302C, as added Pub. L. 103–355, title IX, §9003, Oct. 13, 1994, 108 Stat. 3403; Pub. L. 105–85, title VIII, §850(f)(4)(A), Nov. 18, 1997, 111 Stat. 1850.

§ 4710. Limitations on tiering of subcontractors

(a) **DEFINITION.**—In this section, the term “executive agency” has the same meaning given in section 133 of this title.

(b) **REGULATIONS.**—For executive agencies other than the Department of Defense, the Federal Acquisition Regulation shall—

(1) require contractors to minimize the excessive use of subcontractors, or of tiers of

subcontractors, that add no or negligible value; and

(2) ensure that neither a contractor nor a subcontractor receives indirect costs or profit on work performed by a lower-tier subcontractor to which the higher-tier contractor or subcontractor adds no or negligible value (but not to limit charges for indirect costs and profit based on the direct costs of managing lower-tier subcontracts).

(c) COVERED CONTRACTS.—This section applies to any cost-reimbursement type contract or task or delivery order in an amount greater than the simplified acquisition threshold (as defined by section 134 of this title).

(d) RULE OF CONSTRUCTION.—Nothing in this section shall be construed as limiting the ability of the Department of Defense to implement more restrictive limitations on the tiering of subcontractors.

(e) APPLICABILITY.—The Department of Defense shall continue to be subject to guidance on limitations on tiering of subcontractors issued by the Department of Defense pursuant to section 852 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Public Law 109-364, 10 U.S.C. 2324 note).

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3800.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
4710	41:254b note.	Pub. L. 110-417, [div. A], title VIII, §866, Oct. 14, 2008, 122 Stat. 4551.

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 word “shall” is substituted for the words “shall be amended” to reflect the permanence of the provision.

§ 4711. Linking of award and incentive fees to acquisition outcomes

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

(b) GUIDANCE FOR EXECUTIVE AGENCIES ON LINKING OF AWARD AND INCENTIVE FEES TO ACQUISITION OUTCOMES.—The Federal Acquisition Regulation shall provide executive agencies other than the Department of Defense with instructions, including definitions, on the appropriate use of award and incentive fees in Federal acquisition programs.

(c) ELEMENTS.—The regulations under subsection (b) shall—

(1) ensure that all new contracts using award fees link the fees to acquisition outcomes (which shall be defined in terms of program cost, schedule, and performance);

(2) establish standards for identifying the appropriate level of officials authorized to approve the use of award and incentive fees in new contracts;

(3) provide guidance on the circumstances in which contractor performance may be judged to be “excellent” or “superior” and the percentage of the available award fee which contractors should be paid for the performance;

(4) establish standards for determining the percentage of the available award fee, if any,

which contractors should be paid for performance that is judged to be “acceptable”, “average”, “expected”, “good”, or “satisfactory”;

(5) ensure that no award fee may be paid for contractor performance that is judged to be below satisfactory performance or performance that does not meet the basic requirements of the contract;

(6) provide specific direction on the circumstances, if any, in which it may be appropriate to roll over award fees that are not earned in one award fee period to a subsequent award fee period or periods;

(7) ensure consistent use of guidelines and definitions relating to award and incentive fees across the Federal Government;

(8) ensure that each executive agency—

(A) collects relevant data on award and incentive fees paid to contractors; and

(B) has mechanisms in place to evaluate the data on a regular basis;

(9) include performance measures to evaluate the effectiveness of award and incentive fees as a tool for improving contractor performance and achieving desired program outcomes; and

(10) provide mechanisms for sharing proven incentive strategies for the acquisition of different types of products and services among contracting and program management officials.

(d) GUIDANCE FOR DEPARTMENT OF DEFENSE.—The Department of Defense shall continue to be subject to guidance on award and incentive fees issued by the Secretary of Defense pursuant to section 814 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Public Law 109-364, 10 U.S.C. 2302 note).

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3800.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
4711	41:251 note.	Pub. L. 110-417, [div. A], title VIII, §867, Oct. 14, 2008, 122 Stat. 4551.

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

§ 4712. Enhancement of contractor protection from reprisal for disclosure of certain information

(a) PROHIBITION OF REPRISALS.—

(1) IN GENERAL.—An employee of a contractor, subcontractor, grantee, subgrantee, or personal services contractor may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a person or body described in paragraph (2) information that the employee reasonably believes is evidence of gross mismanagement of a Federal contract or grant, a gross waste of Federal funds, an abuse of authority relating to a Federal contract or grant, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a Federal contract (including the competition for or negotiation of a contract) or grant.

(2) **PERSONS AND BODIES COVERED.**—The persons and bodies described in this paragraph are the persons and bodies as follows:

(A) A Member of Congress or a representative of a committee of Congress.

(B) An Inspector General.

(C) The Government Accountability Office.

(D) A Federal employee responsible for contract or grant oversight or management at the relevant agency.

(E) An authorized official of the Department of Justice or other law enforcement agency.

(F) A court or grand jury.

(G) A management official or other employee of the contractor, subcontractor, grantee, subgrantee, or personal services contractor who has the responsibility to investigate, discover, or address misconduct.

(3) **RULES OF CONSTRUCTION.**—For the purposes of paragraph (1)—

(A) an employee who initiates or provides evidence of contractor, subcontractor, grantee, subgrantee, or personal services contractor misconduct in any judicial or administrative proceeding relating to waste, fraud, or abuse on a Federal contract or grant shall be deemed to have made a disclosure covered by such paragraph; and

(B) a reprisal described in paragraph (1) is prohibited even if it is undertaken at the request of an executive branch official, unless the request takes the form of a non-discretionary directive and is within the authority of the executive branch official making the request.

(b) **INVESTIGATION OF COMPLAINTS.**—

(1) **SUBMISSION OF COMPLAINT.**—A person who believes that the person has been subjected to a reprisal prohibited by subsection (a) may submit a complaint to the Inspector General of the executive agency involved. Unless the Inspector General determines that the complaint is frivolous, fails to allege a violation of the prohibition in subsection (a), or has previously been addressed in another Federal or State judicial or administrative proceeding initiated by the complainant, the Inspector General shall investigate the complaint and, upon completion of such investigation, submit a report of the findings of the investigation to the person, the contractor, subcontractor, grantee, subgrantee, or personal services contractor concerned, and the head of the agency.

(2) **INSPECTOR GENERAL ACTION.**—

(A) **DETERMINATION OR SUBMISSION OF REPORT ON FINDINGS.**—Except as provided under subparagraph (B), the Inspector General shall make a determination that a complaint is frivolous, fails to allege a violation of the prohibition in subsection (a), or has previously been addressed in another Federal or State judicial or administrative proceeding initiated by the complainant or submit a report under paragraph (1) within 180 days after receiving the complaint.

(B) **EXTENSION OF TIME.**—If the Inspector General is unable to complete an investigation in time to submit a report within the 180-day period specified in subparagraph (A)

and the person submitting the complaint agrees to an extension of time, the Inspector General shall submit a report under paragraph (1) within such additional period of time, up to 180 days, as shall be agreed upon between the Inspector General and the person submitting the complaint.

(3) **PROHIBITION ON DISCLOSURE.**—The Inspector General may not respond to any inquiry or disclose any information from or about any person alleging the reprisal, except to the extent that such response or disclosure is—

(A) made with the consent of the person alleging the reprisal;

(B) made in accordance with the provisions of section 552a of title 5 or as required by any other applicable Federal law; or

(C) necessary to conduct an investigation of the alleged reprisal.

(4) **TIME LIMITATION.**—A complaint may not be brought under this subsection more than three years after the date on which the alleged reprisal took place.

(c) **REMEDY AND ENFORCEMENT AUTHORITY.**—

(1) **IN GENERAL.**—Not later than 30 days after receiving an Inspector General report pursuant to subsection (b), the head of the executive agency concerned shall determine whether there is sufficient basis to conclude that the contractor, subcontractor, grantee, subgrantee, or personal services contractor concerned has subjected the complainant to a reprisal prohibited by subsection (a) and shall either issue an order denying relief or shall take one or more of the following actions:

(A) Order the contractor, subcontractor, grantee, subgrantee, or personal services contractor to take affirmative action to abate the reprisal.

(B) Order the contractor, subcontractor, grantee, subgrantee, or personal services contractor to reinstate the person to the position that the person held before the reprisal, together with compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.

(C) Order the contractor, subcontractor, grantee, subgrantee, or personal services contractor to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal, as determined by the head of the executive agency.

(D) Consider disciplinary or corrective action against any official of the executive agency, if appropriate.

(2) **EXHAUSTION OF REMEDIES.**—If the head of an executive agency issues an order denying relief under paragraph (1) or has not issued an order within 210 days after the submission of a complaint under subsection (b), or in the case of an extension of time under paragraph (b)(2)(B), not later than 30 days after the expiration of the extension of time, and there is no

showing that such delay is due to the bad faith of the complainant, the complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint, and the complainant may bring a de novo action at law or equity against the contractor, subcontractor, grantee, subgrantee, or personal services contractor to seek compensatory damages and other relief available under this section in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. Such an action shall, at the request of either party to the action, be tried by the court with a jury. An action under this paragraph may not be brought more than two years after the date on which remedies are deemed to have been exhausted.

(3) **ADMISSIBILITY OF EVIDENCE.**—An Inspector General determination and an agency head order denying relief under paragraph (2) shall be admissible in evidence in any de novo action at law or equity brought pursuant to this subsection.

(4) **ENFORCEMENT OF ORDERS.**—Whenever a person fails to comply with an order issued under paragraph (1), the head of the executive agency concerned shall file an action for enforcement of such order in the United States district court for a district in which the reprisal was found to have occurred. In any action brought under this paragraph, the court may grant appropriate relief, including injunctive relief, compensatory and exemplary damages, and attorney fees and costs. The person upon whose behalf an order was issued may also file such an action or join in an action filed by the head of the executive agency.

(5) **JUDICIAL REVIEW.**—Any person adversely affected or aggrieved by an order issued under paragraph (1) may obtain review of the order's conformance with this subsection, and any regulations issued to carry out this section, in the United States court of appeals for a circuit in which the reprisal is alleged in the order to have occurred. No petition seeking such review may be filed more than 60 days after issuance of the order by the head of the executive agency. Review shall conform to chapter 7 of title 5. Filing such an appeal shall not act to stay the enforcement of the order of the head of an executive agency, unless a stay is specifically entered by the court.

(6) **BURDENS OF PROOF.**—The legal burdens of proof specified in section 1221(e) of title 5 shall be controlling for the purposes of any investigation conducted by an Inspector General, decision by the head of an executive agency, or judicial or administrative proceeding to determine whether discrimination prohibited under this section has occurred.

(7) **RIGHTS AND REMEDIES NOT WAIVABLE.**—The rights and remedies provided for in this section may not be waived by any agreement, policy, form, or condition of employment.

(d) **NOTIFICATION OF EMPLOYEES.**—The head of each executive agency shall ensure that contractors, subcontractors, grantees, subgrantees, and personal services contractors of the agency inform their employees in writing of the rights and remedies provided under this section, in the predominant native language of the workforce.

(e) **CONSTRUCTION.**—Nothing in this section may be construed to authorize the discharge of, demotion of, or discrimination against an employee for a disclosure other than a disclosure protected by subsection (a) or to modify or derogate from a right or remedy otherwise available to the employee.

(f) **EXCEPTIONS.**—(1) This section shall not apply to any element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4)).

(2) This section shall not apply to any disclosure made by an employee of a contractor, subcontractor, grantee, subgrantee, or personal services contractor of an element of the intelligence community if such disclosure—

(A) relates to an activity of an element of the intelligence community; or

(B) was discovered during contract, subcontract, grantee, subgrantee, or personal services contractor services provided to an element of the intelligence community.

(g) **DEFINITIONS.**—In this section:

(1) The term “abuse of authority” means an arbitrary and capricious exercise of authority that is inconsistent with the mission of the executive agency concerned or the successful performance of a contract or grant of such agency.

(2) The term “Inspector General” means an Inspector General appointed under chapter 4 of title 5 and any Inspector General that receives funding from, or has oversight over contracts or grants awarded for or on behalf of, the executive agency concerned.

(h) **CONSTRUCTION.**—Nothing in this section, or the amendments made by this section,¹ shall be construed to provide any rights to disclose classified information not otherwise provided by law.

(Added Pub. L. 112-239, div. A, title VIII, §828(a)(1), Jan. 2, 2013, 126 Stat. 1837; amended Pub. L. 113-66, div. A, title X, §1091(e), Dec. 26, 2013, 127 Stat. 876; Pub. L. 114-261, §1(a)(2), (3)(A), Dec. 14, 2016, 130 Stat. 1362; Pub. L. 116-260, div. U, title VIII, §801, Dec. 27, 2020, 134 Stat. 2297; Pub. L. 117-263, div. A, title VIII, §807(b), Dec. 23, 2022, 136 Stat. 2704; Pub. L. 117-286, §4(b)(74), Dec. 27, 2022, 136 Stat. 4351.)

Editorial Notes

AMENDMENTS

2022—Subsec. (a)(1). Pub. L. 117-263, §807(b)(1)(A), substituted “subgrantee,” for “or subgrantee”.

Subsec. (a)(2). Pub. L. 117-263, §807(b)(1)(B), substituted “subgrantee, or personal services contractor” for “or subgrantee”.

Subsec. (a)(3). Pub. L. 117-263, §807(b)(1)(C), substituted “subgrantee, or personal services contractor” for “or subgrantee”.

Subsec. (b)(1). Pub. L. 117-263, §807(b)(2), substituted “subgrantee, or personal services contractor concerned” for “or subgrantee concerned”.

Subsec. (c)(1). Pub. L. 117-263, §807(b)(3)(A)(i), substituted “subgrantee, or personal services contractor concerned” for “or subgrantee concerned” in introductory provisions.

Subsec. (c)(1)(A). Pub. L. 117-263, §807(b)(3)(A)(ii), substituted “subgrantee, or personal services contractor” for “or subgrantee”.

¹ So in original.

Subsec. (c)(1)(B). Pub. L. 117-263, § 807(b)(3)(A)(iii), substituted “subgrantee, or personal services contractor” for “or subgrantee”.

Subsec. (c)(1)(C). Pub. L. 117-263, § 807(b)(3)(A)(iv), substituted “subgrantee, or personal services contractor” for “or subgrantee”.

Subsec. (c)(1)(D). Pub. L. 117-263, § 807(b)(3)(A)(v), added subpar. (D).

Subsec. (c)(2). Pub. L. 117-263, § 807(b)(3)(B), substituted “subgrantee, or personal services contractor” for “or subgrantee”.

Subsec. (d). Pub. L. 117-263, § 807(b)(4), substituted “subgrantees, and personal services contractors” for “and subgrantees”.

Subsec. (f)(2). Pub. L. 117-263, § 807(b)(5), substituted “subgrantee, or personal services contractor” for “or subgrantee” in two places.

Subsec. (g)(2). Pub. L. 117-286 substituted “chapter 4 of title 5” for “the Inspector General Act of 1978”.

2020—Subsec. (a)(2)(G). Pub. L. 116-260, § 801(1), substituted “grantee, or subgrantee” for “or grantee”.

Subsec. (a)(3)(A). Pub. L. 116-260, § 801(2), substituted “contractor, subcontractor, grantee, or subgrantee” for “contractor, subcontractor, or grantee”.

Subsec. (b)(1). Pub. L. 116-260, § 801(3), substituted “contractor, subcontractor, grantee, or subgrantee” for “contractor or grantee”.

Subsec. (c). Pub. L. 116-260, § 801(4), substituted “contractor, subcontractor, grantee, or subgrantee” for “contractor or grantee” wherever appearing.

Subsec. (d). Pub. L. 116-260, § 801(5), substituted “grantees, and subgrantees” for “and grantees”.

Subsec. (f). Pub. L. 116-260, § 801(6), substituted “grantee, or subgrantee” for “or grantee” in two places.

2016—Pub. L. 114-261, § 1(a)(3)(A)(i), substituted “Enhancement” for “Pilot program for enhancement” in section catchline.

Subsec. (a)(1). Pub. L. 114-261, § 1(a)(2), substituted “grantee, or subgrantee or personal services contractor” for “or grantee”.

Subsec. (i). Pub. L. 114-261, § 1(a)(3)(A)(ii), struck out subsec. (i). Text read as follows: “This section shall be in effect for the four-year period beginning on the date of that is 180 days after the date the enactment of this section.”

2013—Subsec. (i). Pub. L. 113-66 inserted “that is 180 days after the date” before “the enactment”.

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 2013 AMENDMENT

Pub. L. 112-239, div. A, title VIII, § 828(b), Jan. 2, 2013, 126 Stat. 1840, provided that:

“(1) IN GENERAL.—The amendments made by subsection (a) [enacting this section] shall take effect on the date that is 180 days after the date of the enactment of this Act [Jan. 2, 2013], and shall, during the period section 4712 of title 41, United States Code, as added by such subsection, is in effect, apply to—

“(A) all contracts and grants awarded on or after such date;

“(B) all task orders entered on or after such date pursuant to contracts awarded before, on, or after such date; and

“(C) all contracts awarded before such date that are modified to include a contract clause providing for the applicability of such amendments.

“(2) REVISION OF FEDERAL ACQUISITION REGULATION.—Not later than 180 days after the date of the enactment of this Act, the Federal Acquisition Regulation shall be revised to implement the requirements arising under the amendments made by this section [enacting this section and amending sections 4310 and 4705 of this title].

“(3) INCLUSION OF CONTRACT CLAUSE IN CONTRACTS AWARDED BEFORE EFFECTIVE DATE.—At the time of any major modification to a contract that was awarded before the date that is 180 days after the date of the en-

actment of this Act [Jan. 2, 2013], the head of the contracting agency shall make best efforts to include in the contract a contract clause providing for the applicability of the amendments made by this section to the contract.”

§ 4713. Authorities relating to mitigating supply chain risks in the procurement of covered articles

(a) AUTHORITY.—Subject to subsection (b), the head of an executive agency may carry out a covered procurement action.

(b) DETERMINATION AND NOTIFICATION.—Except as authorized by subsection (c) to address an urgent national security interest, the head of an executive agency may exercise the authority provided in subsection (a) only after—

(1) obtaining a joint recommendation, in unclassified or classified form, from the chief acquisition officer and the chief information officer of the agency, or officials performing similar functions in the case of executive agencies that do not have such officials, which includes a review of any risk assessment made available by the executive agency identified under section 1323(a)(3) of this title, that there is a significant supply chain risk in a covered procurement;

(2) providing notice of the joint recommendation described in paragraph (1) to any source named in the joint recommendation advising—

(A) that a recommendation is being considered or has been obtained;

(B) to the extent consistent with the national security and law enforcement interests, of information that forms the basis for the recommendation;

(C) that, within 30 days after receipt of the notice, the source may submit information and argument in opposition to the recommendation; and

(D) of the procedures governing the consideration of the submission and the possible exercise of the authority provided in subsection (a);

(3) making a determination in writing, in unclassified or classified form, after considering any information submitted by a source under paragraph (2) and in consultation with the chief information security officer of the agency, that—

(A) use of the authority under subsection (a) is necessary to protect national security by reducing supply chain risk;

(B) less intrusive measures are not reasonably available to reduce such supply chain risk; and

(C) the use of such authorities will apply to a single covered procurement or a class of covered procurements, and otherwise specifies the scope of the determination; and

(4) providing a classified or unclassified notice of the determination made under paragraph (3) to the appropriate congressional committees and leadership that includes—

(A) the joint recommendation described in paragraph (1);

(B) a summary of any risk assessment reviewed in support of the joint recommendation required by paragraph (1); and

(C) a summary of the basis for the determination, including a discussion of less intrusive measures that were considered and why such measures were not reasonably available to reduce supply chain risk.

(c) **PROCEDURES TO ADDRESS URGENT NATIONAL SECURITY INTERESTS.**—In any case in which the head of an executive agency determines that an urgent national security interest requires the immediate exercise of the authority provided in subsection (a), the head of the agency—

(1) may, to the extent necessary to address such national security interest, and subject to the conditions in paragraph (2)—

(A) temporarily delay the notice required by subsection (b)(2);

(B) make the determination required by subsection (b)(3), regardless of whether the notice required by subsection (b)(2) has been provided or whether the notified source has submitted any information in response to such notice;

(C) temporarily delay the notice required by subsection (b)(4); and

(D) exercise the authority provided in subsection (a) in accordance with such determination within 60 calendar days after the day the determination is made; and

(2) shall take actions necessary to comply with all requirements of subsection (b) as soon as practicable after addressing the urgent national security interest, including—

(A) providing the notice required by subsection (b)(2);

(B) promptly considering any information submitted by the source in response to such notice, and making any appropriate modifications to the determination based on such information;

(C) providing the notice required by subsection (b)(4), including a description of the urgent national security interest, and any modifications to the determination made in accordance with subparagraph (B); and

(D) providing notice to the appropriate congressional committees and leadership within 7 calendar days of the covered procurement actions taken under this section.

(d) **CONFIDENTIALITY.**—The notice required by subsection (b)(2) shall be kept confidential until a determination with respect to a covered procurement action has been made pursuant to subsection (b)(3).

(e) **DELEGATION.**—The head of an executive agency may not delegate the authority provided in subsection (a) or the responsibility identified in subsection (f) to an official below the level one level below the Deputy Secretary or Principal Deputy Director.

(f) **ANNUAL REVIEW OF DETERMINATIONS.**—The head of an executive agency shall conduct an annual review of all determinations made by such head under subsection (b) and promptly amend any covered procurement action as appropriate.

(g) **REGULATIONS.**—The Federal Acquisition Regulatory Council shall prescribe such regulations as may be necessary to carry out this section.

(h) **REPORTS REQUIRED.**—Not less frequently than annually, the head of each executive agen-

cy that exercised the authority provided in subsection (a) or (c) during the preceding 12-month period shall submit to the appropriate congressional committees and leadership a report summarizing the actions taken by the agency under this section during that 12-month period.

(i) **RULE OF CONSTRUCTION.**—Nothing in this section shall be construed to authorize the head of an executive agency to carry out a covered procurement action based solely on the fact of foreign ownership of a potential procurement source that is otherwise qualified to enter into procurement contracts with the Federal Government.

(j) **TERMINATION.**—The authority provided under subsection (a) shall terminate on December 31, 2033.

(k) **DEFINITIONS.**—In this section:

(1) **APPROPRIATE CONGRESSIONAL COMMITTEES AND LEADERSHIP.**—The term “appropriate congressional committees and leadership” means—

(A) the Committee on Homeland Security and Governmental Affairs, the Committee on the Judiciary, the Committee on Appropriations, the Committee on Armed Services, the Committee on Commerce, Science, and Transportation, the Select Committee on Intelligence, and the majority and minority leader of the Senate; and

(B) the Committee on Oversight and Government Reform, the Committee on the Judiciary, the Committee on Appropriations, the Committee on Homeland Security, the Committee on Armed Services, the Committee on Energy and Commerce, the Permanent Select Committee on Intelligence, and the Speaker and minority leader of the House of Representatives.

(2) **COVERED ARTICLE.**—The term “covered article” means—

(A) information technology, as defined in section 11101 of title 40, including cloud computing services of all types;

(B) telecommunications equipment or telecommunications service, as those terms are defined in section 3 of the Communications Act of 1934 (47 U.S.C. 153);

(C) the processing of information on a Federal or non-Federal information system, subject to the requirements of the Controlled Unclassified Information program; or

(D) hardware, systems, devices, software, or services that include embedded or incidental information technology.

(3) **COVERED PROCUREMENT.**—The term “covered procurement” means—

(A) a source selection for a covered article involving either a performance specification, as provided in subsection (a)(3)(B) of section 3306 of this title, or an evaluation factor, as provided in subsection (b)(1)(A) of such section, relating to a supply chain risk, or where supply chain risk considerations are included in the agency’s determination of whether a source is a responsible source as defined in section 113 of this title;

(B) the consideration of proposals for and issuance of a task or delivery order for a covered article, as provided in section

4106(d)(3) of this title, where the task or delivery order contract includes a contract clause establishing a requirement relating to a supply chain risk;

(C) any contract action involving a contract for a covered article where the contract includes a clause establishing requirements relating to a supply chain risk; or

(D) any other procurement in a category of procurements determined appropriate by the Federal Acquisition Regulatory Council, with the advice of the Federal Acquisition Security Council.

(4) **COVERED PROCUREMENT ACTION.**—The term “covered procurement action” means any of the following actions, if the action takes place in the course of conducting a covered procurement:

(A) The exclusion of a source that fails to meet qualification requirements established under section 3311 of this title for the purpose of reducing supply chain risk in the acquisition or use of covered articles.

(B) The exclusion of a source that fails to achieve an acceptable rating with regard to an evaluation factor providing for the consideration of supply chain risk in the evaluation of proposals for the award of a contract or the issuance of a task or delivery order.

(C) The determination that a source is not a responsible source as defined in section 113 of this title based on considerations of supply chain risk.

(D) The decision to withhold consent for a contractor to subcontract with a particular source or to direct a contractor to exclude a particular source from consideration for a subcontract under the contract.

(5) **INFORMATION AND COMMUNICATIONS TECHNOLOGY.**—The term “information and communications technology” means—

(A) information technology, as defined in section 11101 of title 40;

(B) information systems, as defined in section 3502 of title 44; and

(C) telecommunications equipment and telecommunications services, as those terms are defined in section 3 of the Communications Act of 1934 (47 U.S.C. 153).

(6) **SUPPLY CHAIN RISK.**—The term “supply chain risk” means the risk that any person may sabotage, maliciously introduce unwanted function, extract data, or otherwise manipulate the design, integrity, manufacturing, production, distribution, installation, operation, maintenance, disposition, or retirement of covered articles so as to surveil, deny, disrupt, or otherwise manipulate the function, use, or operation of the covered articles or information stored or transmitted on the covered articles.

(7) **EXECUTIVE AGENCY.**—Notwithstanding section 3101(c)(1), this section applies to the Department of Defense, the Coast Guard, and the National Aeronautics and Space Administration.

(Added Pub. L. 115-390, title II, §203(a), Dec. 21, 2018, 132 Stat. 5189; amended Pub. L. 117-263, div. E, title LIX, §5949(k)(2), Dec. 23, 2022, 136 Stat. 3492.)

Editorial Notes

REFERENCES IN TEXT

Section 3101(c)(1), referred to in subsec. (k)(7), probably means section 3101(c)(1) of this title, which excepts the Department of Defense, the Coast Guard, and the National Aeronautics and Space Administration from applicability of the Procurement procedures and regulations of the Administrator of General Services.

AMENDMENTS

2022—Subsec. (j). Pub. L. 117-263 substituted “December 31, 2033” for “the date that is 5 years after the date of the enactment of the Federal Acquisition Supply Chain Security Act of 2018”.

Statutory Notes and Related Subsidiaries

CHANGE OF NAME

Committee on Oversight and Government Reform of House of Representatives changed to Committee on Oversight and Reform of House of Representatives by House Resolution No. 6, One Hundred Sixteenth Congress, Jan. 9, 2019.

EFFECTIVE DATE

Pub. L. 115-390, title II, §203(c), Dec. 21, 2018, 132 Stat. 5192, provided that: “The amendments made by this section [enacting this section] shall take effect on the date that is 90 days after the date of the enactment of this Act [Dec. 21, 2018] and shall apply to contracts that are awarded before, on, or after that date.”

Title II of Pub. L. 115-390 effective 90 days after Dec. 21, 2018, see section 205 of Pub. L. 115-390, set out as a note under section 1321 of this title.

PROHIBITION ON CERTAIN SEMICONDUCTOR PRODUCTS AND SERVICES

Pub. L. 117-263, div. E, title LIX, §5949, Dec. 23, 2022, 136 Stat. 3485, provided that:

“(a) **PROHIBITION ON USE OR PROCUREMENT.**—

“(1) **IN GENERAL.**—The head of an executive agency may not—

“(A) procure or obtain, or extend or renew a contract to procure or obtain, any electronic parts, products, or services that include covered semiconductor products or services; or

“(B) enter into a contract (or extend or renew a contract) with an entity to procure or obtain electronic parts or products that use any electronic parts or products that include covered semiconductor products or services.

“(2) **RULE OF CONSTRUCTION.**—

“(A) **IN GENERAL.**—Nothing in paragraph (1) shall be construed—

“(i) to require any covered semiconductor products or services resident in equipment, systems, or services as of the day before the applicable effective date specified in subsection (c) to be removed or replaced;

“(ii) to prohibit or limit the utilization of such covered semiconductor products or services throughout the lifecycle of such existing equipment;

“(iii) to require the recipient of a Federal contract, grant, loan, or loan guarantee to replace covered semiconductor products or services resident in equipment, systems, or services before the effective date specified in subsection (c); or

“(iv) to require the Federal Communications Commission to designate covered semiconductor products or services to its Covered Communications Equipment or Services List maintained under section 2 of the Secured and Trusted Communications Networks Act of 2019 (47 U.S.C. 1603) [probably should be “(47 U.S.C. 1601)”].

“(B) **CONTRACTING PROHIBITION.**—Nothing in paragraph (1)(B) shall be construed to cover products or

services that include covered semiconductor products or services in a system that is not a critical system.

“(b) WAIVER AUTHORITY.—

“(1) SECRETARY OF DEFENSE.—The Secretary of Defense may provide a waiver on a date later than the effective date described in subsection (c) if the Secretary determines the waiver is in the critical national security interests of the United States.

“(2) DIRECTOR OF NATIONAL INTELLIGENCE.—The Director of National Intelligence may provide a waiver on a date later than the effective date described in subsection (c) if the Director determines the waiver is in the critical national security interests of the United States.

“(3) SECRETARY OF COMMERCE.—The Secretary of Commerce, in consultation with the Director of National Intelligence or the Secretary of Defense, may provide a waiver on a date later than the effective date described in subsection (c) if the Secretary determines the waiver is in the critical national security interests of the United States.

“(4) SECRETARY OF HOMELAND SECURITY.—The Secretary of Homeland Security, in consultation with the Director of National Intelligence or the Secretary of Defense, may provide a waiver on a date later than the effective date described in subsection (c) if the Secretary determines the waiver is in the critical national security interests of the United States.

“(5) SECRETARY OF ENERGY.—The Secretary of Energy, in consultation with the Director of National Intelligence or the Secretary of Defense, may provide a waiver on a date later than the effective date described in subsection (c) if the Secretary determines the waiver is in the critical national security interests of the United States.

“(6) EXECUTIVE AGENCIES.—The head of an executive agency may waive, for a renewable period of not more than two years per waiver, the prohibitions under subsection (a) if—

“(A) the head of the agency, in consultation with the Secretary of Commerce, determines that no compliant product or service is available to be procured as, and when, needed at United States market prices or a price that is not considered prohibitively expensive; and

“(B) the head of the agency, in consultation with the Secretary of Defense or the Director of National Intelligence, determines that such waiver could not reasonably be expected to compromise the critical national security interests of the United States.

“(7) REPORT TO CONGRESS.—Not later than 30 days after granting a waiver under this subsection, the head of the executive agency granting such waiver shall submit to the appropriate committees of Congress and leadership a report with a notification of such waiver, including a justification for the waiver.

“(c) EFFECTIVE DATES AND REGULATIONS.—

“(1) EFFECTIVE DATE.—The prohibitions under subsection (a) shall take effect five years after the date of the enactment of this Act [Dec. 23, 2022].

“(2) REGULATIONS.—Not later than three years after the date of the enactment of this Act, the Federal Acquisition Regulatory Council shall prescribe regulations implementing the prohibitions under subsection (a), including a requirement for prime contractors to incorporate the substance of such prohibitions and applicable implementing contract clauses into contracts for the supply of electronic parts or products.

“(d) OFFICE OF MANAGEMENT AND BUDGET REPORT AND BRIEFING.—Not later than 270 days after the effective date described in subsection (c)(1), the Director of the Office of Management and Budget, in coordination with the Director of National Intelligence and the National Cyber Director, shall provide to the appropriate committees of Congress and leadership a report and briefing on—

“(1) the implementation of the prohibitions under subsection (a), including any challenges in the implementation; and

“(2) the effectiveness and utility of the waiver authority under subsection (b).

“(e) ANALYSIS, ASSESSMENT, AND STRATEGY.—Not later than 180 days after the date of the enactment of this Act, the Secretary of Commerce, in coordination with the Secretary of Defense, the Secretary of Homeland Security, the Director of National Intelligence, and the Secretary of Energy and, to the greatest extent practicable, leveraging relevant previous analyses and assessments, shall—

“(1) conduct an analysis of semiconductor design and production capacity domestically and by allied or partner countries required to meet the needs of the Federal Government, including analyses regarding—

“(A) semiconductors critical to national security, as determined by the Secretary of Commerce, in consultation with the Secretary of Defense and the Director of National Intelligence, in accordance with section 9902(a)(6)(A)(i) of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (Public Law 116-283) [15 U.S.C. 4652(a)(6)(A)(i)]; and

“(B) semiconductors classified as legacy semiconductors pursuant to section 9902(a)(6)(A)(i) of William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (Public Law 116-283);

“(2) assess the risk posed by the presence of covered semiconductor products or services in Federal systems;

“(3) assess the risk posed by the presence of covered semiconductor products or services in the supply chains of Federal contractors and subcontractors, including for non-Federal systems;

“(4) develop a strategy to—

“(A) improve the availability of domestic semiconductor design and production capacity required to meet the requirements of the Federal Government;

“(B) support semiconductor product and service suppliers seeking to contract with domestic, allied, or partner semiconductor producers and to improve supply chain traceability, including to meet the prohibitions under subsection (a); and

“(C) either certify the feasibility of implementing such prohibitions or exercising waiver authorities under subsection (b), to ensure uninterrupted Federal Government access to required semiconductor products and services; and

“(5) provide the results of the analysis, assessment, and strategy developed under paragraphs (1) through (4) to the Federal Acquisition Security Council.

“(f) GOVERNMENTWIDE TRACEABILITY AND DIVERSIFICATION INITIATIVE.—

“(1) IN GENERAL.—Not later than two years after the date of the enactment of this Act [Dec. 23, 2022], the Secretary of Commerce, in coordination with the Secretary of Homeland Security, the Secretary of Defense, the Director of National Intelligence, the Director of the Office of Management and Budget, and the Director of the Office of Science and Technology Policy, and in consultation with industry, shall establish a microelectronics traceability and diversification initiative to coordinate analysis of and response to the Federal Government microelectronics supply chain vulnerabilities.

“(2) ELEMENTS.—The initiative established under paragraph (1) shall include the following elements:

“(A) Sharing best practices, refining microelectronics standards, such as those established pursuant to section 224 of the National Defense Authorization Act for Fiscal Year 2020 (Public Law 116-92) [10 U.S.C. 4501 note prec.], and developing recommendations to identify and mitigate, through diversification efforts, microelectronics supply chain concerns.

“(B) Developing an assessment framework to inform Federal decisions on sourcing microelectronics, considering—

“(i) chain of custody and traceability, including origin and location of design, manufacturing, distribution, shipping, and quantities;

“(ii) confidentiality, including protection, verification, and validation of intellectual property included in microelectronics;

“(iii) integrity, including—

“(I) security weaknesses and vulnerabilities that include potential supply chain attacks;

“(II) risk analysis and consequence to system;

“(III) risk of intentional or unintentional modification or tampering; and

“(IV) risk of insider threats, including integrity of people and processes involved in the design and manufacturing of microelectronics; and

“(iv) availability, including—

“(I) potential supply chain disruptions, including due to natural disasters or geopolitical events;

“(II) prioritization of parts designed and manufactured in the United States and in allied or partner countries to support and sustain the defense and technology industrial base;

“(III) risk associated with sourcing parts from suppliers outside of the United States and allied and partner countries, including long-term impacts on availability of microelectronics produced domestically or in allied or partner countries; and

“(IV) obsolescence management and counterfeited avoidance and detection.

“(C) Developing a process for provenance and traceability from design to disposal of microelectronics components and intellectual property contained therein implementable across the Federal acquisition system to improve reporting, data analysis, and tracking.

“(D) Developing and implementing policies and plans to support the following:

“(i) Development of domestic design and manufacturing capabilities to replace covered semiconductor products or services.

“(ii) Utilization of the assessment framework developed under subparagraph (B).

“(iii) Implementation of the strategy required under subsection (e)(4) as applicable.

“(iv) Identification of and integration with existing information reporting and data visualization systems in the Federal Government, including modification to such systems to track the information.

“(v) A requirement to document microelectronics used in systems and subsystems, including origin and location of design and manufacturing, technologies used, and quantities procured.

“(vi) Elimination from Federal Government supply chains of microelectronics from entities included on the Consolidated Screening List maintained by the International Trade Administration of the Department of Commerce.

“(3) COORDINATION REQUIRED.—In carrying out this subsection, the Secretary of Commerce shall coordinate, as necessary, with the following entities:

“(A) The National Science and Technology Council Subcommittee on Microelectronics Leadership.

“(B) The Department of Commerce semiconductor industrial advisory committee established under subsection 9906(b) of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (Public Law 116-283) [15 U.S.C. 4656(b)].

“(C) The White House Coordinator for CHIPS Implementation.

“(D) The Federal Acquisition Security Council (FASC).

“(E) The Government-Industry Working Group on Microelectronics.

“(F) The Joint Defense Manufacturing Technology Panel (JDMTP).

“(G) Standards development organizations.

“(g) FEDERAL ACQUISITION SECURITY COUNCIL.—Not later than two years after the date of the enactment of

this Act [Dec. 23, 2022], the Federal Acquisition Security Council, in consultation with the Secretary of Commerce, the Secretary of Defense, the Secretary of Homeland Security, the Director of National Intelligence, and the Secretary of Energy, and after engagement with the private sector and other nongovernmental stakeholders in accordance with section 1323 of title 41, United States Code, shall—

“(1) issue recommendations to mitigate supply chain risks relevant to Federal Government acquisition of semiconductor products and services, considering—

“(A) the analysis, assessment, and strategy developed under subsection (e) and any related updates;

“(B) the standards provided under section 224 of the National Defense Authorization Act for Fiscal Year 2020 (Public Law 116-92) [10 U.S.C. 4501 note prec.], including any tiers of trust, levels of security, or risk-based approaches established under such section;

“(C) the extent to which such recommendations would enhance the security of critical systems;

“(D) the extent to which such recommendations would impact Federal access to commercial technologies; and

“(E) any risks to the Federal Government from contracting with microelectronics suppliers that include covered semiconductor products or services in non-Federal supply chains; and

“(2) make recommendations to the Federal Acquisition Regulatory Council and the heads of executive agencies for any needed regulations to mitigate supply chain risks.

“(h) APPLICABILITY AND RESPONSIBILITIES OF COVERED ENTITIES AND CONTRACTORS.—The regulations prescribed pursuant to subsection (c)(2) shall—

“(1) provide that contractors who supply a Federal agency with electronic parts or products are responsible for—

“(A) certifying to the non-use of covered semiconductor products or services in such parts or products;

“(B) detecting and avoiding the use or inclusion of such covered semiconductor products or services in such parts or products; and

“(C) any rework or corrective action that may be required to remedy the use or inclusion of such covered semiconductor products or services in such parts or products;

“(2) require covered entities to disclose to direct customers the inclusion of a covered semiconductor product or service in electronic parts, products, or services included in electronic parts, products, or services subject to the contracting prohibition under subsection (a) as to whether such supplied parts, products, or services include covered semiconductors products or services;

“(3) provide that a covered entity that fails to disclose the inclusion to direct customers of a covered semiconductor product or service in electronic parts, products, or services procured or obtained by an executive agency in contravention of subsection (a) shall be responsible for any rework or corrective action that may be required to remedy the use or inclusion of such covered semiconductor product or service;

“(4) provide that the costs of covered semiconductor products or services, suspect semiconductor products, and any rework or corrective action that may be required to remedy the use or inclusion of such products are not allowable costs for Federal contracts;

“(5) provide that—

“(A) any covered entity or Federal contractor or subcontractor who becomes aware, or has reason to suspect, that any end item, component, or part of a critical system purchased by the Federal Government, or purchased by a Federal contractor or subcontractor for delivery to the Federal Government for any critical system, that contains covered semiconductor products or services shall notify appro-

appropriate Federal authorities in writing within 60 days; and

“(B) the Federal authorities shall report such information to the appropriate committees of Congress and leadership within 120 days;

“(6) provide that Federal bidders and contractors—

“(A) may reasonably rely on the certifications of compliance from covered entities and subcontractors who supply electronic parts, products, or services when providing proposals to the Federal Government; and

“(B) are not required to conduct independent third party audits or other formal reviews related to such certifications;

“(7) provide that a Federal contractor or subcontractor that provides a notification under paragraph (5) that does not regard electronic parts or products manufactured or assembled by such Federal contractor or subcontractor shall not be subject to civil liability nor determined to not be a presently responsible contractor on the basis of such notification; and

“(8) provide that a Federal contractor or subcontractor that provides a notification under paragraph (5) that regards electronic parts or products manufactured or assembled by such Federal contractor or subcontractor shall not be subject to civil liability nor determined to not be a presently responsible contractor on the basis of such notification if the Federal contractor or subcontractor makes a comprehensive and documentable effort to identify and remove covered semiconductor products or services from the Federal supply.

“(i) REPORTS.—

“(1) SECRETARY OF COMMERCE.—Not later than 60 days after completing the assessment required under subsection (e), the Secretary of Commerce shall submit to the appropriate committees of Congress and leadership—

“(A) a report of the findings and recommendations of the analyses, assessment, and strategy developed under such subsection; and

“(B) a report on development of the microelectronics traceability and diversification initiative under subsection (f)(1).

“(2) FEDERAL ACQUISITION SECURITY COUNCIL.—Not later than one year after the date of the enactment of this Act [Dec. 23, 2022], and annually thereafter for ten years, the Federal Acquisition Security Council shall include in the annual report submitted under section 1325 of title 41, United States Code, a description of—

“(A) the development of recommendations under subsection (g), including the considerations described in paragraph (1) of such subsection; and

“(B) as applicable, the impact of any recommendations or regulations implemented.

“(j) DEFINITIONS.—In this section:

“(1) APPROPRIATE COMMITTEES OF CONGRESS AND LEADERSHIP.—The term ‘appropriate committees of Congress and leadership’ means—

“(A) the Committee on Armed Services, the Committee on Commerce, Science, and Transportation, the Committee on Homeland Security and Governmental Affairs, the Committee on Energy and Natural Resources, the Committee on Foreign Relations, the Committee on Banking, Housing, and Urban Affairs, the Select Committee on Intelligence, and the majority and minority leaders of the Senate; and

“(B) the Committee on Armed Services, the Committee on Energy and Commerce, the Committee on Science, Space, and Technology, the Committee on Oversight and Reform, the Committee on Foreign Affairs, the Committee on Homeland Security, the Permanent Select Committee on Intelligence, and the Speaker, the majority leader, and the minority leader of the of the House of Representatives.

“(2) COVERED ENTITY.—The term ‘covered entity’ means an entity that—

“(A) develops, domestically or abroad, a design of a semiconductor that is the direct product of United States origin technology or software; and

“(B) purchases covered semiconductor products or services from an entity described in subparagraph (A) or (C) of paragraph (3).

“(3) COVERED SEMICONDUCTOR PRODUCT OR SERVICES.—The term ‘covered semiconductor product or services’ means any of the following:

“(A) A semiconductor, a semiconductor product, a product that incorporates a semiconductor product, or a service that utilizes such a product, that is designed, produced or provided by, Semiconductor Manufacturing International Corporation (SMIC) (or any subsidiary, affiliate, or successor of such entity).

“(B) A semiconductor, a semiconductor product, a product that incorporates a semiconductor product, or a service that utilizes such a product, that is designed, produced, or provided by ChangXin Memory Technologies (CXMT) or Yangtze Memory Technologies Corp (YMTC) (or any subsidiary, affiliate, or successor of such entities).

“(C) A semiconductor, semiconductor product, or semiconductor service produced or provided by an entity that the Secretary of Defense or the Secretary of Commerce, in consultation with the Director of the National Intelligence or the Director of the Federal Bureau of Investigation, determines to be an entity owned or controlled by, or otherwise connected to, the government of a foreign country of concern, provided that the determination with respect to such entity is published in the Federal Register.

“(4) CRITICAL SYSTEM.—The term ‘critical system’—

“(A) has the meaning given the term ‘national security system’ in section 11103(a)(1) of title 40, United States Code;

“(B) shall include additional systems identified by the Federal Acquisition Security Council;

“(C) shall include additional systems identified by the Department of Defense, consistent with guidance provided under section 224 of the National Defense Authorization Act for Fiscal Year 2020 (Public Law 116-92) [10 U.S.C. 4501 note prec.]; and

“(D) shall not include a system to be used for routine administrative and business applications (including payroll, finance, logistics, and personnel management applications).

“(5) FOREIGN COUNTRY OF CONCERN.—The term ‘foreign country of concern’ has the meaning given the term in paragraph (7) of section 9901 of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (15 U.S.C. 4651), as added by section 103(a)(4) of the CHIPS Act of 2022 (division A of Public Law 117-167).

“(k) EXTENSION OF FEDERAL ACQUISITION SECURITY SUPPLY CHAIN ACT OF 2018.—

“(1) SUBCHAPTER III OF CHAPTER 13 OF TITLE 41, UNITED STATES CODE.—[Amended section 1328 of this title.]

“(2)—[Amended this section.]

“(l) AUTHORIZATION OF APPROPRIATIONS FOR FEDERAL ACQUISITION SECURITY COUNCIL.—

“(1) IN GENERAL.—There is authorized to be appropriated \$3,000,000 for each of fiscal years 2023 through 2033 for the Office of Management and Budget to support the activities of the Federal Acquisition Security Council.

“(2) TRANSFER AUTHORITY.—The Director of the Office of Management and Budget may transfer funds authorized to be appropriated under paragraph (1) to other Federal agencies for the performance of work for which the funds were authorized.”

§ 4714. Prohibition on criminal history inquiries by contractors prior to conditional offer

(a) LIMITATION ON CRIMINAL HISTORY INQUIRIES.—

(1) **IN GENERAL.**—Except as provided in paragraphs (2) and (3), an executive agency—

(A) may not require that an individual or sole proprietor who submits a bid for a contract to disclose criminal history record information regarding that individual or sole proprietor before determining the apparent awardee; and

(B) shall require, as a condition of receiving a Federal contract and receiving payments under such contract that the contractor may not verbally, or through written form, request the disclosure of criminal history record information regarding an applicant for a position related to work under such contract before the contractor extends a conditional offer to the applicant.

(2) **OTHERWISE REQUIRED BY LAW.**—The prohibition under paragraph (1) does not apply with respect to a contract if consideration of criminal history record information prior to a conditional offer with respect to the position is otherwise required by law.

(3) **EXCEPTION FOR CERTAIN POSITIONS.**—

(A) **IN GENERAL.**—The prohibition under paragraph (1) does not apply with respect to—

(i) a contract that requires an individual hired under the contract to access classified information or to have sensitive law enforcement or national security duties; or

(ii) a position that the Administrator of General Services identifies under the regulations issued under subparagraph (B).

(B) **REGULATIONS.**—

(i) **ISSUANCE.**—Not later than 16 months after the date of enactment of the Fair Chance to Compete for Jobs Act of 2019, the Administrator of General Services, in consultation with the Secretary of Defense, shall issue regulations identifying additional positions with respect to which the prohibition under paragraph (1) shall not apply, giving due consideration to positions that involve interaction with minors, access to sensitive information, or managing financial transactions.

(ii) **COMPLIANCE WITH CIVIL RIGHTS LAWS.**—The regulations issued under clause (i) shall—

(I) be consistent with, and in no way supersede, restrict, or limit the application of title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) or other relevant Federal civil rights laws; and

(II) ensure that all hiring activities conducted pursuant to the regulations are conducted in a manner consistent with relevant Federal civil rights laws.

(b) **COMPLAINT PROCEDURES.**—The Administrator of General Services shall establish and publish procedures under which an applicant for a position with a Federal contractor may submit to the Administrator a complaint, or any other information, relating to compliance by the contractor with subsection (a)(1)(B).

(c) **ACTION FOR VIOLATIONS OF PROHIBITION ON CRIMINAL HISTORY INQUIRIES.**—

(1) **FIRST VIOLATION.**—If the head of an executive agency determines that a contractor has violated subsection (a)(1)(B), such head shall—

(A) notify the contractor;

(B) provide 30 days after such notification for the contractor to appeal the determination; and

(C) issue a written warning to the contractor that includes a description of the violation and the additional remedies that may apply for subsequent violations.

(2) **SUBSEQUENT VIOLATION.**—If the head of an executive agency determines that a contractor that was subject to paragraph (1) has committed a subsequent violation of subsection (a)(1)(B), such head shall notify the contractor, shall provide 30 days after such notification for the contractor to appeal the determination, and, in consultation with the relevant Federal agencies, may take actions, depending on the severity of the infraction and the contractor's history of violations, including—

(A) providing written guidance to the contractor that the contractor's eligibility for contracts requires compliance with this section;

(B) requiring that the contractor respond within 30 days affirming that the contractor is taking steps to comply with this section; and

(C) suspending payment under the contract for which the applicant was being considered until the contractor demonstrates compliance with this section.

(d) **DEFINITIONS.**—In this section:

(1) **CONDITIONAL OFFER.**—The term “conditional offer” means an offer of employment for a position related to work under a contract that is conditioned upon the results of a criminal history inquiry.

(2) **CRIMINAL HISTORY RECORD INFORMATION.**—The term “criminal history record information” has the meaning given that term in section 9201 of title 5.

(Added Pub. L. 116–92, div. A, title XI, § 1123(a)(1), Dec. 20, 2019, 133 Stat. 1610.)

Editorial Notes

REFERENCES IN TEXT

The date of enactment of the Fair Chance to Compete for Jobs Act of 2019, referred to in subsec. (a)(3)(B)(i), is the date of enactment of subtitle B (§§ 1121–1124) of title XI of div. A of Pub. L. 116–92, which was approved Dec. 20, 2019.

The Civil Rights Act of 1964, referred to in subsec. (a)(3)(B)(ii)(I), is Pub. L. 88–352, July 2, 1964, 78 Stat. 241. Title VII of the Act is classified generally to subchapter VI (§ 2000e et seq.) of chapter 21 of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 2000a of Title 42 and Tables.

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE

Pub. L. 116–92, div. A, title XI, § 1123(a)(3), Dec. 20, 2019, 133 Stat. 1612, provided that: “Section 4714 of title 41, United States Code, as added by paragraph (1), shall apply with respect to contracts awarded pursuant to

solicitations issued after the effective date described in section 1122(b)(2) of this subtitle [effective 2 years after Dec. 20, 2019, see section 1122(b)(2) of Pub. L. 116–92, div. A, title XI, subtitle B, set out as a note under section 9202 of Title 5, Government Organization and Employees].”

Subtitle II—Other Advertising and Contract Provisions

Chapter		Sec.
61.	Advertising	6101
63.	General Contract Provisions	6301
65.	Contracts for Materials, Supplies, Articles, and Equipment Exceeding \$10,000	6501
67.	Service Contract Labor Standards	6701

CHAPTER 61—ADVERTISING

Sec.	
6101.	Advertising requirement for Federal Government purchases and sales.
6102.	Exceptions from advertising requirement.
6103.	Opening of bids.

§ 6101. Advertising requirement for Federal Government purchases and sales

(a) DEFINITIONS.—In this section—

(1) APPROPRIATION.—The term “appropriation” includes amounts made available by legislation under section 9104 of title 31.

(2) FEDERAL GOVERNMENT.—The term “Federal Government” includes the government of the District of Columbia.

(b) PURCHASES.—

(1) IN GENERAL.—Unless otherwise provided in the appropriation concerned or other law, purchases and contracts for supplies or services for the Federal Government may be made or entered into only after advertising for proposals for a sufficient time.

(2) LIMITATIONS ON APPLICABILITY.—Paragraph (1) does not apply when—

(A) the amount involved in any one case does not exceed \$25,000;

(B) public exigencies require the immediate delivery of articles or performance of services;

(C) only one source of supply is available and the Federal Government purchasing or contracting officer so certifies; or

(D) services are required to be performed by a contractor in person and are—

(i) of a technical and professional nature; or

(ii) under Federal Government supervision and paid for on a time basis.

(c) SALES.—Except when otherwise authorized by law or when the reasonable value involved in any one case does not exceed \$500, sales and contracts of sale by the Federal Government are governed by the requirements of this section for advertising.

(d) APPLICATION TO WHOLLY OWNED GOVERNMENT CORPORATIONS.—For wholly owned Government corporations, this section applies only to administrative transactions.

(Pub. L. 111–350, § 3, Jan. 4, 2011, 124 Stat. 3801.)

HISTORICAL AND REVISION NOTES

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
6101(a)	41:5a.	Aug. 2, 1946, ch. 744, §18, 60 Stat. 811.
6101(b)–(d) ..	41:5.	R.S. §3709; Aug. 2, 1946, ch. 744, §9(a), (c), 60 Stat. 809; June 30, 1949, ch. 288, title VI, §602(f), formerly title V, §502(e), 63 Stat. 403, renumbered title VI, §602(f), Sept. 5, 1950, ch. 849, §§6(a), (b), 8(c), 64 Stat. 583, 591; Pub. L. 85–800, §7, Aug. 28, 1958, 72 Stat. 967; Pub. L. 93–356, §1, July 25, 1974, 88 Stat. 390; Pub. L. 98–191, §9(b), Dec. 1, 1983, 97 Stat. 1332.

In subsection (a), before paragraph (1), the words “In this section” are substituted for “as used in this Act” as the probable intent of Congress. Section 9(a) of the Act of August 2, 1946 (ch. 744, 60 Stat. 809) restated 41:5 generally and section 9(c) of the Act, an independent provision, was editorially added as the last paragraph of 41:5. The definitions which apply to “as used in this Act” are probably intended to apply also to 41:5 as restated by the Act. The definitions for “department” and “continental United States” are omitted because those terms do not appear in 41:5. In paragraph (1), the words “section 9104 of title 31” are substituted for “section 104 of the Government Corporation Control Act, approved December 6, 1945” because of section 4(b) of Public Law. 97–258 (31 U.S.C. note prec. 101). In paragraphs (1) and (2), the word “includes” is substituted for “shall be construed to include” and for “shall be construed as including”, respectively, to eliminate unnecessary words.

In subsection (c), the words “as authorized by section 29 of the Surplus Property Act of 1944 (50 U.S.C. App. 1638)” in section 3709 of the Revised Statutes are omitted because section 29 was repealed by section 602(a)(1) of the Federal Property and Administrative Services Act of 1949 (ch. 288, 63 Stat. 399).

§ 6102. Exceptions from advertising requirement

(a) AMERICAN BATTLE MONUMENTS COMMISSION.—Section 6101 of this title does not apply to the American Battle Monuments Commission with respect to leases in foreign countries for office or garage space.

(b) BUREAU OF INTERPARLIAMENTARY UNION FOR PROMOTION OF INTERNATIONAL ARBITRATION.—Section 6101 of this title does not apply to the Bureau of Interparliamentary Union for Promotion of International Arbitration with respect to necessary stenographic reporting services by contract.

(c) DEPARTMENT OF STATE.—Section 6101 of this title does not apply to the Department of State when the purchase or service relates to the packing of personal and household effects of Diplomatic, Consular, and Foreign Service officers and clerks for foreign shipment.

(d) INTERNATIONAL COMMITTEE OF AERIAL LEGAL EXPERTS.—Section 6101 of this title does not apply to the International Committee of Aerial Legal Experts with respect to necessary stenographic and other services by contract.

(e) ARCHITECT OF THE CAPITOL.—The purchase of supplies and equipment and the procurement of services for all branches under the Architect of the Capitol may be made in the open market according to common business practice, without compliance with section 6101 of this title, when the aggregate amount of the purchase or the service does not exceed \$25,000 in any instance.