§ 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.

(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 paragraphs (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 Awarding 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 1706 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 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) RESTRUCTIONS 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.


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 102–232, title XLIII, §§ 4102(b), 4104(b), Apr. 14, 1991). In subsection (e)(2), the words “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.
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)(1)(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 of that determination not less than 3 days prior to the award of the contract."

JUSTIFICATION AND APPROVAL OF SOLE-SOURCE CONTRACTS


(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 justified the use of a sole-source contract in writing;

(2) a specification of the statutory provision providing for the sole-source contract; and

(3) a determination that the use of a sole-source contract is in the best interest of the agency concerned.

(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 for the sole-source contract; and

(3) A determination that the use of a sole-source contract is in the best interest of the agency concerned.

(c) Exceptions.—(1) Not later than 180 days after the date of the enactment of this Act [Oct. 28, 2009], the Administrator, when making a determination not less than 3 days prior to the award of the contract, shall specify for purposes of this section.

(d) Prohibition on Dividing Contracts.—In the case of a covered procurement, the contracting officer may not divide the procurement into contract for an amount exceeding $10,000,000 unless—

(1) the contracting officer for the contract justified the use of a sole-source contract in writing;

(2) a specification of the statutory provision providing for the sole-source contract; and

(3) a determination that the use of a sole-source contract is in the best interest of the agency concerned.

(e) Compliance with Special Requirements of Federal Acquisition Regulation.—Any executive agency shall comply with the Federal Acquisition Regulation provisions referred to in section 1901(e) of this title.

HISTORICAL AND REVISION NOTES

§ 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 or 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.

(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.