unit price for supplies procured in each recom-
manded quantity.

Editorial Notes
AMENDMENTS
2021—Pub. L. 116–283, §1813(c), renumbered section 2384a of this title as this section.
Subsec. (a). Pub. L. 116–283, §1813(c)(1), as amended by Pub. L. 117–81, §1701(b)(5), inserted heading, in par. (1), substituted “section 3063” for “section 2303(a)” and re-
formatted subpars. (A) and (B) to add line breaks before each subpar. designation, and, in par. (2), realigned margin.
Subsec. (b). Pub. L. 116–283, §1813(c)(2), inserted head-
ing.

Statutory Notes and Related Subsidiaries
EFFECTIVE DATE OF 2021 AMENDMENT
Amendment by Pub. L. 117–81 applicable as if included in the enactment of title XVIII of Pub. L. 116–283 as enacted, see section 1701(a)(2) of Pub. L. 117–81, set out in a note preceding section 3001 of this title and note below.
Amendment by Pub. L. 116–283 effective Jan. 1, 2022, with additional provisions for delayed implementation and applicability of existing law, see section 1801(d) of Pub. L. 116–283, set out as a note preceding section 3001 of this title.

EFFECTIVE DATE
Pub. L. 98–525, title XII, §1233(b), Oct. 19, 1984, 98 Stat. 2971, provided that: “The amendment made by sub-
section (a) [enacting this section] shall take effect at the end of the 180-day period beginning on the date of the enactment of this Act [Oct. 19, 1984].”

§ 3243. Encouragement of new competitors: qualifica-
tion requirement
(a) QUALIFICATION REQUIREMENT DEFINED.—In this section, the term “qualification requirement” means a requirement for testing or other quality assurance demonstration that must be completed by an offeror before award of a contract.
(b) ACTIONS BEFORE ESTABLISHING QUALIFICATION REQUIREMENT.—Except as provided in sub-
section (c), the head of the agency shall, before establishing a qualification requirement—
(1) prepare a written justification stating the necessity for establishing the qualification requirement and specify why the qualification requirement must be demonstrated before contract award;
(2) specify in writing and make available to a potential offeror upon request all requirements which a prospective offeror, or its product, must satisfy in order to become qualified, such requirements to be limited to those least restrictive to meet the purposes necessitating the establishment of the qualification require-
ment;
(3) specify an estimate of the costs of testing and evaluation likely to be incurred by a poten-
tial offeror in order to become qualified;
(4) ensure that a potential offeror is pro-
vided, upon request and on a reimbursable
basis, a prompt opportunity to demonstrate its ability to meet the standards specified for qualification using qualified personnel and fac-
cilities of the agency concerned or of another agency obtained through interagency agree-
ment, or under contract, or other methods ap-
proved by the agency (including use of ap-
proved testing and evaluation services not provided under contract to the agency);
(5) if testing and evaluation services are pro-
vided under contract to the agency for the purposes of paragraph (4), provide to the ex-
tent possible that such services be provided by a contractor who is not expected to benefit from an absence of additional qualified sources and who shall be required in such contract to adhere to any restriction on technical data as-
serted by the potential offeror seeking qualifi-
cation; and
(6) ensure that a potential offeror seeking qualification is promptly informed as to whether qualification is attained and, in the event qualification is not attained, is prompt-
ly furnished specific information why qualification was not attained.
(c) APPLICABILITY, WAIVER AUTHORITY, AND RE-
FERRAL OF OFFERS.—
(1) APPLICABILITY.—Subsection (b) does not apply with respect to a qualification require-
ment established by statute or administrative action before October 19, 1984, unless such re-
quirement is a qualified products list.
(2) WAIVER AUTHORITY.—
(A) SUBMISSION OF DETERMINATION OF UNREASONABLENESS.—Except as provided in sub-
paragraph (C), if it is unreasonable to specify the standards for qualification which a prospective offeror or its product must satis-
fy, a determination to that effect shall be sub-
mitted to the advocate for competition of the procuring activity responsible for the purchase of the item subject to the qualification requirement.
(B) AUTHORITY TO GRANT WAIVER.—After considering any comments of the advocate for competition reviewing such determina-
tion, the head of the purchasing office may waive the requirements of clauses (2) through (6) of subsection (b) for up to two years with respect to the item subject to the qualification requirement.
(C) INAPPLICABILITY TO QUALIFIED PRODUCTS LIST.—The waiver authority provided in this para-
graph does not apply with respect to a qualified products list.
(3) SUBMISSION AND CONSIDERATION OF OFFER NOT TO BE DENIED IN CERTAIN CASES.—A poten-
tial offeror may not be denied the opportunity to submit and have considered an offer for a contract solely because the potential offeror (A) is not on a qualified bidders list, qualified manufacturers list, or qualified products list, or (B) has not been identified as meeting a qualification requirement established after October 19, 1984, if the potential offeror can demonstrate to the satisfaction of the con-
tracting officer (or, in the case of a contract for the procurement of an aviation critical safety item or ship critical safety item, the head of the design control activity for such
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cern under section 3 of the Small Business Act and evaluation costs under paragraph (1)(B) to request the United States to bear testing

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turers list, or qualified bidders list.

any qualified products list, qualified manufacturers, respectively, the head of the agency concerned shall—

(A) periodically publish notice in the Commerce Business Daily soliciting additional sources or products to seek qualification, unless the contracting officer determines that such publication would compromise national security; and

(B) subject to paragraph (2), bear the cost of conducting the specified testing and evaluation (excluding the costs associated with producing the item or establishing the production, quality control, or other system to be tested and evaluated) for a small business concern or a product manufactured by a small business concern which has met the standards specified for qualification and which could reasonably be expected to compete actively for an anticipated future requirement is fewer than two actual manufacturers or the products of two actual manufacturers, respectively, the head of the agency concerned shall—

(1) Solicitation and testing of additional sources or products.—If the number of qualified sources or qualified products available to compete actively for an anticipated future requirement is fewer than two actual manufacturers or the products of two actual manufacturers, respectively, the head of the agency concerned shall—

periodically publish notice in the Commerce Business Daily soliciting additional sources or products to seek qualification, unless the contracting officer determines that such publication would compromise national security; and

subject to paragraph (2), bear the cost of conducting the specified testing and evaluation (excluding the costs associated with producing the item or establishing the production, quality control, or other system to be tested and evaluated) for a small business concern or a product manufactured by a small business concern which has met the standards specified for qualification and which could reasonably be expected to compete actively for an anticipated future requirement is fewer than two actual manufacturers or the products of two actual manufacturers, respectively, the head of the agency concerned shall—

(2) Certification when agency may bear cost.—Costs may be borne under paragraph (1)(B) only if the head of the agency determines that such additional qualified sources or products are likely to result in cost savings from increased competition for future requirements sufficient to amortize the costs incurred by the agency within a reasonable period of time considering the duration and dollar value of anticipated future requirements.

(3) Certification required.—The head of an agency shall require a prospective contractor requesting the United States to bear testing and evaluation costs under paragraph (1)(B) to certify as to its status as a small business concern under section 3 of the Small Business Act (15 U.S.C. 632).

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

(f) Restriction on enforcement.—Except in an emergency as determined by the head of the agency, whenever the head of the agency determines not to enforce a qualification requirement for a solicitation, the agency may not thereafter enforce that qualification requirement unless the agency complies with the requirements of subsection (b).

(g) Definitions.—In this section:

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

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

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


Editorial Notes

AMENDMENTS


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


(a) The Secretary of Defense may—
(1) prescribe regulations for the preparation, submission, and opening of bids for contracts; and
(2) require that a bid be accompanied by a written guaranty, signed by one or more responsible persons, undertaking that the bidder, if his bid is accepted, will, within the time prescribed by the Secretary or other officer authorized to make the contract, make a contract and furnish a bond with good and sufficient sureties for the performance of the contract.

(b) If a bidder, after being notified of the acceptance of his bid, fails within the time prescribed under subsection (a)(2) to enter into a contract and furnish the prescribed bond, the Secretary concerned or other authorized officer shall—
(1) contract with another person; and
(2) charge against the defaulting bidder and his guarantors the difference between the amount specified by the bidder in his bid and the amount for which a contract is made with the other person, this difference being immediately recoverable by the United States for the use of the military department concerned in an action against the bidder and his guarantors, jointly or severally.

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