

Subsec. (a)(1). Pub. L. 116-283, §1811(d)(2)(A)–(C), inserted heading, substituted “covered by chapter 137 legacy provisions” for “covered by this chapter” in introductory provisions, and realigned margins of subpars. (A) to (F).

Subsec. (a)(2). Pub. L. 116-283, §1811(d)(2)(F), redesignated par. (4) as (2), inserted heading, and realigned margin. Former pars. (2) and (3) redesignated subsecs. (b) and (c), respectively.

Subsec. (b). Pub. L. 116-283, §1811(d)(2)(D), redesignated subsec. (a)(2) as (b), inserted heading, and substituted “chapter 137 legacy provisions” for “this section”.

Subsec. (c). Pub. L. 117-81 substituted “subsections (a)(1) and (b)” for “paragraphs (1) and (2)”.

Pub. L. 116-283, §1811(d)(2)(E), redesignated subsec. (a)(3) as (c), inserted heading, and substituted “section 3204(e)(1) of this title” for “subsection (f)(1)”.

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 2021 AMENDMENT

Amendment by Pub. L. 117-81 to take effect immediately after the amendments made by title XVIII of Pub. L. 116-283 have taken effect, see section 1701(a)(3) of Pub. L. 117-81, set out in a note preceding section 3001 of this title and Effective Date note below.

EFFECTIVE DATE

Section and 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 an Effective Date of 2021 Amendment note preceding section 3001 of this title.

§ 3204. Use of procedures other than competitive procedures

(a) WHEN PROCEDURES OTHER THAN COMPETITIVE PROCEDURES MAY BE USED.—The head of an agency may use procedures other than competitive procedures only when—

(1) the property or services needed by the agency are available from only one responsible source or only from a limited number of responsible sources and no other type of property or services will satisfy the needs of the agency;

(2) the agency’s need for the property or services is of such an unusual and compelling urgency that the United States would be seriously injured unless the 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 or sources in order—

(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; or

(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 any court, administrative tribunal, or agency, or to procure the services of an expert or neutral for use in any part of an alternative dis-

pute resolution or negotiated rulemaking process, whether or not the expert is expected to testify;

(4) the terms of an international agreement or a treaty between the United States and a foreign government or international organization, or the written directions of a foreign government reimbursing the agency for the cost of the procurement of the property or services for such government, have the effect of requiring the use of procedures other than competitive procedures;

(5) subject to section 3201(e) of this title, a statute expressly authorizes or requires that the procurement be made through another 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 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 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 the Congress in writing of such determination not less than 30 days before the award of the contract.

(b) PROPERTY OR SERVICES CONSIDERED TO BE AVAILABLE FROM ONLY ONE SOURCE.—For the purposes of applying subsection (a)(1)—

(A) in the case of a contract for property or services to be awarded on the basis of acceptance of an unsolicited research proposal, the property or services shall be considered to be available from only one source if the source has submitted an unsolicited research proposal that demonstrates a concept—

(i) that is unique and innovative or, in the case of a service, for which the source demonstrates a unique capability of the source to provide the service; and

(ii) the substance of which is not otherwise available to the United States, and does not resemble the substance of a pending competitive procurement; and

(B) in the case of a follow-on contract for the continued development or production of a major system or highly specialized equipment, or the continued provision of highly specialized services, such property or services 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—

(i) substantial duplication of cost to the United States which is not expected to be recovered through competition; or

(ii) unacceptable delays in fulfilling the 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 para-

graph (2) that is entered into by an 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 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 agency entering into such 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.**—The head of an agency using procedures other than competitive procedures to procure property or services by reason of the application of paragraph (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 PROCEDURES OTHER THAN COMPETITIVE PROCEDURES.**—

(1) **PREREQUISITES FOR AWARDED CONTRACT.**—Except as provided in paragraphs (3), (4), and (7), the head of an agency may not award a contract using procedures other than competitive procedures unless—

(A) the contracting officer for the contract justifies the use of such procedures in writing and certifies the accuracy and completeness of the justification;

(B) the justification is approved—

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

(ii) in the case of a contract for an amount exceeding \$10,000,000 (but equal to or less than \$75,000,000), by the head of the procuring activity (or the head of the procuring activity's delegate designated pursuant to paragraph (5)(A)); or

(iii) in the case of a contract for an amount exceeding \$75,000,000, by the senior procurement executive of the agency designated pursuant to section 1702(c) of title 41 (without further delegation) or in the case of the Under Secretary of Defense for Acquisition and Sustainment, acting in his capacity as the senior procurement executive for the Department of Defense, the Under Secretary's delegate designated pursuant to paragraph (5)(B); and

(C) any required notice has been published with respect to such contract pursuant to section 1708 of title 41 and all bids or proposals received in response to that notice have been considered by the head of the agency.

(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 the sources, if any, that expressed in writing an interest in the procurement; and

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

(3) **JUSTIFICATION AND APPROVAL 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 AND APPROVAL NOT REQUIRED.**—The justification and approval required by paragraph (1) is not required—

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

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

(C) in the case of a procurement permitted by subsection (a)(7);

(D) in the case of a procurement conducted under (i) chapter 85 of title 41, or (ii) section 8(a) of the Small Business Act (15 U.S.C. 637(a)); or

(E) in the case of a procurement permitted by subsection (a)(4), but only if the head of the contracting activity prepares a document in connection with such procurement that describes the terms of an agreement or treaty, or the written directions, referred to in that subsection that have the effect of requiring the use of procedures other than competitive procedures.

(5) **RESTRICTIONS ON AGENCIES.**—

(A) In no case may the head of an 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 of funds available to the agency for procurement functions; or

(ii) procure property or services from another agency unless such other agency complies fully with the requirements of chapter 137 legacy provisions in its procurement of such property or services.

(B) The restriction contained in subparagraph (A)(ii) is in addition to, and not in lieu of, any other restriction provided by law.

(6) **LIMITATION ON DELEGATIONS OF AUTHORITY UNDER PARAGRAPH (1)(B).**—(A) The authority of the head of a procuring activity under paragraph (1)(B)(ii) may be delegated only to an officer or employee who—

(i) if a member of the armed forces, is a general or flag officer; or

(ii) if a civilian, is serving in a position with a grade under the General Schedule (or any other schedule for civilian officers or employees) that is comparable to or higher than the grade of brigadier general or rear admiral (lower half).

(B) The authority of the Under Secretary of Defense for Acquisition and Sustainment under paragraph (1)(B)(iii) may be delegated only to—

(i) an Assistant Secretary of Defense; or

(ii) with respect to the element of the Department of Defense (as specified in section 111(b) of this title), other than a military department, carrying out the procurement action concerned, an officer or employee serving in or assigned or detailed to that element who—

(I) if a member of the armed forces, is serving in a grade above brigadier general or rear admiral (lower half); or

(II) if a civilian, is serving in a position with a grade under the General Schedule (or any other schedule for civilian officers or employees) that is comparable to or higher than the grade of major general or rear admiral.

(7) JUSTIFICATION AND APPROVAL NOT REQUIRED FOR PHASE III SBIR AWARD.—The justification and approval required by paragraph (1) is not required in the case of a Phase III award made pursuant to section 9(r)(4) of the Small Business Act (15 U.S.C. 638(r)(4)).

(f) PUBLIC AVAILABILITY OF JUSTIFICATION AND APPROVAL REQUIRED FOR USING PROCEDURES OTHER THAN COMPETITIVE 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 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 shall be made available on the website of the agency and through a government-wide website selected by the Administrator for Federal Procurement Policy.

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

(g) REGULATIONS WITH RESPECT TO NEGOTIATION OF PRICES.—

(1) The Secretary of Defense shall prescribe by regulation the manner in which the Department of Defense negotiates prices for supplies to be obtained through the use of procedures other than competitive procedures.

(2) The regulations required by paragraph (1) shall—

(A) specify the incurred overhead a contractor may appropriately allocate to supplies referred to in that paragraph; and

(B) require the contractor to identify those supplies which it did not manufacture or to which it did not contribute significant value.

(3) Such regulations shall not apply to an item of supply included in a contract or subcontract for which the price is based on established catalog or market prices of commercial products sold in substantial quantities to the general public.

(Added and amended Pub. L. 116-283, div. A, title XVIII, §1811(d)(1), (3)-(8), Jan. 1, 2021, 134 Stat. 4166-4169; Pub. L. 117-81, div. A, title XVII, §1701(b)(4)(B)-(E), Dec. 27, 2021, 135 Stat. 2132.)

Editorial Notes

CODIFICATION

The text of subsec. (c) of section 2304 of this title, which was transferred to this section, redesignated as subsec. (a), and amended by Pub. L. 116-283, §1811(d)(3), was based on Pub. L. 98-369, div. B, title VII, §2723(a)(1)(C), July 18, 1984, 98 Stat. 1187; Pub. L. 99-500, §101(c) [title X, §923(a)], Oct. 18, 1986, 100 Stat. 1783-82, 1783-152, and Pub. L. 99-591, §101(c) [title X, §923(a)], Oct. 30, 1986, 100 Stat. 3341-82, 3341-152; Pub. L. 99-661, div. A, title IX, formerly title IV, §923(a), Nov. 14, 1986, 100 Stat. 3932, renumbered title IX, Pub. L. 100-26, §3(5), Apr. 21, 1987, 101 Stat. 273; Pub. L. 103-355, title I, §1005, title VII, §7203(a)(1)(A), Oct. 13, 1994, 108 Stat. 3254, 3379; Pub. L. 104-320, §§7(a)(1), 11(c)(1), Oct. 19, 1996, 110 Stat. 3871, 3873; Pub. L. 105-85, div. A, title X, §1073(a)(42), Nov. 18, 1997, 111 Stat. 1902; Pub. L. 115-232, div. A, title VIII, §836(c)(2)(A), Aug. 13, 2018, 132 Stat. 1864.

The text of subsec. (d) of section 2304 of this title, which was transferred to this section, redesignated as subsecs. (b) and (c), and amended by Pub. L. 116-283, §1811(d)(4), was based on Pub. L. 98-369, div. B, title VII, §2723(a)(1)(C), July 18, 1984, 98 Stat. 1187; Pub. L. 99-500, §101(c) [title X, §923(b), (c)], Oct. 18, 1986, 100 Stat. 1783-82, 1783-152, and Pub. L. 99-591, §101(c) [title X, §923(b), (c)], Oct. 30, 1986, 100 Stat. 3341-82, 3341-152; Pub. L. 99-661, div. A, title IX, formerly title IV, §923(b), (c), Nov. 14, 1986, 100 Stat. 3932, renumbered title IX, Pub. L. 100-26, §3(5), Apr. 21, 1987, 101 Stat. 273; Pub. L. 110-417, [div. A], title VIII, §862(b), Oct. 14, 2008, 122 Stat. 4546.

The text of subsec. (e) of section 2304 of this title, which was transferred to this section, redesignated as subsec. (d), and amended by Pub. L. 116-283, §1811(d)(5), was based on Pub. L. 98-369, div. B, title VII, §2723(a)(1)(C), July 18, 1984, 98 Stat. 1187.

The text of subsec. (f) of section 2304 of this title, which was transferred to this section, redesignated as subsec. (e), and amended by Pub. L. 116-283, §1811(d)(6), was based on Pub. L. 98-369, div. B, title VII, §2723(a)(1)(C), July 18, 1984, 98 Stat. 1187; Pub. L. 98-577, title V, §504(b)(2), Oct. 30, 1984, 98 Stat. 3086; Pub. L. 99-145, title IX, §961(a)(1), Nov. 8, 1985, 99 Stat. 703; Pub. L. 100-26, §7(d)(3)(A), Apr. 21, 1987, 101 Stat. 281; Pub. L. 100-456, div. A, title VIII, §803, Sept. 29, 1988, 102 Stat. 2008; Pub. L. 101-189, div. A, title VIII, §§817, 818, Nov. 29, 1989, 103 Stat. 1501, 1502; Pub. L. 103-160, div. A, title IX, §904(d)(1), Nov. 30, 1993, 107 Stat. 1728; Pub. L. 103-355, title I, §1003, Oct. 13, 1994, 108 Stat. 3249; Pub. L. 104-106, div. D, title XLI, §§4102(a), title XLIII, §4321(b)(4), Feb. 10, 1996, 110 Stat. 643, 672; Pub. L. 105-85, div. A, title VIII, §841(b), title X, §1073(a)(43), Nov. 18, 1997, 111 Stat. 1843, 1902; Pub. L. 107-107, div. A, title X, §1048(b)(2), Dec. 28, 2001, 115 Stat. 1225; Pub. L. 108-375, div. A, title VIII, §815, Oct. 28, 2004, 118 Stat. 2015; Pub.

L. 109–364, div. A, title X, §1071(a)(2), Oct. 17, 2006, 120 Stat. 2398; Pub. L. 110–181, div. A, title VIII, §844(b)(2), Jan. 28, 2008, 122 Stat. 239; Pub. L. 111–350, §5(b)(12)(A)–(C), Jan. 4, 2011, 124 Stat. 3843; Pub. L. 115–91, div. A, title XVII, §1709(b)(2), Dec. 12, 2017, 131 Stat. 1809; Pub. L. 115–232, div. A, title VIII, §836(c)(2)(A), Aug. 13, 2018, 132 Stat. 1864; Pub. L. 116–92, div. A, title IX, §902(39), title XVII, §1731(a)(37), Dec. 20, 2019, 133 Stat. 1547, 1814.

The text of subsec. (l) of section 2304 of this title, which was transferred to this section, redesignated as subsec. (f), and amended by Pub. L. 116–283, §1811(d)(7), was based on Pub. L. 110–181, div. A, title VIII, §844(b)(1), Jan. 28, 2008, 122 Stat. 239.

The text of subsec. (i) of section 2304 of this title, which was transferred to this section, redesignated as subsec. (g), and amended by Pub. L. 116–283, §1811(d)(8), was based on Pub. L. 99–500, §101(c) [title X, §927(a)], Oct. 18, 1986, 100 Stat. 1783–82, 1783–155, and Pub. L. 99–591, §101(c) [title X, §927(a)], Oct. 30, 1986, 100 Stat. 3341–82, 3341–155; Pub. L. 99–661, div. A, title IX, formerly title IV, §927(a), Nov. 14, 1986, 100 Stat. 3935, renumbered title IX, Pub. L. 100–26, §3(5), Apr. 21, 1987, 101 Stat. 273; Pub. L. 115–232, div. A, title VIII, §836(c)(2)(C), Aug. 13, 2018, 132 Stat. 1864.

PRIOR PROVISIONS

A prior section 3204, act Aug. 10, 1956, ch. 1041, 70A Stat. 173, Pub. L. 85–600, §1(2), Aug. 6, 1958, 72 Stat. 522; Pub. L. 95–551, §2, Oct. 30, 1978, 92 Stat. 2069, prescribed authorized strength of Regular Army in commissioned officers of active list, prior to repeal by Pub. L. 96–513, title II, §202, title VII, §701, Dec. 12, 1980, 94 Stat. 2878, 2955, effective Sept. 15, 1981.

AMENDMENTS

2021—Subsec. (a). Pub. L. 116–283, §1811(d)(3)(A), inserted heading.

Pub. L. 116–283, §1811(d)(3), redesignated subsec. (c) of section 2304 of this title as subsec. (a) of this section.

Subsec. (a)(3). Pub. L. 116–283, §1811(d)(3)(B), as amended by Pub. L. 117–81, §1701(b)(4)(B), inserted dash after “in order” and reformatted subpars. (A) to (C) to add line breaks before each subpar. designation and substituted semicolons for commas.

Subsec. (a)(5). Pub. L. 116–283, §1811(d)(3)(C), substituted “section 3201(e) of this title” for “subsection (k)”.

Subsec. (a)(7). Pub. L. 116–283, §1811(d)(3)(D), inserted “(who may not delegate the authority under this paragraph)” after “the head of the agency” in introductory provisions.

Subsec. (b). Pub. L. 116–283, §1811(d)(4)(A), (B), inserted heading, struck out par. (1) designation at beginning, and substituted “subsection (a)(1)” for “subsection (c)(1)” in introductory provisions.

Pub. L. 116–283, §1811(d)(4), redesignated subsec. (d) of section 2304 of this title as subsec. (b) of this section.

Subsec. (b)(2). Pub. L. 116–283, §1811(d)(4)(C), struck out par. (2) which read as follows: “The authority of the head of an agency under subsection (c)(7) may not be delegated.”

Subsec. (c). Pub. L. 116–283, §1811(d)(4)(D), as amended by Pub. L. 117–81, §1701(b)(4)(C), redesignated subsec. (b)(3) as (c) and inserted heading; redesignated subpars. (A) and (B) as pars. (1) and (2), respectively, inserted headings, and realigned margins; in par. (1) as redesignated, substituted “paragraph (2)” for “subparagraph (B)” and “subsection (a)(2)” for “subsection (c)(2)” in introductory provisions, redesignated cl. (i) and subcls. (I) and (II) as subpar. (A) and cls. (i) and (ii), respectively, redesignated cl. (ii) as subpar. (B), and realigned margins; and, in par. (2) as redesignated, substituted “This subsection” for “This paragraph”.

Subsec. (d). Pub. L. 116–283, §1811(d)(5), as amended by Pub. L. 117–81, §1701(b)(4)(D), redesignated subsec. (e) of section 2304 of this title as subsec. (d) of this section, inserted heading, and substituted “paragraph (2) or (6) of subsection (a)” for “subsection (c)(2) or (c)(6)”.

Subsec. (e). Pub. L. 116–283, §1811(d)(6)(A), as amended by Pub. L. 117–81, §1701(b)(4)(E)(i), inserted heading.

Pub. L. 116–283, §1811(d)(6), redesignated subsec. (f) of section 2304 of this title as subsec. (e) of this section.

Subsec. (e)(1). Pub. L. 116–283, §1811(d)(6)(A), (B), as amended by Pub. L. 117–81, §1701(b)(4)(E)(ii), inserted heading, substituted “Except as provided in paragraphs (3), (4), and (7)” for “Except as provided in paragraph (2) and paragraph (6)”, and realigned margins of subpars. (A) to (C).

Subsec. (e)(2). Pub. L. 116–283, §1811(d)(6)(C), (D), (K), redesignated par. (3) as (2), inserted heading, and realigned margin. Former par. (2) redesignated (3).

Subsec. (e)(3). Pub. L. 116–283, §1811(d)(6)(C), (E), (K), redesignated par. (2) as (3), inserted heading, substituted “subsection (a)(2)” for “subsection (c)(2)”, and realigned margin. Former par. (3) redesignated (2).

Subsec. (e)(4). Pub. L. 116–283, §1811(d)(6)(G), (K), designated second sentence of par. (3) as (4), inserted heading, realigned margin, and substituted “subsection (a)(7)” for “subsection (c)(7)” in subpar. (C) and “subsection (a)(4)” for “subsection (c)(4)” in subpar. (E). Former par. (4) redesignated (5).

Subsec. (e)(5). Pub. L. 116–283, §1811(d)(6)(F), (H), (K), redesignated par. (4) as (5), inserted heading, and realigned margin; inserted subpar. (A) designation before “In no case”, redesignated former subpars. (A) and (B) as cls. (i) and (ii), respectively, and, in cl. (ii), substituted “chapter 137 legacy provisions” for “this chapter”; and designated concluding provisions as subpar. (B) and substituted “subparagraph (A)(ii)” for “clause (B)”. Former par. (5) redesignated (6).

Subsec. (e)(6). Pub. L. 116–283, §1811(d)(6)(I), (K), redesignated par. (5) as (6), inserted heading, and realigned margin. Former par. (6) redesignated (7).

Subsec. (e)(7). Pub. L. 116–283, §1811(d)(6)(J), (K), redesignated par. (6) as (7), inserted heading, and realigned margin.

Subsec. (f). Pub. L. 116–283, §1811(d)(7)(A), inserted heading.

Pub. L. 116–283, §1811(d)(7), redesignated subsec. (l) of section 2304 of this title as subsec. (f) of this section.

Subsec. (f)(1). Pub. L. 116–283, §1811(d)(7)(A)–(C), inserted par. and subpar. headings, substituted “subsection (a)” for “subsection (c)” and “subsection (e)(1)” for “subsection (f)(1)” in subpar. (A) and “subsection (a)(2)” for “subsection (c)(2)” in subpar. (B).

Subsec. (f)(2), (3). Pub. L. 116–283, §1811(d)(7)(D)–(F), inserted headings and realigned margins.

Subsec. (g). Pub. L. 116–283, §1811(d)(8)(A), inserted heading.

Pub. L. 116–283, §1811(d)(8), redesignated subsec. (i) of section 2304 of this title as subsec. (g) of this section.

Subsec. (g)(1). Pub. L. 116–283, §1811(d)(8)(B), struck out “, as defined in section 2302(2) of this title” before period at end.

Subsec. (g)(2), (3). Pub. L. 116–283, §1811(d)(8)(C), realigned margins.

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 Effective Date note below.

EFFECTIVE DATE

Section and 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 an Effective Date of 2021 Amendment note preceding section 3001 of this title.

PILOT PROGRAM TO INCENTIVIZE CONTRACTING WITH EMPLOYEE-OWNED BUSINESSES

Pub. L. 117–81, div. A, title VIII, §874, Dec. 27, 2021, 135 Stat. 1863, as amended by Pub. L. 118–31, div. A, title VIII, §872, Dec. 22, 2023, 137 Stat. 349, provided that:

“(a) QUALIFIED BUSINESS WHOLLY-OWNED THROUGH AN EMPLOYEE STOCK OWNERSHIP PLAN DEFINED.—The term ‘qualified businesses wholly-owned through an Employee Stock Ownership Plan’ means an S corporation (as defined in section 1361(a)(1) of the Internal Revenue Code of 1986 [26 U.S.C. 1361(a)(1)]) for which 100 percent of the outstanding stock is held through an employee stock ownership plan (as defined in section 4975(e)(7) of such Code [26 U.S.C. 4975(e)(7)]).

“(b) PILOT PROGRAM TO USE NONCOMPETITIVE PROCEDURES FOR CERTAIN FOLLOW-ON CONTRACTS TO QUALIFIED BUSINESSES WHOLLY-OWNED THROUGH AN EMPLOYEE STOCK OWNERSHIP PLAN.—

“(1) ESTABLISHMENT.—The Secretary of Defense may establish a pilot program and prescribe regulations to carry out the requirements of this section.

“(2) FOLLOW-ON CONTRACTS.—Notwithstanding the requirements of section 2304 of title 10, United States Code [see 10 U.S.C. 3201 et seq.], and with respect to a follow-on contract for the continued development, production, or provision of products or services that are the same as or substantially similar to the products or services procured by or for the Department of Defense under a prior contract held by a qualified business wholly-owned through an Employee Stock Ownership Plan, the products or services to be procured under the follow-on contract may be procured by or for the Department of Defense through procedures other than competitive procedures if the performance of the qualified business wholly-owned through an Employee Stock Ownership Plan on the prior contract was rated as satisfactory (or the equivalent) or better in the applicable past performance database.

“(3) LIMITATION.—Each contract held by a qualified business wholly-owned through an Employee Stock Ownership Plan may have a single opportunity for award of a sole-source follow-on contract under this section, unless a senior contracting official (as defined in section 1737 of title 10, United States Code) approves a waiver of the requirements of this section.

“(c) VERIFICATION AND REPORTING OF QUALIFIED BUSINESSES WHOLLY-OWNED THROUGH AN EMPLOYEE STOCK OWNERSHIP PLAN.—Under a pilot program established under this section, the Secretary of Defense shall establish procedures—

“(1) for businesses to verify status as a qualified businesses wholly-owned through an Employee Stock Ownership Plan for the purposes of this section by using existing Federal reporting mechanisms;

“(2) for a qualified businesses wholly-owned through an Employee Stock Ownership Plan to certify that not more than 50 percent of the amount paid under the contract will be expended on subcontracts, except—

“(A) to the extent subcontracted amounts exceeding 50 percent are subcontracted to other qualified businesses wholly-owned through an Employee Stock Ownership Plan;

“(B) in the case of contracts for products, to the extent subcontracted amounts exceeding 50 percent are for materials not available from another qualified business wholly-owned through an Employee Stock Ownership Plan; or

“(C) pursuant to such necessary and reasonable waivers as the Secretary may prescribe; and

“(3) to record information on each follow-on contract awarded under subsection (b), including details relevant to the nature of such contract and the qualified business wholly-owned through an Employee Stock Ownership Plan that received such contract, and to provide such information to the Comptroller General of the United States.

“(d) DATA.—

“(1) IN GENERAL.—If the Secretary of Defense establishes a pilot program under this section, the Secretary shall establish mechanisms to collect and analyze data on the pilot program for the purposes of—

“(A) developing and sharing best practices relating to the pilot program;

“(B) providing information to leadership and the congressional defense committees [Committees on Armed Services and Appropriations of the Senate and the House of Representatives] on the pilot program, including with respect to each qualified business wholly-owned through an Employee Stock Ownership Plan that received a follow-on contract under this section—

“(i) the size of such business;

“(ii) performance of the follow-on contract; and

“(iii) other information as determined necessary; and

“(C) providing information to leadership and the congressional defense committees on policy issues related to the pilot program.

“(2) LIMITATION.—The Secretary of Defense may not carry out the pilot program under this section before—

“(A) completing a data collection and reporting strategy and plan to meet the requirements of this subsection; and

“(B) submitting the strategy and plan to the congressional defense committees.

“(e) SUNSET.—Any pilot program established under this section shall expire on the date that is eight years after the date of the enactment of this Act [Dec. 27, 2021].

“(f) COMPTROLLER GENERAL REPORT.—

“(1) IN GENERAL.—Not later than three years after the date of the enactment of this Act, the Comptroller General of the United States shall submit to Congress a report on any individual and aggregate uses of the authority under a pilot program established under this section.

“(2) ELEMENTS.—The report under paragraph (1) shall include the following elements:

“(A) An assessment of the frequency and nature of the use of the authority under the pilot program.

“(B) An assessment of the impact of the pilot program in supporting the national defense strategy required under section 113(g) of title 10, United States Code.

“(C) The number of businesses that became qualified businesses wholly-owned through an Employee Stock Ownership Plan in order to benefit from the pilot program and the factors that influenced that decision.

“(D) Acquisition authorities that could incentivize businesses to become qualified businesses wholly-owned through an Employee Stock Ownership Plan, including an extension of the pilot program.

“(E) Any related matters the Comptroller General considers appropriate.”

MODIFICATION OF JUSTIFICATION AND APPROVAL REQUIREMENT FOR CERTAIN DEPARTMENT OF DEFENSE CONTRACTS

Pub. L. 116-92, div. A, title VIII, §823, Dec. 20, 2019, 133 Stat. 1490, provided that:

“(a) MODIFICATION OF JUSTIFICATION AND APPROVAL REQUIREMENT.—Notwithstanding section 811 of the National Defense Authorization Act for Fiscal Year 2010 (Public Law 111-84; 123 Stat. 2405) [41 U.S.C. 3304 note]—

“(1) no justification and approval is required under such section for a sole-source contract awarded by the Department of Defense in a covered procurement for an amount not exceeding \$100,000,000; and

“(2) for purposes of subsections (a)(2) and (c)(3)(A) of such section, the appropriate official designated to approve the justification for a sole-source contract awarded by the Department of Defense in a covered procurement exceeding \$100,000,000 is the official designated in section 2304(f)(1)(B)(ii) of title 10, United States Code [now 10 U.S.C. 3204(e)(1)(B)(ii)].

“(b) GUIDANCE.—Not later than 90 days after the date of the enactment of this Act [Dec. 20, 2019], the Secretary of Defense shall issue guidance to implement the authority under subsection (a).

“(c) COMPTROLLER GENERAL REVIEW.—

“(1) DATA TRACKING AND COLLECTION.—The Department of Defense shall track the use of the authority as modified by subsection (a) and make the data available to the Comptroller General for purposes of the report required under paragraph (2).

“(2) REPORT.—Not later than March 1, 2022, the Comptroller General of the United States shall submit a report to the congressional defense committees [Committees on Armed Services and Appropriations of the Senate and the House of Representatives] on the use of the authority as modified by subsection (a) through the end of fiscal year 2021. The report shall include—

“(A) a review of the financial effect of the change to the justification and approval requirement in subsection (a) on the native corporations and businesses and associated native communities;

“(B) a description of the nature and extent of contracts excluded from the justification and approval requirement by subsection (a); and

“(C) other matters the Comptroller General deems appropriate.”

§ 3205. Simplified procedures for small purchases

(a) AUTHORIZATION.—In order to promote efficiency and economy in contracting and to avoid unnecessary burdens for agencies and contractors, the Federal Acquisition Regulation shall provide for—

(1) special simplified procedures for purchases of property and services for amounts not greater than the simplified acquisition threshold; and

(2) special simplified procedures for purchases of property and services for amounts greater than the simplified acquisition threshold but not greater than \$5,000,000 with respect to 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) 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 in order to use the simplified procedures required by subsection (a).

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

(d) COMPLIANCE WITH SPECIAL REQUIREMENTS OF FEDERAL ACQUISITION REGULATION.—The head of an agency shall comply with the Federal Acquisition Regulation provisions referred to in section 1901(e) of title 41.

(Added and amended Pub. L. 116-283, div. A, title XVIII, §1811(d)(1), (9), Jan. 1, 2021, 134 Stat. 4166, 4170.)

Editorial Notes

CODIFICATION

The text of subsec. (g) of section 2304 of this title, which was transferred to this section and amended by Pub. L. 116-283, §1811(d)(9), was based on Pub. L. 98-369, div. B, title VII, §2723(a)(1)(C), July 18, 1984, 98 Stat. 1187; Pub. L. 100-26, §7(d)(3)(A), Apr. 21, 1987, 101 Stat. 281; Pub. L. 101-510, div. A, title VIII, §806(b), Nov. 5, 1990, 104 Stat. 1592; Pub. L. 102-25, title VII, §701(d)(2)(A), Apr. 6, 1991, 105 Stat. 114; Pub. L. 103-355, title I, §1001(2), title IV, §4401(a), Oct. 13, 1994, 108 Stat.

3249, 3347; Pub. L. 104-106, div. D, title XLII, §4202(a)(1), Feb. 10, 1996, 110 Stat. 652; Pub. L. 105-85, div. A, title VIII, §850(f)(3)(B), Nov. 18, 1997, 111 Stat. 1850; Pub. L. 111-350, §5(b)(12)(D), Jan. 4, 2011, 124 Stat. 3843; Pub. L. 115-232, div. A, title VIII, §836(c)(2), Aug. 13, 2018, 132 Stat. 1864.

PRIOR PROVISIONS

A prior section 3205, act Aug. 10, 1956, ch. 1041, 70A Stat. 173; Pub. L. 85-600, §1(3), Aug. 6, 1958, 72 Stat. 522; Pub. L. 85-861, §1(60), (65), Sept. 2, 1958, 72 Stat. 1462, 1463; Pub. L. 95-551, §2, Oct. 30, 1978, 92 Stat. 2069, prescribed authorized strength of Regular Army in commissioned officers on active list, exclusive of certain categories, prior to repeal by Pub. L. 96-513, title II, §202, title VII, §701, Dec. 12, 1980, 94 Stat. 2878, 2955, effective Sept. 15, 1981.

AMENDMENTS

2021—Subsec. (a). Pub. L. 116-283, §1811(d)(9)(A), (C), inserted heading, struck out par. (1) designation before “In order to”, and redesignated subpars. (A) and (B) as pars. (1) and (2), respectively. Former pars. (2) to (4) redesignated subsecs. (b) to (d), respectively.

Pub. L. 116-283, §1811(d)(9), redesignated subsec. (g) of section 2304 of this title as subsec. (a) of this section.

Subsec. (b). Pub. L. 116-283, §1811(d)(9)(B), (D), redesignated subsec. (a)(2) as (b), inserted heading, and substituted “subsection (a)” for “paragraph (1)”.

Subsec. (c). Pub. L. 116-283, §1811(d)(9)(B), (E), redesignated subsec. (a)(3) as (c) and inserted heading.

Subsec. (d). Pub. L. 116-283, §1811(d)(9)(B), (F), redesignated subsec. (a)(4) as (d) and inserted heading.

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE

Section and 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 an Effective Date of 2021 Amendment note preceding section 3001 of this title.

§ 3206. Planning and solicitation requirements

(a) PLANNING AND SPECIFICATIONS.—

(1) PREPARING FOR PROCUREMENT.—In preparing for the procurement of property or services, the head of an agency shall—

(A) specify the agency’s 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 such manner as is 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 chapter 137 legacy provisions shall include specifications which—

(A) consistent with the provisions of chapter 137 legacy provisions, permit full and open competition; and

(B) include restrictive provisions or conditions only to the extent necessary to satisfy the needs of the 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 agency and the market available to satisfy such