

Secretary shall, to the maximum extent practicable, rely on the information contained in the Federal procurement data system established pursuant to section 1122(a)(4) of title 41, United States Code, including any modifications to that system.”

§ 3301. Basis of award and rejection

(a) AWARD.—The head of an agency shall evaluate sealed bids and competitive proposals and make an award 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 head of the agency determines that such action is in the public interest.

(Added and amended Pub. L. 116–283, div. A, title XVIII, §1816(c)(2)(A), (3), Jan. 1, 2021, 134 Stat. 4182.)

Editorial Notes

CODIFICATION

The text of subsec. (b)(1), (2) of section 2305 of this title, which was transferred to this section and amended by Pub. L. 116–283, §1816(c)(1), (2)(A), (3), was based on Pub. L. 98–369, div. B, title VII, §2723(b), July 18, 1984, 98 Stat. 1191, 1192; Pub. L. 101–510, div. A, title VIII, §802(d)(1), Nov. 5, 1990, 104 Stat. 1589.

AMENDMENTS

2021—Pub. L. 116–283, §1816(c)(3), redesignated subsec. (b)(1) and (2) of section 2305 of this title as subsecs. (a) and (b), respectively, of this section and inserted headings.

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.

CONSIDERATION OF THE PAST PERFORMANCE OF AFFILIATE COMPANIES OF SMALL BUSINESS CONCERNS

Pub. L. 118–31, div. A, title VIII, §865, Dec. 22, 2023, 137 Stat. 348, provided that: “Not later than July 1, 2024, the Secretary of Defense shall amend section 215.305 of the Defense Federal Acquisition Supplement (or any successor regulation) to require that when small business concerns bid on Department of Defense contracts, the past performance evaluation and source selection processes shall consider, if relevant, the past performance information of affiliate companies of the small business concerns.”

INCLUSION OF BEST AVAILABLE INFORMATION REGARDING PAST PERFORMANCE OF SUBCONTRACTORS AND JOINT VENTURE PARTNERS

Pub. L. 115–232, div. A, title VIII, §823, Aug. 13, 2018, 132 Stat. 1855, provided that: “Not later than 180 days after the date of the enactment of this Act [Aug. 13, 2018], the Secretary of Defense, in consultation with the Federal Acquisition Regulatory Council and the Administrator for Federal Procurement Policy, shall develop policies for the Department of Defense to ensure the best information regarding past performance of certain subcontractors and joint venture partners is available when awarding Department of Defense contracts. The policies shall include proposed revisions to the Defense Federal Acquisition Regulation Supplement as follows:

“(1) Required performance evaluations, as part of a government-wide evaluation reporting tool, for first-

tier subcontractors on construction and architect-engineer contracts performing a portion of the contract valued at the threshold set forth in section 42.1502(e) of the Federal Acquisition Regulation, or 20 percent of the value of the prime contract, whichever is higher, provided—

“(A) the information included in rating the subcontractor is not inconsistent with the information included in the rating for the prime contractor;

“(B) the subcontractor evaluation is conducted consistent with the provisions of section 42.15 of the Federal Acquisition Regulation;

“(C) negative evaluations of a subcontractor in no way obviate the prime contractor’s responsibility for successful completion of the contract and management of its subcontractors; and

“(D) that in the judgment of the contracting officer, the overall execution of the work is impacted by the performance of the subcontractor or subcontractors.

“(2) Required performance evaluations, as part of a government-wide evaluation reporting tool, of individual partners of joint venture-awarded construction and architect-engineer contracts valued at the threshold set forth in section 42.1502(e) of the Federal Acquisition Regulation, to ensure that past performance on joint venture projects is considered in future awards to individual joint venture partners, provided—

“(A) at a minimum, the rating for joint ventures includes an identification that allows the evaluation to be retrieved for each partner of the joint venture;

“(B) each partner, through the joint venture, is given the same opportunity to submit comments, rebutting statements, or additional information, consistent with the provisions of section 42.15 of the Federal Acquisition Regulation; and

“(C) the rating clearly identifies the responsibilities of joint venture partners for discrete elements of the work where the partners are not jointly and severally responsible for the project.

“(3) Processes to request exceptions from the annual evaluation requirement under section 42.1502(a) of the Federal Acquisition Regulation for construction and architect-engineer contracts where submission of the annual evaluations would not provide the best representation of the performance of a contractor, including subcontractors and joint venture partners, including—

“(A) where no severable element of the work has been completed;

“(B) where the contracting officer determines that—

“(i) an insubstantial portion of the contract work has been completed in the preceding year; and

“(ii) the lack of performance is at no fault to the contractor; or

“(C) where the contracting officer determines that there is an issue in dispute which, until resolved, would likely cause the annual rating to inaccurately reflect the past performance of the contractor.”

INCLUSION OF DATA ON CONTRACTOR PERFORMANCE IN PAST PERFORMANCE DATABASES FOR SOURCE SELECTION DECISIONS

Pub. L. 112–81, div. A, title VIII, §806, Dec. 31, 2011, 125 Stat. 1487, as amended by Pub. L. 112–239, div. A, title X, §1076(a)(11), Jan. 2, 2013, 126 Stat. 1948; Pub. L. 116–92, div. A, title IX, §902(35), Dec. 20, 2019, 133 Stat. 1547, provided that:

“(a) STRATEGY ON INCLUSION REQUIRED.—Not later than 180 days after the date of the enactment of this Act [Dec. 31, 2011], the Under Secretary of Defense for Acquisition and Sustainment shall develop a strategy for ensuring that timely, accurate, and complete information on contractor performance is included in past performance databases used for making source selection decisions.

“(b) ELEMENTS.—The strategy required by subsection (a) shall, at a minimum—

“(1) establish standards for the timeliness and completeness of past performance submissions for purposes of databases described in subsection (a);

“(2) assign responsibility and management accountability for the completeness of past performance submissions for such purposes; and

“(3) ensure that past performance submissions for such purposes are consistent with award fee evaluations in cases where such evaluations have been conducted.

“(c) CONTRACTOR COMMENTS.—Not later than 180 days after the date of the enactment of this Act [Dec. 31, 2011], the Under Secretary of Defense for Acquisition and Sustainment shall revise the Defense Supplement to the Federal Acquisition Regulation to require the following:

“(1) That affected contractors are provided, in a timely manner, information on contractor performance to be included in past performance databases in accordance with subsection (a).

“(2) That such contractors are afforded up to 14 calendar days, from the date of delivery of the information provided in accordance with paragraph (1), to submit comments, rebuttals, or additional information pertaining to past performance for inclusion in such databases.

“(3) That agency evaluations of contractor past performance, including any information submitted under paragraph (2), are included in the relevant past performance database not later than the date that is 14 days after the date of delivery of the information provided in accordance with paragraph (1).

“(d) CONSTRUCTION.—Nothing in this section shall be construed to prohibit a contractor from submitting comments, rebuttals, or additional information pertaining to past performance after the period described in subsection (c)(2) has elapsed or to prohibit a contractor from challenging a past performance evaluation in accordance with applicable laws, regulations, or procedures.

“(e) COMPTROLLER GENERAL REPORT.—Not later than 18 months after the date of the enactment of this Act [Dec. 31, 2011], the Comptroller General of the United States shall submit to the congressional defense committees [Committees on Armed Services and Appropriations of the Senate and the House of Representatives] a report on the actions taken by the Under Secretary of Defense for Acquisition and Sustainment pursuant to this section, including an assessment of the extent to which such actions have achieved the objectives of this section.”

§ 3302. 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 head of the agency shall evaluate the bids in accordance with section 3301(a) of this title without discussions with the bidders and, except as provided in section 3301(b) of this title, shall award a contract with reasonable promptness to the responsible bidder whose bid conforms to the solicitation and is most advantageous to the United States, 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 three days after the date of contract award, the head of the agency shall notify, in writing or by electronic means, each bidder not awarded the contract that the contract has been awarded.

(Added and amended Pub. L. 116-283, div. A, title XVIII, §1816(c)(2)(B), (4), Jan. 1, 2021, 134 Stat. 4182.)

Editorial Notes

CODIFICATION

The text of subsec. (b)(3) of section 2305 of this title, which was transferred to this section and amended by Pub. L. 116-283, §1816(c)(1), (2)(B), (4) was based on Pub. L. 98-369, div. B, title VII, §2723(b), July 18, 1984, 98 Stat. 1192; Pub. L. 101-510, div. A, title VIII, §802(d)(2), Nov. 5, 1990, 104 Stat. 1589; Pub. L. 103-355, title I, §1013(a), Oct. 13, 1994, 108 Stat. 3255.

PRIOR PROVISIONS

A prior section 3302, act Aug. 10, 1956, ch. 1041, 70A Stat. 187, related to promotion to captain, major, or lieutenant colonel of commissioned officers of Medical Corps, Dental Corps, and Veterinary Corps upon examination of professional fitness and effect upon failure of promotion, prior to repeal by Pub. L. 96-513, title II, §204, title VII, §701, Dec. 12, 1980, 94 Stat. 2880, 2955, effective Sept. 15, 1981. See sections 631 and 632 of this title.

AMENDMENTS

2021—Subsec. (a). Pub. L. 116-283, §1816(c)(4)(A), (C), redesignated subsec. (b)(3) of section 2305 of this title as subsec. (a) of this section and inserted heading. Former second and third sentences of subsec. (a) designated subsecs. (b) and (c), respectively.

Subsec. (b). Pub. L. 116-283, §1816(c)(4)(B), (D), designated second sentence of subsec. (a) as subsec. (b) of this section, inserted heading, and substituted “section 3301(a) of this title” for “paragraph (1)” and “section 3301(b) of this title” for “paragraph (2)”.

Subsec. (c). Pub. L. 116-283, §1816(c)(4)(B), (E), designated third sentence of subsec. (a) as subsec. (c) of this section 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.

§ 3303. Competitive proposals

(a) EVALUATION AND AWARD.—The head of an agency shall evaluate competitive proposals in accordance with section 3301(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, without discussions with the offerors (other than discussions conducted for the purpose of minor clarification) provided that 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 competi-