

div. A, title XVIII, §1817(a), Jan. 1, 2021, 134 Stat. 4186, which added this analysis, by substituting “[Reserved]” for “Preference for fixed-price contracts” in item 3324.

§ 3321. Contracts awarded using procedures other than sealed-bid procedures

(a) AUTHORIZED TYPES.—Subject to the limitation in section 3322(a) of this title, the other provisions of this chapter, and other applicable provisions of law, the head of an agency, in awarding contracts under chapter 137 legacy provisions after using procedures other than sealed-bid procedures, may enter into any kind of contract that he considers will promote the best interests of the United States.

(b) REQUIRED WARRANTY.—

(1) CONTENT.—Each contract awarded under chapter 137 legacy provisions after using procedures other than sealed-bid procedures shall contain a warranty, determined to be suitable by the head of the agency, that the contractor has employed or retained no person or selling agency to solicit or obtain the contract under an understanding or agreement for a commission, percentage, brokerage, or contingent fee, except a bona fide employee or established commercial or selling agency maintained by the contractor to obtain business.

(2) REMEDY FOR BREAKING WARRANTY.—If a contractor breaks such a warranty the United States—

(A) may annul the contract without liability; or

(B) may deduct the commission, percentage, brokerage, or contingent fee from the contract price or consideration.

(3) INAPPLICABILITY TO CERTAIN CONTRACTS.—This subsection does not apply—

(A) to a contract that is for an amount not greater than the simplified acquisition threshold; or

(B) to a contract for the acquisition of commercial products or commercial services.

(Added and amended Pub. L. 116-283, div. A, title XVIII, §1817(a), (b), (d), Jan. 1, 2021, 134 Stat. 4186.)

Editorial Notes

CODIFICATION

The text of subsec. (a) of section 2306 of this title, which was transferred to this section and amended by Pub. L. 116-283, §1817(b), (d)(1), was based on act Aug. 10, 1956, ch. 1041, 70A Stat. 130; Pub. L. 87-653, §1(d), Sept. 10, 1962, 76 Stat. 528; Pub. L. 98-369, div. B, title VII, §2724(a), July 18, 1984, 98 Stat. 1192; Pub. L. 99-145, title XIII, §1303(a)(15), Nov. 8, 1985, 99 Stat. 739.

The text of subsec. (b) of section 2306 of this title, which was transferred to this section and amended by Pub. L. 116-283, §1817(b), (d)(2), was based on act Aug. 10, 1956, ch. 1041, 70A Stat. 130; Pub. L. 98-369, div. B, title VII, §2724(b), July 18, 1984, 98 Stat. 1193; Pub. L. 103-355, title IV, §4102(b), Oct. 13, 1994, 108 Stat. 3340; Pub. L. 115-232, div. A, title VIII, §836(c)(4), Aug. 13, 2018, 132 Stat. 1865.

AMENDMENTS

2021—Subsec. (a). Pub. L. 116-283, §1817(b), (d)(1), transferred subsec. (a) of section 2306 of this title to this section, inserted heading before second sentence, and substituted “section 3322(a) of this title” for “the

preceding sentence”, “provisions of this chapter” for “provisions of this section”, and “under chapter 137 legacy provisions” for “under this chapter”. Former first sentence of subsec. (a) designated section 3322(a) of this title.

Subsec. (b). Pub. L. 116-283, §1817(b), (d)(2), transferred subsec. (b) of section 2306 of this title to this section, inserted heading, and designated first, second, and third sentences as pars. (1) to (3), respectively.

Subsec. (b)(1). Pub. L. 116-283, §1817(d)(2)(A)-(C), inserted heading and substituted “under chapter 137 legacy provisions” for “under this chapter” and “maintained by the contractor” for “maintained by him”.

Subsec. (b)(2). Pub. L. 116-283, §1817(d)(2)(E), inserted heading, inserted dash after “the United States” and subparagraph. (A) designation before “may annul”, substituted “liability; or” for “liability or”, and inserted subparagraph. (B) designation before “may deduct”.

Subsec. (b)(3). Pub. L. 116-283, §1817(d)(2)(F), inserted heading, inserted dash after “does not apply” and subparagraph. (A) designation before “to a contract that is”, substituted “threshold; or” for “threshold or”, and inserted subparagraph. (B) designation before “to a contract for the acquisition”.

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.

§ 3322. Cost contracts

(a) COST-PLUS-A-PERCENTAGE-OF-COST SYSTEM OF CONTRACTING PROHIBITED.—The cost-plus-a-percentage-of-cost system of contracting may not be used.

(b) COST-PLUS-A-FIXED-FEE CONTRACTS.—The fee for performing a cost-plus-a-fixed-fee contract for experimental, developmental, or research work may not be more than 15 percent of the estimated cost of the contract, not including the fee. The fee for performing a cost-plus-a-fixed-fee contract for architectural or engineering services for a public work or utility plus the cost of those services to the contractor may not be more than 6 percent of the estimated cost of that work or project, not including fees. The fee for performing any other cost-plus-a-fixed-fee contract may not be more than 10 percent of the estimated cost of the contract, not including the fee. Determinations under this subsection of the estimated costs of a contract or project shall be made by the head of the agency at the time the contract is made.

(c) ADVANCE NOTICE OF CERTAIN SUBCONTRACTS.—

(1) IN GENERAL.—Except as provided in paragraph (2), each cost contract and each cost-plus-a-fixed-fee contract shall provide for notice to the agency by the contractor before the making, under the prime contract, of—

(A) a cost-plus-a-fixed-fee subcontract; or

(B) a fixed-price subcontract or purchase order involving more than the greater of (i) the simplified acquisition threshold, or (ii) 5 percent of the estimated cost of the prime contract.

(2) EXCEPTION.—Paragraph (1) shall not apply to a prime contract with a contractor that maintains a purchasing system approved by the contracting officer for the contract.