

cial products or commercial services” for “commercial items” and, in cl. (i), substituted “commercial products, commercial components, or commercial services” for “commercial items or commercial components”.

Subsec. (e)(2)(D). Pub. L. 115-232, § 836(b)(10)(A)(v)(IV), substituted “commercial products, commercial components, or commercial services” for “commercial items or commercial components”.

Subsec. (e)(4)(A). Pub. L. 115-232, § 836(b)(10)(A)(v)(VI), substituted “commercial products or commercial services” for “commercial items” in introductory provisions.

Subsec. (e)(4)(C)(i). Pub. L. 115-232, § 836(b)(10)(A)(v)(VII), substituted “commercial product, as described in section 103a(1)” for “commercial item, as described in section 103(5)”.

Subsec. (e)(5). Pub. L. 115-232, § 836(b)(10)(A)(v)(VIII), substituted “products” for “items” wherever appearing.

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 2018 AMENDMENT

Amendment by Pub. L. 115-232 effective Jan. 1, 2020, subject to a savings provision, see section 836(h) of Pub. L. 115-232, set out as an Effective Date of 2018 Amendment; Savings Provision note under section 453b of Title 6, Domestic Security.

§ 3308. Planning for future competition in contracts for major systems

(a) DEVELOPMENT CONTRACT.—

(1) DETERMINING WHETHER PROPOSALS ARE NECESSARY.—In preparing a solicitation for the award of a development contract for a major system, the head of an agency shall consider requiring in the solicitation that an offeror include in its offer proposals described in paragraph (2). In determining whether to require the proposals, the head of the agency shall consider the purposes for which the system is being procured and the technology necessary to meet the system’s required capabilities. If the proposals are required, the head of the agency shall consider them in evaluating the offeror’s price.

(2) CONTENTS OF PROPOSALS.—The proposals that the head of an agency is to consider requiring in a solicitation for the award of a development contract are the following:

(A) Proposals to incorporate in the design of the major system items that are currently available within the supply system of the Federal agency responsible for the major system, available elsewhere in the national supply system, or commercially available from more than one source.

(B) With respect to items that are likely to be required in substantial quantities during the system’s service life, proposals to incorporate in the design of the major system items that the Federal Government will be able to acquire competitively in the future.

(b) PRODUCTION CONTRACT.—

(1) DETERMINING WHETHER PROPOSALS ARE NECESSARY.—In preparing a solicitation for the award of a production contract for a major system, the head of an agency shall consider requiring in the solicitation that an offeror include in its offer proposals described in paragraph (2). In determining whether to require the proposals, the head of the agency shall consider the purposes for which the system is

being procured and the technology necessary to meet the system’s required capabilities. If the proposals are required, the head of the agency shall consider them in evaluating the offeror’s price.

(2) CONTENT OF PROPOSALS.—The proposals that the head of an agency is to consider requiring in a solicitation for the award of a production contract are proposals identifying opportunities to ensure that the Federal Government will be able to obtain on a competitive basis items procured in connection with the system that are likely to be reproposed in substantial quantities during the service life of the system. Proposals submitted in response to this requirement may include the following:

(A) Proposals to provide to the Federal Government the right to use technical data to be provided under the contract for competitive reprourement of the item, together with the cost to the Federal Government of acquiring the data and the right to use the data.

(B) Proposals for the qualification or development of multiple sources of supply for the item.

(c) CONSIDERATION OF FACTORS AS OBJECTIVES IN NEGOTIATIONS.—If the head of an agency is making a noncompetitive award of a development contract or a production contract for a major system, the factors specified in subsections (a) and (b) to be considered in evaluating an offer for a contract may be considered as objectives in negotiating the contract to be awarded.

(Pub. L. 111-350, § 3, Jan. 4, 2011, 124 Stat. 3758.)

HISTORICAL AND REVISION NOTES

| Revised Section | Source (U.S. Code) | Source (Statutes at Large) |
|-----------------|--------------------|--|
| 3308 | 41:253b(j). | June 30, 1949, ch. 288, title III, § 303B(j), formerly § 303B(f), as added Pub. L. 98-577, title II, § 201(a), Oct. 30, 1984, 98 Stat. 3068; redesignated as § 303B(g), Pub. L. 103-355, title I, § 1064(1), Oct. 13, 1994, 108 Stat. 3268; redesignated as § 303B(j), Pub. L. 104-106, title XLI, § 4104(b)(2), Feb. 10, 1996, 110 Stat. 645. |

§ 3309. Design-build selection procedures

(a) AUTHORIZATION.—Unless the traditional acquisition approach of design-bid-build established under sections 1101 to 1104 of title 40 or another acquisition procedure authorized by law is used, the head of an executive agency shall use the two-phase selection procedures authorized in this section for entering into a contract for the design and construction of a public building, facility, or work when a determination is made under subsection (b) that the procedures are appropriate for use.

(b) CRITERIA FOR USE.—A contracting officer shall make a determination whether two-phase selection procedures are appropriate for use for entering into a contract for the design and construction of a public building, facility, or work when—

(1) the contracting officer anticipates that 3 or more offers will be received for the contract;

(2) design work must be performed before an offeror can develop a price or cost proposal for the contract;

(3) the offeror will incur a substantial amount of expense in preparing the offer; and
 (4) the contracting officer has considered information such as the following:

- (A) The extent to which the project requirements have been adequately defined.
- (B) The time constraints for delivery of the project.
- (C) The capability and experience of potential contractors.
- (D) The suitability of the project for use of the two-phase selection procedures.
- (E) The capability of the agency to manage the two-phase selection process.
- (F) Other criteria established by the agency.

(c) PROCEDURES DESCRIBED.—Two-phase selection procedures consist of the following:

(1) DEVELOPMENT OF SCOPE OF WORK STATEMENT.—The agency develops, either in-house or by contract, a scope of work statement for inclusion in the solicitation that defines the project and provides prospective offerors with sufficient information regarding the Federal Government's requirements (which may include criteria and preliminary design, budget parameters, and schedule or delivery requirements) to enable the offerors to submit proposals that meet the Federal Government's needs. If the agency contracts for development of the scope of work statement, the agency shall contract for architectural and engineering services as defined by and in accordance with sections 1101 to 1104 of title 40.

(2) SOLICITATION OF PHASE-ONE PROPOSALS.—The contracting officer solicits phase-one proposals that—

- (A) include information on the offeror's—
 - (i) technical approach; and
 - (ii) technical qualifications; and
- (B) do not include—
 - (i) detailed design information; or
 - (ii) cost or price information.

(3) EVALUATION FACTORS.—The evaluation factors to be used in evaluating phase-one proposals are stated in the solicitation and include specialized experience and technical competence, capability to perform, past performance of the offeror's team (including the architect-engineer and construction members of the team), and other appropriate factors, except that cost-related or price-related evaluation factors are not permitted. Each solicitation establishes the relative importance assigned to the evaluation factors and subfactors that must be considered in the evaluation of phase-one proposals. The agency evaluates phase-one proposals on the basis of the phase-one evaluation factors set forth in the solicitation.

(4) SELECTION BY CONTRACTING OFFICER.—
 (A) NUMBER OF OFFERORS SELECTED AND WHAT IS TO BE EVALUATED.—The contracting officer selects as the most highly qualified the number of offerors specified in the solicitation to provide the property or services under the contract and requests the selected

offerors to submit phase-two competitive proposals that include technical proposals and cost or price information. Each solicitation establishes with respect to phase two—

- (i) the technical submission for the proposal, including design concepts or proposed solutions to requirements addressed within the scope of work, or both; and
- (ii) the evaluation factors and subfactors, including cost or price, that must be considered in the evaluations of proposals in accordance with subsections (b) to (d) of section 3306 of this title.

(B) SEPARATE EVALUATIONS.—The contracting officer separately evaluates the submissions described in clauses (i) and (ii) of subparagraph (A).

(5) AWARDING OF CONTRACT.—The agency awards the contract in accordance with chapter 37 of this title.

(d) SOLICITATION TO STATE NUMBER OF OFFERORS TO BE SELECTED FOR PHASE-TWO REQUESTS FOR COMPETITIVE PROPOSALS.—A solicitation issued pursuant to the procedures described in subsection (c) shall state the maximum number of offerors that are to be selected to submit competitive proposals pursuant to subsection (c)(4). The maximum number specified in the solicitation shall not exceed 5 unless the agency determines with respect to an individual solicitation that a specified number greater than 5 is in the Federal Government's interest and is consistent with the purposes and objectives of the two-phase selection process.

(e) REQUIREMENT FOR GUIDANCE AND REGULATIONS.—The Federal Acquisition Regulation shall include guidance—

- (1) regarding the factors that may be considered in determining whether the two-phase contracting procedures authorized by subsection (a) are appropriate for use in individual contracting situations;
- (2) regarding the factors that may be used in selecting contractors; and
- (3) providing for a uniform approach to be used Government-wide.

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3759.)

HISTORICAL AND REVISION NOTES

| Revised Section | Source (U.S. Code) | Source (Statutes at Large) |
|-----------------|--------------------|---|
| 3309 | 41:253m. | June 30, 1949, ch. 288, title III, §303M, as added Pub. L. 104-106, div. D, title XLI, §4105(b)(1), Feb. 10, 1996, 110 Stat. 647. |

In subsections (a) and (c)(1), the words "sections 1101 to 1104 of title 40" are substituted for "the Brooks Architect-Engineers Act (title IX of this Act)" and "the Brooks Architect-Engineers Act (40 U.S.C. 541 et seq.)", respectively, because of section 5(c) of Public Law 107-217 (40 U.S.C. note prec. 101) and for consistency with title 40.

In subsection (c)(5), the reference to section 253b of this title is limited to chapter 37 of the revised title for clarity.

Statutory Notes and Related Subsidiaries

PROHIBITION ON USE OF A REVERSE AUCTION FOR THE AWARD OF A CONTRACT FOR COMPLEX, SPECIALIZED, OR SUBSTANTIAL DESIGN AND CONSTRUCTION SERVICES

Pub. L. 116-260, div. U, title IV, § 402, Dec. 27, 2020, 134 Stat. 2292, as amended by Pub. L. 117-28, § 2, July 26, 2021, 135 Stat. 304, provided that:

“(a) FINDINGS.—Congress makes the following findings:

“(1) In contrast to a traditional auction in which the buyers bid up the price, sellers bid down the price in a reverse auction.

“(2) Reverse auctions, while providing value for the vast majority of Federal acquisitions, including certain construction-related acquisitions, are limited in value for complex, specialized, or substantial design and construction services.

“(b) REVERSE AUCTION DEFINED.—In this section, the term ‘reverse auction’ means, with respect to any procurement by an executive agency, a real-time auction generally conducted through an electronic medium among two or more offerors who compete by submitting bids for a supply or service contract, or a delivery order, task order, or purchase order under the contract, with the ability to submit revised lower bids at any time before the closing of the auction.

“(c) PROHIBITION.—

“(1) IN GENERAL.—Not later than 270 days after the date of the enactment of this section [July 26, 2021], the Federal Acquisition Regulation shall be amended to prohibit the use of reverse auctions for awarding contracts for complex, specialized, or substantial design and construction services.

“(2) APPLICABILITY TO ACQUISITIONS ABOVE THE SIMPLIFIED ACQUISITION THRESHOLD.—The prohibition on reverse auctions for complex, specialized, or substantial design and construction services shall apply only to acquisitions above the simplified acquisition threshold (SAT) for construction and design services pursuant to part 36 of the Federal Acquisition Regulation.

“(d) RULEMAKING FOR COMPLEX, SPECIALIZED, OR SUBSTANTIAL SERVICES.—Not later than 180 days after the date of the enactment of this section, the Federal Acquisition Regulatory Council shall promulgate a definition of complex, specialized, or substantial design and construction services, which shall include—

- “(1) site planning and landscape design;
“(2) architectural and engineering services (as defined in section 1102 of title 40, United States Code);
“(3) interior design;
“(4) performance of substantial construction work for facility, infrastructure, and environmental restoration projects; and
“(5) construction or substantial alteration of public buildings or public works.

“(e) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to restrict the use of reverse auctions for the procurement of other goods and services except as specifically provided for under this section.

“(f) REPORT.—Not later than two years after the date of the enactment of this section, the Administrator of General Services shall submit to the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Oversight and Reform [now Committee on Oversight and Accountability] of the House of Representatives a report on the effectiveness of this section in delivering complex, specialized, or substantial design and construction services to the United States Government.”

§ 3310. Quantities to order

(a) FACTORS AFFECTING QUANTITY TO ORDER.—Each executive agency shall procure supplies in a quantity that—

- (1) will result in the total cost and unit cost most advantageous to the Federal Government, where practicable; and

(2) does not exceed the quantity reasonably expected to be required by the agency.

(b) OFFEROR’S OPINION OF QUANTITY.—Each solicitation for a contract for supplies shall, if practicable, include a provision inviting each offeror responding to the solicitation to state an opinion on whether the quantity of supplies proposed to be procured is economically advantageous to the Federal Government and, if applicable, to recommend a quantity that would be more economically advantageous to the Federal Government. Each recommendation shall include a quotation of the total price and the unit price for supplies procured in each recommended quantity.

(Pub. L. 111-350, § 3, Jan. 4, 2011, 124 Stat. 3761.)

HISTORICAL AND REVISION NOTES

Table with 3 columns: Revised Section, Source (U.S. Code), Source (Statutes at Large). Row 3310: Revised Section 3310, Source 41:253f., Source June 30, 1949, ch. 288, title III, § 303F, formerly § 303G, as added Pub. L. 98-577, title II, § 205(a), Oct. 30, 1984, 98 Stat. 3073; renumbered § 303F, Pub. L. 99-145, title XIII, § 1304(c)(4)(A), Nov. 8, 1985, 99 Stat. 742.

In subsection (b), the words “or quantities” are omitted because of 1:1.

§ 3311. Qualification requirement

(a) DEFINITION.—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 ENFORCING QUALIFICATION REQUIREMENT.—Except as provided in subsection (c), the head of an agency, before enforcing any qualification requirement, shall—

- (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 on request all requirements that a prospective offeror, or its product, must satisfy to become qualified, with those requirements to be limited to those least restrictive to meet the purposes necessitating the establishment of the qualification requirement;
(3) specify an estimate of the cost of testing and evaluation likely to be incurred by a potential offeror to become qualified;

(4) ensure that a potential offeror is provided, on request, a prompt opportunity to demonstrate at its own expense (except as provided in subsection (d)) its ability to meet the standards specified for qualification using—

- (A) qualified personnel and facilities—
(i) of the agency concerned;
(ii) of another agency obtained through interagency agreement; or
(iii) under contract; or

(B) other methods approved by the agency (including use of approved testing and evaluation services not provided under contract to the agency);