

HISTORICAL AND REVISION NOTES

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
1708(a)	41:416(a)(1).	Pub. L. 93-400, §18, as added Pub. L. 98-369, title VII, §2732(a), July 18, 1984, 98 Stat. 1195; Pub. L. 98-577, title III, §303(a), Oct. 30, 1984, 98 Stat. 3077; Pub. L. 99-500, §101(c) [title X, §922(b), (d)(2)], Oct. 18, 1986, 100 Stat. 1783-151, 1783-152; Pub. L. 99-591, §101(c) [title X, §922(b), (d)(2)], Oct. 30, 1986, 100 Stat. 3341-151, 3341-152; Pub. L. 99-661, title IX, formerly title IV, §922(b), (d)(2), Nov. 14, 1986, 100 Stat. 3931, 3932, renumbered title IX, Pub. L. 100-26, §3(5), Apr. 21, 1987, 101 Stat. 273; Pub. L. 101-510, title VIII, §806(d), Nov. 5, 1990, 104 Stat. 1592; Pub. L. 103-355, title I, §1055(b)(1), title IV, §§4201(b), (c), 4202(a)-(c), title VIII, §8302, title IX, §9001(b), Oct. 13, 1994, 108 Stat. 3265, 3344, 3398, 3402; Pub. L. 104-106, title XLI, §4101(c), title XLII, §4202(d), title XLIII, §§4310, 4321(h)(3), Feb. 10, 1996, 110 Stat. 642, 654, 670, 675; Pub. L. 105-85, title VIII, §850(e)(2), Nov. 18, 1997, 111 Stat. 1849; Pub. L. 105-261, title X, §1069(d)(1), Oct. 17, 1998, 112 Stat. 2136; Pub. L. 106-398, §1 [div. A], title VIII, §810(a), (b), Oct. 30, 2000, 114 Stat. 1654A-209; Pub. L. 107-296, title VIII, §833(c)(2), Nov. 25, 2002, 116 Stat. 2226.
1708(b)(1), (2).	41:416(c).	
1708(b)(3)	no source.	
1708(c)	41:416(b).	
1708(d)	41:416(a)(2), (7).	
1708(e)	41:416(a)(3), (5), (6).	
1708(f)	41:416(a)(4).	
1708(g)	41:416(d).	

In subsection (a)(3), the words “under a basic agreement, basic ordering agreement, or similar arrangement” are substituted for “referred to in clause (A)(ii)” for clarity. The words “by the Secretary of Commerce” are omitted as obsolete. The Secretary of Commerce no longer has responsibility for publishing notices of awards or orders. See revision note for subsection (d).

In subsection (b)(2), the text of 41 U.S.C. 416(C)(1)(H) is omitted because the procurement authority of the Secretary of Homeland Security pursuant to the special procedures provided in section 833(c) of the Homeland Security Act of 2002 (6 U.S.C. 339(c)) expired on September 30, 2007.

Subsection (b)(3) is added because of section 850(e)(3) of the National Defense Authorization Act for Fiscal Year 1998 (Public Law 105-85, 111 Stat. 1849, 15:637 note), which in part provided that the amendments made by section 850(e)(2), which amended 41:416(c)(1), be implemented in a manner consistent with applicable international agreements.

Subsection (d) is substituted for 41:416(a)(2) and (7) to eliminate unnecessary words. Federal Business Opportunities is the designated single point of universal electronic public access for publication of all procurement information and notices previously published by the Secretary of Commerce in the Commerce Business Daily. See 66 Fed. Reg. 27407, May 16, 2001, 68 Fed. Reg. 56678, October 1, 2003, 48 CFR ch. 1, subch. B, part 5, and the special notice posted in CBDNet on December 28, 2001, and printed on January 2, 2002. The special notice can be found by going to <http://cbdnet.gpo.gov> and clicking on “Federal Business Opportunities to replace the Commerce Business Daily”.

In subsection (e)(1)(B)(i), the words “required for a bid or proposal for a contract described in” are substituted for “required by” for clarity.

In subsection (e)(1)(B)(ii), the words “required for an order described in” are substituted for “required by” for clarity.

APPLICABILITY TO TENNESSEE VALLEY AUTHORITY

Pub. L. 98-577, title III, §303(c), Oct. 30, 1984, 98 Stat. 3079, provided that: “The provisions of the amendments made by subsection (a) of this section [see Tables for classification] shall apply to the Tennessee Valley Authority only with respect to procurements to be paid from appropriated funds.”

§ 1709. Contracting functions performed by Federal personnel

(a) COVERED PERSONNEL.—Personnel referred to in subsection (b) are—

- (1) an employee, as defined in section 2105 of title 5;
- (2) a member of the armed forces; and
- (3) an individual assigned to a Federal agency pursuant to subchapter VI of chapter 33 of title 5.

(b) LIMITATION ON PAYMENT FOR ADVISORY AND ASSISTANCE SERVICES.—No individual who is not an individual described in subsection (a) may be paid by an executive agency for services to conduct evaluations or analyses of any aspect of a proposal submitted for an acquisition unless personnel described in subsection (a) with adequate training and capabilities to perform the evaluations and analyses are not readily available in the agency or another Federal agency. When administering this subsection, the head of each executive agency shall determine in accordance with standards and procedures prescribed in the Federal Acquisition Regulation whether—

- (1) a sufficient number of personnel described in subsection (a) in the agency or another Federal agency are readily available to perform a particular evaluation or analysis for the head of the executive agency making the determination; and
- (2) the readily available personnel have the training and capabilities necessary to perform the evaluation or analysis.

(c) CERTAIN RELATIONSHIP NOT AFFECTED.—This section does not affect the relationship between the Federal Government and a Federally funded research and development center.

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3714.)

HISTORICAL AND REVISION NOTES

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
1709(a)	41:419(b).	Pub. L. 93-400, §23, as added Pub. L. 103-355, title VI, §6002(a), Oct. 13, 1994, 108 Stat. 3363.
1709(b)	41:419(a).	
1709(c)	41:419(c).	

In subsection (a), before paragraph (1), the words “Personnel referred to in subsection (b) are” are substituted for “For purposes of subsection (a) of this section, the personnel described in this subsection are as follows” to eliminate unnecessary words. In paragraph (3), the words “employee from State or local governments” are substituted for “person” for clarity.

SENATE REVISION AMENDMENT

In subsec. (a)(3), “individual” substituted for “employee from State or local governments” by S. Amdt.

4726 (111th Cong.). See 156 Cong. Rec. S8442, Dec. 2, 2010 (daily ed.).

REQUIREMENT FOR GUIDANCE AND REGULATIONS

Pub. L. 103-355, title VI, §6002(b), Oct. 13, 1994, 108 Stat. 3363, provided that: “The Federal Acquisition Regulatory Council established by section 25(a) of the Office of Federal Procurement Policy Act ([former] 41 U.S.C. 421(a)) [now 41 U.S.C. 1302(a)] shall—

“(1) review part 37 of title 48 of the Code of Federal Regulations as it relates to the use of advisory and assistance services; and

“(2) provide guidance and promulgate regulations regarding—

“(A) what actions Federal agencies are required to take to determine whether expertise is readily available within the Federal Government before contracting for advisory and technical services to conduct acquisitions; and

“(B) the manner in which personnel with expertise may be shared with agencies needing expertise for such acquisitions.”

§ 1710. Public-private competition required before conversion to contractor performance

(a) PUBLIC-PRIVATE COMPETITION.—

(1) WHEN CONVERSION TO CONTRACTOR PERFORMANCE IS ALLOWED.—A function of an executive agency performed by 10 or more agency civilian employees may not be converted, in whole or in part, to performance by a contractor unless the conversion is based on the results of a public-private competition that—

(A) formally compares the cost of performance of the function by agency civilian employees with the cost of performance by a contractor;

(B) creates an agency tender, including a most efficient organization plan, in accordance with Office of Management and Budget Circular A76, as implemented on May 29, 2003, or any successor circular;

(C) includes the issuance of a solicitation;

(D) determines whether the submitted offers meet the needs of the executive agency with respect to factors other than cost, including quality, reliability, and timeliness;

(E) examines the cost of performance of the function by agency civilian employees and the cost of performance of the function by one or more contractors to demonstrate whether converting to performance by a contractor will result in savings to the Federal Government over the life of the contract, including—

(i) the estimated cost to the Federal Government (based on offers received) for performance of the function by a contractor;

(ii) the estimated cost to the Federal Government for performance of the function by agency civilian employees; and

(iii) an estimate of all other costs and expenditures that the Federal Government would incur because of the award of the contract;

(F) requires continued performance of the function by agency civilian employees unless the difference in the cost of performance of the function by a contractor compared to the cost of performance of the function by agency civilian employees would, over all

performance periods required by the solicitation, be equal to or exceed the lesser of—

(i) 10 percent of the personnel-related costs for performance of that function in the agency tender; or

(ii) \$10,000,000; and

(G) examines the effect of performance of the function by a contractor on the agency mission associated with the performance of the function.

(2) NOT A NEW REQUIREMENT.—A function that is performed by the executive agency and is reengineered, reorganized, modernized, upgraded, expanded, or changed to become more efficient, but still essentially provides the same service, shall not be considered a new requirement.

(3) PROHIBITIONS.—In no case may a function being performed by executive agency personnel be—

(A) modified, reorganized, divided, or in any way changed for the purpose of exempting the conversion of the function from the requirements of this section; or

(B) converted to performance by a contractor to circumvent a civilian personnel ceiling.

(b) CONSULTING WITH AFFECTED EMPLOYEES OR THEIR REPRESENTATIVES.—

(1) CONSULTING WITH AFFECTED EMPLOYEES.—Each civilian employee of an executive agency responsible for determining under Office of Management and Budget Circular A76 whether to convert to contractor performance any function of the executive agency—

(A) shall, at least monthly during the development and preparation of the performance work statement and the management efficiency study used in making that determination, consult with civilian employees who will be affected by that determination and consider the views of the employees on the development and preparation of that statement and that study; and

(B) may consult with the employees on other matters relating to that determination.

(2) CONSULTING WITH REPRESENTATIVES.—

(A) EMPLOYEES REPRESENTED BY A LABOR ORGANIZATION.—In the case of employees represented by a labor organization accorded exclusive recognition under section 7111 of title 5, consultation with representatives of that labor organization shall satisfy the consultation requirement in paragraph (1).

(B) EMPLOYEES NOT REPRESENTED BY A LABOR ORGANIZATION.—In the case of employees other than employees referred to in subparagraph (A), consultation with appropriate representatives of those employees shall satisfy the consultation requirement in paragraph (1).

(3) REGULATIONS.—The head of each executive agency shall prescribe regulations to carry out this subsection. The regulations shall include provisions for the selection or designation of appropriate representatives of employees referred to in paragraph (2)(B) for purposes of consultation required by paragraph (1).