

(III) authorizes a subsequent change in the ceiling price only on a determination, documented in the contract file, that it is in the best interest of the procuring agency to change the ceiling price.

(C) CATEGORIES OF COMMERCIAL SERVICES.—The categories of commercial services referred to in subparagraph (B) are as follows:

(i) Commercial services procured for support of a commercial item, as described in section 103(5) of this title.

(ii) Any other category of commercial services that the Administrator for Federal Procurement Policy designates in the Federal Acquisition Regulation for the purposes of this subparagraph on the basis that—

(I) the commercial services in the category are of a type of commercial services that are commonly sold to the general public through use of time-and-materials or labor-hour contracts; and

(II) it would be in the best interests of the Federal Government to authorize use of time-and-materials or labor-hour contracts for purchases of the commercial services in the category.

(5) CONTRACT QUALITY REQUIREMENTS.—Regulations prescribed under paragraph (1) shall include provisions that—

(A) allow, to the maximum extent practicable, a contractor under a commercial items acquisition to use the existing quality assurance system of the contractor as a substitute for compliance with an otherwise applicable requirement for the Federal Government to inspect or test the commercial items before the contractor's tender of those items for acceptance by the Federal Government;

(B) require that, to the maximum extent practicable, the executive agency take advantage of warranties (including extended warranties) offered by offerors of commercial items and use those warranties for the repair and replacement of commercial items; and

(C) set forth guidance regarding the use of past performance of commercial items and sources as a factor in contract award decisions.

(Pub. L. 111-350, § 3, Jan. 4, 2011, 124 Stat. 3754.)

HISTORICAL AND REVISION NOTES

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
3307(a)	41:264.	June 30, 1949, ch. 288, title III, §§314, 314B, as added Pub. L. 103-355, title VIII, §§8201, 8203, Oct. 13, 1994, 108 Stat. 3394.
3307(b)	41:264b(a).	
3307(c)	41:264b(b).	
3307(d)	41:264b(c).	
3307(e)	41:264 note.	Pub. L. 103-355, title VIII, §8002, Oct. 13, 1994, 108 Stat. 3386; Pub. L. 108-136, title XIV, 1432, Nov. 24, 2003, 117 Stat. 1672.

Subsection (a)(1) is substituted for 41 U.S.C. 264(a) for clarity.

In subsection (e), the text of section 8002(f) of the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355, 41 U.S.C. 264 note) is omitted as obsolete.

In subsection (e)(2)(B)(i) and (C)(i), the words "as the case may be" are omitted as unnecessary.

§ 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 reprocedured 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 reprocurement 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

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
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.