

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.

§ 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

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
3310	41:253f.	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);

(5) if testing and evaluation services are provided under contract to the agency for the purposes of paragraph (4), provide to the extent possible that those services be provided by a contractor that—

- (A) is not expected to benefit from an absence of additional qualified sources; and
- (B) is required in the contract to adhere to any restriction on technical data asserted by the potential offeror seeking qualification; and

(6) ensure that a potential offeror seeking qualification is promptly informed whether qualification is attained and, if not attained, is promptly furnished specific information about why qualification was not attained.