

(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.

(c) **APPLICABILITY, WAIVER AUTHORITY, AND REFERRAL OF OFFERS.**—

(1) **APPLICABILITY.**—Subsection (b) does not apply to a qualification requirement established by statute prior to October 30, 1984.

(2) **WAIVER AUTHORITY.**—

(A) **SUBMISSION OF DETERMINATION OF UNREASONABLENESS.**—Except as provided in subparagraph (C), if it is unreasonable to specify the standards for qualification that a prospective offeror or its product must satisfy, a determination to that effect shall be submitted to the advocate for competition of the procuring activity responsible for the purchase of the item subject to the qualification requirement.

(B) **AUTHORITY TO GRANT WAIVER.**—After considering any comments of the advocate for competition reviewing the determination, the head of the procuring activity may waive the requirements of paragraphs (2) to (5) of subsection (b) for up to 2 years with respect to the item subject to the qualification requirement.

(C) **NONAPPLICABILITY TO QUALIFIED PRODUCTS LIST.**—Waiver authority under this paragraph does not apply with respect to a qualified products list.

(3) **SUBMISSION AND CONSIDERATION OF OFFER NOT TO BE DENIED.**—A potential offeror may not be denied the opportunity to submit and have considered an offer for a contract solely because the potential offeror has not been identified as meeting a qualification requirement if the potential offeror can demonstrate to the satisfaction of the contracting officer that the potential offeror or its product meets the standards established for qualification or can meet those standards before the date specified for award of the contract.

(4) **REFERRAL TO SMALL BUSINESS ADMINISTRATION NOT REQUIRED.**—This subsection does not require the referral of an offer to the Small Business Administration pursuant to section 8(b)(7) of the Small Business Act (15 U.S.C. 637(b)(7)) if the basis for the referral is a challenge by the offeror to either the validity of the qualification requirement or the offeror's compliance with that requirement.

(5) **DELAY OF PROCUREMENT NOT REQUIRED.**—The head of an agency need not delay a proposed procurement to comply with subsection (b) or to provide a potential offeror with an opportunity to demonstrate its ability to meet the standards specified for qualification.

(d) **FEWER THAN 2 ACTUAL MANUFACTURERS.**—

(1) **SOLICITATION AND TESTING OF ADDITIONAL SOURCES OR PRODUCTS.**—If the number of qualified sources or qualified products available to compete actively for an anticipated future requirement is fewer than 2 actual manufacturers or the products of 2 actual manufacturers, respectively, the head of the agency concerned shall—

(A) publish notice periodically soliciting additional sources or products to seek qualification, unless the contracting officer determines that doing so would compromise national security; and

(B) subject to paragraph (2), bear the cost of conducting the specified testing and eval-

uation (excluding the cost associated with producing the item or establishing the production, quality control, or other system to be tested and evaluated) for a small business concern or a product manufactured by a small business concern that has met the standards specified for qualification and that could reasonably be expected to compete for a contract for that requirement.

(2) **WHEN AGENCY MAY BEAR COST.**—The head of the agency concerned may bear the cost under paragraph (1)(B) only if the head of the agency determines that the additional qualified sources or products are likely to result in cost savings from increased competition for future requirements sufficient to offset (within a reasonable period of time considering the duration and dollar value of anticipated future requirements) the cost incurred by the agency.

(3) **CERTIFICATION REQUIRED.**—The head of the agency shall require a prospective contractor requesting the Federal Government to bear testing and evaluation costs under paragraph (1)(B) to certify its status as a small business concern under section 3 of the Small Business Act (15 U.S.C. 632).

(e) **EXAMINATION AND REVALIDATION OF QUALIFICATION REQUIREMENT.**—Within 7 years after the establishment of a qualification requirement, the need for the requirement shall be examined and the standards of the requirement revalidated in accordance with the requirements of subsection (b). This subsection does not apply in the case of a qualification requirement for which a waiver is in effect under subsection (c)(2).

(f) **WHEN ENFORCEMENT OF QUALIFICATION REQUIREMENT NOT ALLOWED.**—Except in an emergency as determined by the head of the agency, after the head of the agency determines not to enforce a qualification requirement for a solicitation, the agency may not enforce the requirement unless the agency complies with the requirements of subsection (b).

(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)
3311	41:253c.	June 30, 1949, ch. 288, title III, §303C, formerly §303D, as added Pub. L. 98-577, title II, §202(a), Oct. 30, 1984, 98 Stat. 3069; renumbered §303C, Pub. L. 99-145, title XIII, §1304(c)(4)(A), Nov. 8, 1985, 99 Stat. 742.

In subsection (d)(1)(A), the words “in the Commerce Business Daily” are omitted as obsolete. See revision note for section 1708(d) of the revised title.

CHAPTER 35—TRUTHFUL COST OR PRICING DATA

- Sec. 3501. General.
- 3502. Required cost or pricing data and certification.
- 3503. Exceptions.
- 3504. Cost or pricing data on below-threshold contracts.
- 3505. Submission of other information.