

contract with an executive agency subject to this chapter and the overpayment was due to the submission by the contractor of defective cost or pricing data, the contractor shall be liable to the Federal Government—

(1) for interest on the amount of the overpayment, to be computed—

(A) for the period beginning on the date the overpayment was made to the contractor and ending on the date the contractor repays the amount of the overpayment to the Federal Government; and

(B) at the current rate prescribed by the Secretary of the Treasury under section 6621 of the Internal Revenue Code of 1986 (26 U.S.C. 6621); and

(2) if the submission of the defective data was a knowing submission, for an additional amount equal to the amount of the overpayment.

(b) LIABILITY NOT AFFECTED BY REFUSAL TO SUBMIT CERTIFICATION.—Any liability under this section of a contractor that submits cost or pricing data but refuses to submit the certification required by section 3502(b) of this title with respect to the cost or pricing data is not affected by the refusal to submit the certification.

(Pub. L. 111-350, § 3, Jan. 4, 2011, 124 Stat. 3769.)

HISTORICAL AND REVISION NOTES

Table with 3 columns: Revised Section, Source (U.S. Code), Source (Statutes at Large). Row 3507: 41:254b(f), June 30, 1949, ch. 288, title III, §304A(f), as added Pub. L. 103-355, title I, §1251(a)(2), Oct. 13, 1994, 108 Stat. 3283.

§ 3508. Right to examine contractor records

For the purpose of evaluating the accuracy, completeness, and currency of cost or pricing data required to be submitted by this chapter, an executive agency shall have the authority provided by section 4706(b)(2) of this title.

(Pub. L. 111-350, § 3, Jan. 4, 2011, 124 Stat. 3770.)

HISTORICAL AND REVISION NOTES

Table with 3 columns: Revised Section, Source (U.S. Code), Source (Statutes at Large). Row 3508: 41:254b(g), June 30, 1949, ch. 288, title III, §304A(g), as added Pub. L. 103-355, title I, §1251(a)(2), Oct. 13, 1994, 108 Stat. 3283.

§ 3509. Notification of violations of Federal criminal law or overpayments

(a) DEFINITION.—In this section, the term “covered contract” means any contract in an amount greater than \$5,000,000 and more than 120 days in duration.

(b) FEDERAL ACQUISITION REGULATION.—The Federal Acquisition Regulation shall include, pursuant to FAR Case 2007-006 (as published at 72 Fed. Reg. 64019, November 14, 2007) or any follow-on FAR case, provisions that require timely notification by Federal contractors of violations of Federal criminal law or overpayments in connection with the award or performance of covered contracts or subcontracts, including those

performed outside the United States and those for commercial items.

(Pub. L. 111-350, § 3, Jan. 4, 2011, 124 Stat. 3770; Pub. L. 115-232, div. A, title VIII, §836(b)(14), Aug. 13, 2018, 132 Stat. 1864.)

AMENDMENT OF SUBSECTION (b)

Pub. L. 115-232, div. A, title VIII, § 836(b)(14), (h), Aug. 13, 2018, 132 Stat. 1864, 1874, provided that, effective Jan. 1, 2020, subject to a savings provision, subsection (b) of this section is amended by striking “commercial items” and inserting “commercial products or commercial services”. See 2018 Amendment note below.

HISTORICAL AND REVISION NOTES

Table with 3 columns: Revised Section, Source (U.S. Code), Source (Statutes at Large). Row 3509: 41:251 note, Pub. L. 110-252, title VI, §§6102, 6103, June 30, 2008, 122 Stat. 2386, 2387.

In subsection (b), the words “shall include” are substituted for “shall be amended” and “to include” to reflect the permanence of the provision. The words “within 180 days after the date of the enactment of this Act” are omitted as obsolete.

AMENDMENTS

2018—Subsec. (b). Pub. L. 115-232 substituted “commercial products or commercial services” for “commercial items”.

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.

CHAPTER 37—AWARDING OF CONTRACTS

- Sec. 3701. Basis of award and rejection. 3702. Sealed bids. 3703. Competitive proposals. 3704. Post-award debriefings. 3705. Pre-award debriefings. 3706. Encouragement of alternative dispute resolution. 3707. Antitrust violations. 3708. Protests.

§ 3701. Basis of award and rejection

(a) AWARD.—An executive agency shall evaluate sealed bids and competitive proposals, and award a contract, based solely on the factors specified in the solicitation.

(b) REJECTION.—All sealed bids or competitive proposals received in response to a solicitation may be rejected if the agency head determines that rejection is in the public interest.

(Pub. L. 111-350, § 3, Jan. 4, 2011, 124 Stat. 3770.)

HISTORICAL AND REVISION NOTES

Table with 3 columns: Revised Section, Source (U.S. Code), Source (Statutes at Large). Row 3701(a): 41:253b(a), June 30, 1949, ch. 288, title III, §303B(a), (b), as added Pub. L. 98-369, title VII, §2711(a)(2), July 18, 1984, 98 Stat. 1179; Pub. L. 103-355, title I, §1061(c)(1), Oct. 13, 1994, 108 Stat. 3267. Row 3701(b): 41:253b(b).

USE OF LOWEST PRICE TECHNICALLY ACCEPTABLE  
SOURCE SELECTION PROCESS

Pub. L. 115-232, div. A, title VIII, §880, Aug. 13, 2018, 132 Stat. 1909, provided that:

“(a) STATEMENT OF POLICY.—It shall be the policy of the United States Government to avoid using lowest price technically acceptable source selection criteria in circumstances that would deny the Government the benefits of cost and technical tradeoffs in the source selection process.

“(b) REVISION OF FEDERAL ACQUISITION REGULATION.—Not later than 120 days after the date of the enactment of this Act [Aug. 13, 2018], the Federal Acquisition Regulation shall be revised to require that, for solicitations issued on or after the date that is 120 days after the date of the enactment of this Act, lowest price technically acceptable source selection criteria are used only in situations in which—

“(1) an executive agency is able to comprehensively and clearly describe the minimum requirements expressed in terms of performance objectives, measures, and standards that will be used to determine acceptability of offers;

“(2) the executive agency would realize no, or minimal, value from a contract proposal exceeding the minimum technical or performance requirements set forth in the request for proposal;

“(3) the proposed technical approaches will require no, or minimal, subjective judgment by the source selection authority as to the desirability of one offeror’s proposal versus a competing proposal;

“(4) the executive agency has a high degree of confidence that a review of technical proposals of offerors other than the lowest bidder would not result in the identification of factors that could provide value or benefit to the executive agency;

“(5) the contracting officer has included a justification for the use of a lowest price technically acceptable evaluation methodology in the contract file; and

“(6) the executive agency has determined that the lowest price reflects full life-cycle costs, including for operations and support.

“(c) AVOIDANCE OF USE OF LOWEST PRICE TECHNICALLY ACCEPTABLE SOURCE SELECTION CRITERIA IN CERTAIN PROCUREMENTS.—To the maximum extent practicable, the use of lowest price technically acceptable source selection criteria shall be avoided in the case of a procurement that is predominately for the acquisition of—

“(1) information technology services, cybersecurity services, systems engineering and technical assistance services, advanced electronic testing, audit or audit readiness services, health care services and records, telecommunications devices and services, or other knowledge-based professional services;

“(2) personal protective equipment; or

“(3) knowledge-based training or logistics services in contingency operations or other operations outside the United States, including in Afghanistan or Iraq.

“(d) REPORT REQUIREMENT.—Not later than one year after the date of the enactment of this Act, and annually thereafter for two years, the Comptroller General of the United States shall submit to the appropriate congressional committees a report on the number of instances in which lowest price technically acceptable source selection criteria is used for a contract exceeding \$5,000,000, including an explanation of how the situations listed in subsection (b) were considered in making a determination to use lowest price technically acceptable source selection criteria.

“(e) DEFINITIONS.—In this section:

“(1) EXECUTIVE AGENCY.—The term ‘executive agency’ has the meaning given that term in section 102 of title 40, United States Code, except that the term does not include the Department of Defense.

“(2) CONTINGENCY OPERATION.—The term ‘contingency operation’ has the meaning given that term in section 101 of title 10, United States Code.

“(3) APPROPRIATE CONGRESSIONAL COMMITTEES.—The term ‘appropriate congressional committees’ means

the Committee on Oversight and Government Reform of the House of Representatives and the Committee on Homeland Security and Governmental Affairs of the Senate.”

CONGRESSIONAL STATEMENT OF PURPOSE

Pub. L. 98-577, title I, §101, Oct. 30, 1984, 98 Stat. 3066, provided that: “The purposes of this Act [see Tables for classification] are to—

“(1) eliminate procurement procedures and practices that unnecessarily inhibit full and open competition for contracts;

“(2) promote the use of contracting opportunities as a means to expand the industrial base of the United States in order to ensure adequate responsive capability of the economy to the increased demands of the Government in times of national emergency; and

“(3) foster opportunities for the increased participation in the competitive procurement process of small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals.”

EX. ORD. NO. 12979. AGENCY PROCUREMENT PROTESTS

Ex. Ord. No. 12979, Oct. 25, 1995, 60 F.R. 55171, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to ensure effective and efficient expenditure of public funds and fair and expeditious resolution of protests to the award of Federal procurement contracts, it is hereby ordered as follows:

SECTION 1. Heads of executive departments and agencies (“agencies”) engaged in the procurement of supplies and services shall prescribe administrative procedures for the resolution of protests to the award of their procurement contracts as an alternative to protests in fora outside the procuring agencies. Procedures prescribed pursuant to this order shall:

(a) emphasize that whenever conduct of a procurement is contested, all parties should use their best efforts to resolve the matter with agency contracting officers;

(b) to the maximum extent practicable, provide for inexpensive, informal, procedurally simple, and expeditious resolution of protests, including, where appropriate and as permitted by law, the use of alternative dispute resolution techniques, third party neutrals, and another agency’s personnel;

(c) allow actual or prospective bidders or offerors whose direct economic interests would be affected by the award or failure to award the contract to request a review, at a level above the contracting officer, of any decision by a contracting officer that is alleged to have violated a statute or regulation and, thereby, caused prejudice to the protester; and

(d) except where immediate contract award or performance is justified for urgent and compelling reasons or is determined to be in the best interest of the United States, prohibit award or performance of the contract while a timely filed protest is pending before the agency. To allow for the withholding of a contract award or performance, the agency must have received notice of the protest within either 10 calendar days after the contract award or 5 calendar days after the bidder or offeror who is protesting the contract award was given the opportunity to be debriefed by the agency, whichever date is later.

SEC. 2. The Administrator for Federal Procurement Policy shall: (a) work with the heads of executive agencies to provide policy guidance and leadership necessary to implement provisions of this order; and

(b) review and evaluate agency experience and performance under this order, and report on any findings to the President within 2 years from the date of this order.

SEC. 3. The Administrator of General Services, the Secretary of Defense, and the Administrator of the Na-

tional Aeronautics and Space Administration, in coordination with the Office of Federal Procurement Policy, shall amend the Federal Acquisition Regulation, 48 C.F.R. 1, within 180 days of the date of this order to further the purposes of this order.

WILLIAM J. CLINTON.

**§ 3702. Sealed bids**

(a) OPENING OF BIDS.—Sealed bids shall be opened publicly at the time and place stated in the solicitation.

(b) CRITERIA FOR AWARDING CONTRACT.—The executive agency shall evaluate the bids in accordance with section 3701(a) of this title without discussions with the bidders and, except as provided in section 3701(b) of this title, shall award a contract with reasonable promptness to the responsible source whose bid conforms to the solicitation and is most advantageous to the Federal Government, considering only price and the other price-related factors included in the solicitation.

(c) NOTICE OF AWARD.—The award of a contract shall be made by transmitting, in writing or by electronic means, notice of the award to the successful bidder. Within 3 days after the date of contract award, the executive agency shall notify, in writing or by electronic means, each bidder not awarded the contract that the contract has been awarded.

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3770.)

HISTORICAL AND REVISION NOTES

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
3702(a) .....	41:253b(c) (1st sentence).	June 30, 1949, ch. 288, title III, §303B(c), as added Pub. L. 98-369, title VII, §2711(a)(2), July 18, 1984, 98 Stat. 1179; Pub. L. 103-355, title I, §§1061(c)(2), 1063(a), Oct. 13, 1994, 108 Stat. 3267, 3268.
3702(b) .....	41:253b(c) (2d sentence).	
3702(a) .....	41:253b(c) (3d, last sentences).	

**§ 3703. Competitive proposals**

(a) EVALUATION AND AWARD.—An executive agency shall evaluate competitive proposals in accordance with section 3701(a) of this title and may award a contract—

(1) after discussions with the offerors, provided that written or oral discussions have been conducted with all responsible offerors who submit proposals within the competitive range; or

(2) based on the proposals received and without discussions with the offerors (other than discussions conducted for the purpose of minor clarification), if, as required by section 3306(b)(2)(B)(i) of this title, the solicitation included a statement that proposals are intended to be evaluated, and award made, without discussions unless discussions are determined to be necessary.

(b) LIMIT ON NUMBER OF PROPOSALS.—If the contracting officer determines that the number of offerors that would otherwise be included in the competitive range under subsection (a)(1) exceeds the number at which an efficient competition can be conducted, the contracting officer

may limit the number of proposals in the competitive range, in accordance with the criteria specified in the solicitation, to the greatest number that will permit an efficient competition among the offerors rated most highly in accordance with those criteria.

(c) CRITERIA FOR AWARDING CONTRACT.—Except as otherwise provided in section 3701(b) of this title, the executive agency shall award a contract with reasonable promptness to the responsible source whose proposal is most advantageous to the Federal Government, considering only cost or price and the other factors included in the solicitation.

(d) NOTICE OF AWARD.—The executive agency shall award the contract by transmitting, in writing or by electronic means, notice of the award to that source and, within 3 days after the date of contract award, shall notify, in writing or by electronic means, all other offerors of the rejection of their proposals.

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3771.)

HISTORICAL AND REVISION NOTES

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
3703(a) .....	41:253b(d)(1).	June 30, 1949, ch. 288, title III, §303B(d), as added Pub. L. 98-369, title VII, §2711(a)(2), July 18, 1984, 98 Stat. 1180; Pub. L. 103-355, title I, §§1061(c)(3), 1063(b), Oct. 13, 1994, 108 Stat. 3267, 3268; Pub. L. 104-106, title XLI, §4103(b), Feb. 10, 1996, 110 Stat. 644.
3703(b) .....	41:253b(d)(2).	
3703(c) .....	41:253b(d)(3) (1st sentence).	
3703(d) .....	41:253b(d)(3) (last sentence).	

**§ 3704. Post-award debriefings**

(a) REQUEST FOR DEBRIEFING.—When a contract is awarded by the head of an executive agency on the basis of competitive proposals, an unsuccessful offeror, on written request received by the agency within 3 days after the date on which the unsuccessful offeror receives the notification of the contract award, shall be debriefed and furnished the basis for the selection decision and contract award.

(b) WHEN DEBRIEFING TO BE CONDUCTED.—The executive agency shall debrief the offeror within, to the maximum extent practicable, 5 days after receipt of the request by the executive agency.

(c) INFORMATION TO BE PROVIDED.—The debriefing shall include, at a minimum—

(1) the executive agency's evaluation of the significant weak or deficient factors in the offeror's offer;

(2) the overall evaluated cost and technical rating of the offer of the contractor awarded the contract and the overall evaluated cost and technical rating of the offer of the debriefed offeror;

(3) the overall ranking of all offers;

(4) a summary of the rationale for the award;

(5) in the case of a proposal that includes a commercial item that is an end item under the contract, the make and model of the item being provided in accordance with the offer of the contractor awarded the contract; and