

**§ 2305a. Design-build selection procedures**

(a) AUTHORIZATION.—Unless the traditional acquisition approach of design-bid-build established under chapter 11 of title 40 is used or another acquisition procedure authorized by law is used, the head of an 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 the contracting officer anticipates that three or more offers will be received for such contract, design work must be performed before an offeror can develop a price or cost proposal for such contract, the offeror will incur a substantial amount of expense in preparing the offer, and the contracting officer has considered information such as the following:

- (1) The extent to which the project requirements have been adequately defined.
- (2) The time constraints for delivery of the project.
- (3) The capability and experience of potential contractors.
- (4) The suitability of the project for use of the two-phase selection procedures.
- (5) The capability of the agency to manage the two-phase selection process.
- (6) Other criteria established by the agency.

(c) PROCEDURES DESCRIBED.—Two-phase selection procedures consist of the following:

(1) 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 Government's requirements (which may include criteria and preliminary design, budget parameters, and schedule or delivery requirements) to enable the offerors to submit proposals which meet the 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 chapter 11 of title 40.

(2) 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) 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) 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—

(A) the technical submission for the proposal, including design concepts or proposed solutions to requirements addressed within the scope of work (or both), and

(B) the evaluation factors and subfactors, including cost or price, that must be considered in the evaluations of proposals in accordance with paragraphs (2), (3), and (4) of section 2305(a) of this title.

The contracting officer separately evaluates the submissions described in subparagraphs (A) and (B).

(5) The agency awards the contract in accordance with section 2305(b)(4) 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). If the contract value exceeds \$4,000,000, the maximum number specified in the solicitation shall not exceed 5 unless—

(1) the solicitation is issued pursuant to an indefinite delivery-indefinite quantity contract for design-build construction; or

(2)(A) the head of the contracting activity, delegable to a level no lower than the senior contracting official within the contracting activity, approves the contracting officer's justification with respect to an individual solicitation that a maximum number greater than 5 is in the interest of the Federal Government; and

(B) the contracting officer provides written documentation of how a maximum number greater than 5 is consistent with the purposes and objectives of the two-phase selection procedures.

(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.

(f) SPECIAL AUTHORITY FOR MILITARY CONSTRUCTION PROJECTS.—(1) The Secretary of a

military department may use funds available to the Secretary under section 2807(a) or 18233(e) of this title to accelerate the design effort in connection with a military construction project for which the two-phase selection procedures described in subsection (c) are used to select the contractor for both the design and construction portion of the project before the project is specifically authorized by law and before funds are appropriated for the construction portion of the project. Notwithstanding the limitations contained in such sections, use of such funds for the design portion of a military construction project may continue despite the subsequent authorization of the project. The advance notice requirement of section 2807(b) of this title shall continue to apply whenever the estimated cost of the design portion of the project exceeds the amount specified in such section.

(2) Any military construction contract that provides for an accelerated design effort, as authorized by paragraph (1), shall include as a condition of the contract that the liability of the United States in a termination for convenience before funds are first made available for construction may not exceed an amount attributable to the final design of the project.

(3) For each fiscal year during which the authority provided by this subsection is in effect, the Secretary of a military department may select not more than two military construction projects to include the accelerated design effort authorized by paragraph (1) for each armed force under the jurisdiction of the Secretary. To be eligible for selection under this subsection, a request for the authorization of the project, and for the authorization of appropriations for the project, must have been included in the annual budget of the President for a fiscal year submitted to Congress under section 1105(a) of title 31.

(4) Not later than March 1, 2008, the Secretary of Defense shall submit to the congressional defense committees a report evaluating the usefulness of the authority provided by this subsection in expediting the design and construction of military construction projects. The authority provided by this subsection expires September 30, 2008, except that, if the report required by this paragraph is not submitted by March 1, 2008, the authority shall expire on that date.

(Added Pub. L. 104-106, div. D, title XLI, §4105(a)(1), Feb. 10, 1996, 110 Stat. 645; amended Pub. L. 105-85, div. A, title X, §1073(a)(44), Nov. 18, 1997, 111 Stat. 1902; Pub. L. 107-217, §3(b)(4), Aug. 21, 2002, 116 Stat. 1295; Pub. L. 108-178, §4(b)(3), Dec. 15, 2003, 117 Stat. 2641; Pub. L. 108-375, div. B, title XXVIII, §2807, Oct. 28, 2004, 118 Stat. 2123; Pub. L. 109-163, div. B, title XXVIII, §2807, Jan. 6, 2006, 119 Stat. 3508; Pub. L. 113-291, div. A, title VIII, §814, Dec. 19, 2014, 128 Stat. 3430; Pub. L. 115-91, div. A, title VIII, §823, Dec. 12, 2017, 131 Stat. 1465; Pub. L. 116-92, div. A, title XVII, §1731(a)(38), Dec. 20, 2019, 133 Stat. 1814.)

#### PRIOR PROVISIONS

A prior section 2305a was renumbered section 2438 of this title.

#### AMENDMENTS

2019—Subsec. (d)(1). Pub. L. 116-92 substituted “an indefinite” for “a indefinite”.

2017—Subsec. (d). Pub. L. 115-91 substituted “If the contract value exceeds \$4,000,000, the maximum number specified in the solicitation shall not exceed 5 unless—” and pars. (1) and (2) for “If the contract value exceeds \$4,000,000, the maximum number specified in the solicitation shall not exceed 5 unless the head of the contracting activity, delegable to a level no lower than the senior contracting official within the contracting activity, approves the contracting officer’s justification with respect to an individual solicitation that a number greater than 5 is in the Federal Government’s interest. The contracting officer shall provide written documentation of how a maximum number exceeding 5 is consistent with the purposes and objectives of the two-phase selection procedures.”

2014—Subsec. (d). Pub. L. 113-291 substituted “If the contract value exceeds \$4,000,000, the maximum number specified in the solicitation shall not exceed 5 unless the head of the contracting activity, delegable to a level no lower than the senior contracting official within the contracting activity, approves the contracting officer’s justification with respect to an individual solicitation that a number greater than 5 is in the Federal Government’s interest. The contracting officer shall provide written documentation of how a maximum number exceeding 5 is consistent with the purposes and objectives of the two-phase selection procedures.” for “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 Government’s interest and is consistent with the purposes and objectives of the two-phase selection process.”

2006—Subsec. (f)(2). Pub. L. 109-163, §2807(a), amended par. (2) generally. Prior to amendment, par. (2) read as follows: “Any military construction contract that provides for an accelerated design effort, as authorized by paragraph (1), shall include as a condition of the contract that the liability of the United States in a termination for convenience may not exceed the actual costs incurred as of the termination date.”

Subsec. (f)(4). Pub. L. 109-163, §2807(b), substituted “2008” for “2007” wherever appearing.

2004—Subsec. (f). Pub. L. 108-375 added subsec. (f).

2003—Subsec. (c)(1). Pub. L. 108-178 substituted “chapter 11 of title 40” for “the Brooks Architect-Engineers Act (40 U.S.C. 541 et seq.)”.

2002—Subsec. (a). Pub. L. 107-217 substituted “chapter 11 of title 40” for “the Brooks Architect-Engineers Act (40 U.S.C. 541 et seq.)”.

1997—Subsec. (a). Pub. L. 105-85 substituted “(40 U.S.C.” for “(41 U.S.C.”.

#### EFFECTIVE DATE OF 2003 AMENDMENT

Amendment by Pub. L. 108-178 effective Aug. 21, 2002, see section 5 of Pub. L. 108-178, set out as a note under section 5334 of Title 5, Government Organization and Employees.

#### EFFECTIVE DATE

For effective date and applicability of section, see section 4401 of Pub. L. 104-106, set out as an Effective Date of 1996 Amendment note under section 2302 of this title.

#### § 2306. Kinds of contracts

(a) The cost-plus-a-percentage-of-cost system of contracting may not be used. Subject to the limitation in the preceding sentence, the other provisions of this section, and other applicable provisions of law, the head of an agency, in awarding contracts under this chapter after using procedures other than sealed-bid procedures, may enter into any kind of contract that he considers will promote the best interests of the United States.

(b) Each contract awarded under this chapter after using procedures other than sealed-bid pro-