

Commerce and Trade, see section 2723(c) of Pub. L. 98-369, set out as a note under section 2304 of this title.

### § 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 con-

struction 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.)

#### TRANSFER OF SECTION

*Pub. L. 116-283, div. A, title XVIII, §§1801(d), 1813(b), Jan. 1, 2021, 134 Stat. 4151, 4177, provided that, effective Jan. 1, 2022, with additional provisions for delayed implementation and applicability of existing law, this section is transferred to chapter 223 of this title, as added by section 1813(a) of Pub. L. 116-283, inserted after the table of sections at the beginning, and redesignated as section 3241 of this title. See Effective Date of 2021 Amendment note below.*

*vided that, effective Jan. 1, 2022, with additional provisions for delayed implementation and applicability of existing law, this section is transferred to chapter 223 of this title, as added by section 1813(a) of Pub. L. 116-283, inserted after the table of sections at the beginning, and redesignated as section 3241 of this title. See Effective Date of 2021 Amendment note below.*

#### 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 2021 AMENDMENT

Amendment by Pub. L. 116-283 effective Jan. 1, 2022, with additional provisions for delayed implementation and applicability of existing law, see section 1801(d) of Pub. L. 116-283, set out as a note preceding section 3001 of this title.

#### 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 procedures shall contain a warranty, determined to be suitable by the head of the agency, that the contractor has employed or retained no person or selling agency to solicit or obtain the contract under an understanding or agreement for a commission, percentage, brokerage, or contingent fee, except a bona fide employee or established commercial or selling agency maintained by him to obtain business. If a contractor breaks such a warranty the United States may annul the contract without liability or may deduct the commission, percentage, brokerage, or contingent fee from the contract price or consideration. This subsection does not apply to a contract that is for an amount not greater than the simplified acquisition threshold or to a contract for the acquisition of commercial products or commercial services.

(c) A contract entered into by the United States in connection with a military construction project or a military family housing project may not use any form of cost-plus contracting. This prohibition is in addition to the prohibition specified in subsection (a) on the use of the cost-plus-a-percentage-of-cost system of contracting and applies notwithstanding a declaration of war or the declaration by the President of a national emergency under section 201 of the National Emergencies Act (50 U.S.C. 1621) that includes the use of the armed forces.

(d) The fee for performing a cost-plus-a-fixed-fee contract for experimental, developmental, or research work may not be more than 15 percent of the estimated cost of the contract, not including the fee. The fee for performing a cost-plus-a-fixed-fee contract for architectural or engineering services for a public work or utility plus the cost of those services to the contractor may not be more than 6 percent of the estimated cost of that work or project, not including fees. The fee for performing any other cost-plus-a-fixed-fee contract may not be more than 10 percent of the estimated cost of the contract, not including the fee. Determinations under this subsection of the estimated costs of a contract or project shall be made by the head of the agency at the time the contract is made.

(e)(1) Except as provided in paragraph (2), each cost contract and each cost-plus-a-fixed-fee con-

tract shall provide for notice to the agency by the contractor before the making, under the prime contract, of—

(A) a cost-plus-a-fixed-fee subcontract; or

(B) a fixed-price subcontract or purchase order involving more than the greater of (i) the simplified acquisition threshold, or (ii) 5 percent of the estimated cost of the prime contract.

(2) Paragraph (1) shall not apply to a prime contract with a contractor that maintains a purchasing system approved by the contracting officer for the contract.

(f) So-called “truth-in-negotiations” provisions relating to cost or pricing data to be submitted by certain contractors and subcontractors are provided in section 2306a of this title.

(g) Multiyear contracting authority for the acquisition of services is provided in section 2306c of this title.

(h) Multiyear contracting authority for the purchase of property is provided in section 2306b of this title.

(Aug. 10, 1956, ch. 1041, 70A Stat. 130; Pub. L. 87-653, §1(d), (e), Sept. 10, 1962, 76 Stat. 528; Pub. L. 90-378, §1, July 5, 1968, 82 Stat. 289; Pub. L. 90-512, Sept. 25, 1968, 82 Stat. 863; Pub. L. 96-513, title V, §511(77), Dec. 12, 1980, 94 Stat. 2926; Pub. L. 97-86, title IX, §§907(b), 909(b), Dec. 1, 1981, 95 Stat. 1117, 1118; Pub. L. 98-369, div. B, title VII, §2724, July 18, 1984, 98 Stat. 1192; Pub. L. 99-145, title XIII, §1303(a)(15), Nov. 8, 1985, 99 Stat. 739; Pub. L. 99-500, §101(c) [title X, §952(b)(1), (c)(1)], Oct. 18, 1986, 100 Stat. 1783-82, 1783-169, and Pub. L. 99-591, §101(c) [title X, §952(b)(1), (c)(1)], Oct. 30, 1986, 100 Stat. 3341-82, 3341-169; Pub. L. 99-661, div. A, title IX, formerly title IV, §952(b)(1), (c)(1), Nov. 14, 1986, 100 Stat. 3949, renumbered title IX, Pub. L. 100-26, §3(5), Apr. 21, 1987, 101 Stat. 273; Pub. L. 101-189, div. A, title VIII, §805(a), Nov. 29, 1989, 103 Stat. 1488; Pub. L. 101-510, div. A, title VIII, §808, Nov. 5, 1990, 104 Stat. 1593; Pub. L. 102-25, title VII, §701(d)(3), Apr. 6, 1991, 105 Stat. 114; Pub. L. 103-355, title I, §§1021, 1022(b), title IV, §§4102(b), 4401(c), title VIII, §8105(a), Oct. 13, 1994, 108 Stat. 3257, 3260, 3340, 3348, 3392; Pub. L. 105-85, div. A, title X, §1073(a)(45), Nov. 18, 1997, 111 Stat. 1902; Pub. L. 106-398, §1 [[div. A], title VIII, §802(b)], Oct. 30, 2000, 114 Stat. 1654, 1654A-205; Pub. L. 108-136, div. A, title VIII, §842, Nov. 24, 2003, 117 Stat. 1552; Pub. L. 112-81, div. B, title XXVIII, §2801(a), Dec. 31, 2011, 125 Stat. 1684; Pub. L. 115-232, div. A, title VIII, §836(c)(4), Aug. 13, 2018, 132 Stat. 1865; Pub. L. 116-283, div. A, title XVIII, §1817(b), (c), (e), (g)(1), Jan. 1, 2021, 134 Stat. 4186, 4187.)

#### AMENDMENT OF SECTION

*Pub. L. 116-283, div. A, title XVIII, §§1801(d), 1817(b), (c), (e), (g)(1), Jan. 1, 2021, 134 Stat. 4151, 4186, 4187, provided that, effective Jan. 1, 2022, with additional provisions for delayed implementation and applicability of existing law, this section is amended as follows:*

*(1) by transferring subsection (a) to sections 3321(a) and 3322(a) of this title;*

*(2) by transferring subsection (b) to section 3321(b) of this title;*

*(3) by transferring subsection (c) to section 3323 of this title; and*