

2011, 124 Stat. 3843; Pub. L. 112-239, div. A, title X, § 1076(f)(24), Jan. 2, 2013, 126 Stat. 1953; Pub. L. 115-232, div. A, title VIII, § 811(d), Aug. 13, 2018, 132 Stat. 1845.)

TRANSFER OF SECTION

Pub. L. 116-283, div. A, title XVIII, §§ 1801(d), 1813(f), Jan. 1, 2021, 134 Stat. 4151, 4181, 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 of Pub. L. 116-283, inserted after section 3247, and redesignated as section 3249 of this title. See Effective Date of 2021 Amendment note below.

AMENDMENTS

2018—Pub. L. 115-232 substituted “Each advocate for competition designated pursuant to section 1705(a) of title 41 for” for “(b) Each advocate for competition of” and “in a position classified above GS-15 pursuant to section 5108 of title 5” for “a grade GS-16 or above under the General Schedule (or in a comparable or higher position under another schedule)” and struck out subsec. (a) which related to designation of an officer or employee of the Defense Logistics Agency to serve as the advocate for competition of the agency.

2013—Subsec. (a)(2). Pub. L. 112-239 substituted “subsections (b) and (c) of section 1705” for “section 1705(b) and (c)”.

2011—Subsec. (a)(1). Pub. L. 111-350, § 5(b)(17)(A), substituted “section 1705(a) of title 41” for “section 20(a) of the Office of Federal Procurement Policy Act (41 U.S.C. 418(a))”.

Subsec. (a)(2). Pub. L. 111-350, § 5(b)(17)(B), substituted “section 1705(b) and (c) of title 41” for “sections 20(b) and 20(c) of the Office of Federal Procurement Policy Act (41 U.S.C. 418(b), (c))”.

1994—Subsec. (c). Pub. L. 103-355 struck out subsec. (c) which read as follows: “Each advocate for competition of an agency of the Department of Defense shall transmit to the Secretary of Defense a report describing his activities during the preceding year. The report of each advocate for competition shall be included in the annual report of the Secretary of Defense required by section 23 of the Office of Federal Procurement Policy Act (41 U.S.C. 419), in the form in which it was submitted to the Secretary.”

1991—Subsec. (c). Pub. L. 102-25 substituted “section 23” for “section 21”.

1987—Subsec. (a)(1). Pub. L. 100-26, § 7(d)(4)(A), inserted “(41 U.S.C. 418(a))” after “Policy Act”.

Subsec. (a)(2). Pub. L. 100-26, § 7(d)(4)(B), inserted “(41 U.S.C. 418(b), (c))” after “Policy Act”.

Subsec. (c). Pub. L. 100-26, § 7(d)(4)(C), inserted “(41 U.S.C. 419)” after “Policy Act”.

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

Pub. L. 98-525, title XII, § 1216(c)(1), Oct. 19, 1984, 98 Stat. 2599, provided that: “Section 2318 of title 10, United States Code (as added by subsection (a)), shall take effect on April 1, 1985.”

§ 2319. Encouragement of new competitors

(a) 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) Except as provided in subsection (c), the head of the agency shall, before establishing a qualification requirement—

(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 upon request all requirements which a prospective offeror, or its product, must satisfy in order to become qualified, such 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 costs of testing and evaluation likely to be incurred by a potential offeror in order to become qualified;

(4) ensure that a potential offeror is provided, upon request and on a reimbursable basis, a prompt opportunity to demonstrate its ability to meet the standards specified for qualification using qualified personnel and facilities of the agency concerned or of another agency obtained through interagency agreement, or under contract, or 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 clause (4), provide to the extent possible that such services be provided by a contractor who is not expected to benefit from an absence of additional qualified sources and who shall be required in such 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 as to whether qualification is attained and, in the event qualification is not attained, is promptly furnished specific information why qualification was not attained.

(c)(1) Subsection (b) of this section does not apply with respect to a qualification requirement established by statute or administrative action before October 19, 1984, unless such requirement is a qualified products list.

(2)(A) Except as provided in subparagraph (B), if it is unreasonable to specify the standards for qualification which 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. After considering any comments of the advocate for competition reviewing such determination, the head of the purchasing office may waive the requirements of clauses (2) through (6) of subsection (b) for up to two years with respect to the item subject to the qualification requirement.

(B) The waiver authority provided in this paragraph does not apply with respect to a qualified products list.

(3) A potential offeror may not be denied the opportunity to submit and have considered an offer for a contract solely because the potential

offeror (A) is not on a qualified bidders list, qualified manufacturers list, or qualified products list, or (B) has not been identified as meeting a qualification requirement established after October 19, 1984, if the potential offeror can demonstrate to the satisfaction of the contracting officer (or, in the case of a contract for the procurement of an aviation critical safety item or ship critical safety item, the head of the design control activity for such item) that the potential offeror or its product meets the standards established for qualification or can meet such standards before the date specified for award of the contract.

(4) Nothing contained in this subsection requires 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 such requirement.

(5) The head of an agency need not delay a proposed procurement in order to comply with subsection (b) or in order to provide a potential offeror with an opportunity to demonstrate its ability to meet the standards specified for qualification.

(6) The requirements of subsection (b) also apply before enforcement of any qualified products list, qualified manufacturers list, or qualified bidders list.

(d)(1) If the number of qualified sources or qualified products available to compete actively for an anticipated future requirement is fewer than two actual manufacturers or the products of two actual manufacturers, respectively, the head of the agency concerned shall—

(A) periodically publish notice in the Commerce Business Daily soliciting additional sources or products to seek qualification, unless the contracting officer determines that such publication would compromise national security; and

(B) bear the cost of conducting the specified testing and evaluation (excluding the costs 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 which has met the standards specified for qualification and which could reasonably be expected to compete for a contract for that requirement, but such costs may be borne only if the head of the agency determines that such additional qualified sources or products are likely to result in cost savings from increased competition for future requirements sufficient to amortize the costs incurred by the agency within a reasonable period of time considering the duration and dollar value of anticipated future requirements.

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

(e) Within seven years after the establishment of a qualification requirement under subsection

(b) or within seven years following an agency's enforcement of a qualified products list, qualified manufacturers list, or qualified bidders list, any such qualification requirement shall be examined and revalidated in accordance with the requirements of subsection (b). The preceding sentence does not apply in the case of a qualification requirement for which a waiver is in effect under subsection (c)(2).

(f) Except in an emergency as determined by the head of the agency, whenever the head of the agency determines not to enforce a qualification requirement for a solicitation, the agency may not thereafter enforce that qualification requirement unless the agency complies with the requirements of subsection (b).

(g) DEFINITIONS.—In this section:

(1) The term “aviation critical safety item” means a part, an assembly, installation equipment, launch equipment, recovery equipment, or support equipment for an aircraft or aviation weapon system if the part, assembly, or equipment contains a characteristic any failure, malfunction, or absence of which could cause a catastrophic or critical failure resulting in the loss of or serious damage to the aircraft or weapon system, an unacceptable risk of personal injury or loss of life, or an uncommanded engine shutdown that jeopardizes safety.

(2) The term “ship critical safety item” means any ship part, assembly, or support equipment containing a characteristic the failure, malfunction, or absence of which could cause a catastrophic or critical failure resulting in loss of or serious damage to the ship or unacceptable risk of personal injury or loss of life.

(3) The term “design control activity”, with respect to an aviation critical safety item or ship critical safety item, means the systems command of a military department that is specifically responsible for ensuring the airworthiness of an aviation system or equipment, or the seaworthiness of a ship or ship equipment, in which such item is to be used.

(Added Pub. L. 98-525, title XII, §1216(a), Oct. 19, 1984, 98 Stat. 2593; amended Pub. L. 100-26, §7(d)(5), (i)(4), (k)(3), Apr. 21, 1987, 101 Stat. 281, 282, 284; Pub. L. 108-136, div. A, title VIII, §802(d), Nov. 24, 2003, 117 Stat. 1541; Pub. L. 109-364, div. A, title I, §130(d), Oct. 17, 2006, 120 Stat. 2110.)

TRANSFER OF SECTION

Pub. L. 116-283, div. A, title XVIII, §§1801(d), 1813(d), Jan. 1, 2021, 134 Stat. 4151, 4179, 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, inserted after section 3242, and redesignated as section 3243 of this title. See Effective Date of 2021 Amendment note below.

AMENDMENTS

2006—Subsec. (c)(3). Pub. L. 109-364, §130(d)(1), inserted “or ship critical safety item” after “aviation critical safety item”.

Subsec. (g)(2), (3). Pub. L. 109-364, §130(d)(2), added par. (2), redesignated former par. (2) as (3), inserted “or ship critical safety item” after “aviation critical safe-

ty item” and “, or the seaworthiness of a ship or ship equipment,” after “or equipment”, and substituted “such item” for “the item”.

2003—Subsec. (c)(3). Pub. L. 108-136, §802(d)(1), inserted “(or, in the case of a contract for the procurement of an aviation critical safety item, the head of the design control activity for such item)” after “the contracting officer”.

Subsec. (g). Pub. L. 108-136, §802(d)(2), added subsec. (g).

1987—Subsec. (a). Pub. L. 100-26, §7(k)(3), inserted “the term” after “In this section,”.

Subsec. (c)(1), (3). Pub. L. 100-26, §7(i)(4), substituted “October 19, 1984,” for “the date of the enactment of the Defense Procurement Reform Act of 1984”.

Subsec. (c)(4). Pub. L. 100-26, §7(d)(5)(A), inserted “(15 U.S.C. 637(b)(7))” after “Small Business Act”.

Subsec. (d)(2). Pub. L. 100-26, §7(d)(5)(B), inserted “(15 U.S.C. 632)” after “Small Business Act”.

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

Pub. L. 98-525, title XII, §1216(c)(2), Oct. 19, 1984, 98 Stat. 2599, provided that: “Sections 2319, 2320, and 2321 of title 10, United States Code (as added by subsection (a)), shall apply with respect to solicitations issued after the end of the one-year period beginning on the date of the enactment of this Act [Oct. 19, 1984].”

§ 2320. Rights in technical data

(a)(1) The Secretary of Defense shall prescribe regulations to define the legitimate interest of the United States and of a contractor or subcontractor in technical data pertaining to an item or process. Such regulations shall be included in regulations of the Department of Defense prescribed as part of the Federal Acquisition Regulation. Such regulations may not impair any right of the United States or of any contractor or subcontractor with respect to patents or copyrights or any other right in technical data otherwise established by law. Such regulations also may not impair the right of a contractor or subcontractor to receive from a third party a fee or royalty for the use of technical data pertaining to an item or process developed exclusively at private expense by the contractor or subcontractor, except as otherwise specifically provided by law.

(2) Such regulations shall include the following provisions:

(A) DEVELOPMENT EXCLUSIVELY WITH FEDERAL FUNDS.—In the case of an item or process that is developed by a contractor or subcontractor exclusively with Federal funds (other than an item or process developed under a contract or subcontract to which regulations under section 9(j)(2) of the Small Business Act (15 U.S.C. 638(j)(2)) apply), the United States shall have the unlimited right to—

(i) use technical data pertaining to the item or process; or

(ii) release or disclose the technical data to persons outside the government or permit the use of the technical data by such persons.

(B) DEVELOPMENT EXCLUSIVELY AT PRIVATE EXPENSE.—Except as provided in subpara-

graphs (C), (D), and (G), in the case of an item or process that is developed by a contractor or subcontractor exclusively at private expense, the contractor or subcontractor may restrict the right of the United States to release or disclose technical data pertaining to the item or process to persons outside the government or permit the use of the technical data by such persons.

(C) EXCEPTION TO SUBPARAGRAPH (B).—Subparagraph (B) does not apply to technical data that—

(i) constitutes a correction or change to data furnished by the United States;

(ii) relates to form, fit, or function;

(iii) is necessary for operation, maintenance, installation, or training (other than detailed manufacturing or process data, including such data pertaining to a major system component); or

(iv) is otherwise publicly available or has been released or disclosed by the contractor or subcontractor without restriction on further release or disclosure.

(D) EXCEPTION TO SUBPARAGRAPH (B).—Notwithstanding subparagraph (B), the United States may release or disclose technical data to persons outside the Government, or permit the use of technical data by such persons, if—

(i) such release, disclosure, or use—

(I) is necessary for emergency repair and overhaul;

(II) is a release, disclosure, or use of technical data pertaining to an interface between an item or process and other items or processes necessary for the segregation of an item or process from, or the reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes; or

(III) is a release or disclosure of technical data (other than detailed manufacturing or process data) to, or use of such data by, a foreign government that is in the interest of the United States and is required for evaluational or informational purposes;

(ii) such release, disclosure, or use is made subject to a prohibition that the person to whom the data is released or disclosed may not further release, disclose, or use such data; and

(iii) the contractor or subcontractor asserting the restriction is notified of such release, disclosure, or use.

(E) DEVELOPMENT WITH MIXED FUNDING.—Except as provided in subparagraphs (F) and (G), in the case of an item or process that is developed in part with Federal funds and in part at private expense, the respective rights of the United States and of the contractor or subcontractor in technical data pertaining to such item or process shall be established as early in the acquisition process as practicable (preferably during contract negotiations) and shall be based on negotiations between the United States and the contractor, except in any case in which the Secretary of Defense determines, on the basis of criteria established in the regu-