

Date of 2021 Amendment note preceding section 3001 of this title.

**CHAPTER 223—OTHER PROVISIONS RELATING TO PLANNING AND SOLICITATION GENERALLY**

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**PRIOR PROVISIONS**

A prior chapter 223 “PLANNING AND SOLICITATION RELATING TO PARTICULAR ITEMS OR SERVICES”, as added by Pub. L. 115-232, div. A, title VIII, § 801(a), Aug. 13, 2018, 132 Stat. 1827, and consisting of reserved section 3251, was repealed by Pub. L. 116-283, div. A, title XVIII, § 1811(b), Jan. 1, 2021, 134 Stat. 4164.

**§ 3241. 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—

- (1) the contracting officer anticipates that three or more offers will be received for such contract;
- (2) design work must be performed before an offeror can develop a price or cost proposal for such contract;
- (3) the offeror will incur a substantial amount of expense in preparing the offer; and
- (4) the contracting officer has considered information such as the following:
  - (A) The extent to which the project requirements have been adequately defined.
  - (B) The time constraints for delivery of the project.
  - (C) The capability and experience of potential contractors.
  - (D) The suitability of the project for use of the two-phase selection procedures.
  - (E) The capability of the agency to manage the two-phase selection process.
  - (F) Other criteria established by the agency.

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

<sup>1</sup> So in original. There is no section 3248.

(1) **DEVELOPMENT OF SCOPE OF WORK STATEMENT.**—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) **SOLICITATION OF PHASE-ONE PROPOSALS.**—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) **EVALUATION FACTORS.**—

(A) **EVALUATION FACTORS TO BE USED.**—The evaluation factors to be used in evaluating phase-one proposals are stated in the solicitation and include—

- (i) specialized experience and technical competence;
- (ii) capability to perform;
- (iii) past performance of the offeror’s team (including the architect-engineer and construction members of the team); and
- (iv) other appropriate factors, except that cost-related or price-related evaluation factors are not permitted.

(B) **RELATIVE IMPORTANCE OF EVALUATION FACTORS AND SUBFACTORS.**—Each solicitation establishes the relative importance assigned to the evaluation factors and subfactors that must be considered in the evaluation of phase-one proposals.

(C) **EVALUATION OF PROPOSALS.**—The agency evaluates phase-one proposals on the basis of the phase-one evaluation factors set forth in the solicitation.

(4) **SELECTION BY CONTRACTING OFFICER.**—

(A) **NUMBER OF OFFERORS SELECTED AND WHAT IS TO BE EVALUATED.**—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—

- (i) the technical submission for the proposal, including design concepts or proposed solutions to requirements addressed within the scope of work (or both), and
- (ii) the evaluation factors and subfactors, including cost or price, that must be considered in the evaluations of proposals in accordance with subsections (b), (c), and (d) of section 3206 of this title.

(B) The contracting officer separately evaluates the submissions described in clauses (i) and (ii) of subparagraph (A).

(5) AWARDING OF CONTRACT.—The agency awards the contract in accordance with section 3303 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, §2305a; 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; renumbered §3241 and amended Pub. L. 116-283, div. A, title XVIII, §1813(b), Jan. 1, 2021, 134 Stat. 4177.)

#### AMENDMENTS

2021—Pub. L. 116-283, §1813(b), renumbered section 2305a of this title as this section.

Subsec. (b). Pub. L. 116-283, §1813(b)(1), inserted dash after “or work when”, reorganized remainder of former introductory provisions of subsec. (b) into designated pars. (1) to (4), and redesignated former pars. (1) to (6) as subpars. (A) to (F), respectively, of par. (4) and realigned margins.

Subsec. (c)(1), (2). Pub. L. 116-283, §1813(b)(2)(A), (B), inserted headings.

Subsec. (c)(3). Pub. L. 116-283, §1813(b)(2)(C)(i), (ii), inserted par. heading, designated first, second, and third sentences of existing provisions as subpars. (A), (B), and (C), respectively, and inserted subpar. headings.

Subsec. (c)(3)(A). Pub. L. 116-283, §1813(b)(2)(C)(iii), inserted dash after “and include—” and reorganized remainder of subpar. (A) into designated cls. (i) to (iv).

Subsec. (c)(4). Pub. L. 116-283, §1813(b)(2)(D)(i), (ii), (iv), inserted par. heading, designated first sentence as subpar. (A), inserted subpar. heading, and redesignated former subpars. (A) and (B) as cls. (i) and (ii), respectively, and designated concluding provisions as subpar. (B) and realigned margin.

Subsec. (c)(4)(A)(ii). Pub. L. 116-283, §1813(b)(2)(D)(iii), substituted “subsections (b), (c), and (d) of section 3206” for “paragraphs (2), (3), and (4) of section 2305(a)”.

Subsec. (c)(4)(B). Pub. L. 116-283, §1813(b)(2)(D)(v), substituted “clauses (i) and (ii) of subparagraph (A)” for “subparagraphs (A) and (B)”.

Subsec. (c)(5). Pub. L. 116-283, §1813(b)(2)(E), inserted heading and substituted “section 3303” for “section 2305(b)(4)”.

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.

**§ 3242. Supplies: economic order quantities**

(a) QUANTITY TO PROCURE.—

(1) An agency referred to in section 3063 of this title shall procure supplies in such quantity as—

(A) will result in the total cost and unit cost most advantageous to the United States, where practicable; and

(B) does not exceed the quantity reasonably expected to be required by the agency.

(2) The Secretary of Defense shall take paragraph (1) into account in approving rates of obligation of appropriations under section 2204 of this title.

(b) OPINION OF OFFEROR WITH RESPECT TO QUANTITY TO BE PROCURED.—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 the supplies proposed to be procured is economically advantageous to the United States and, if applicable, to recommend a quantity or quantities which would be more economically advantageous to the United States. Each such recommendation shall include a quotation of the total price and the unit price for supplies procured in each recommended quantity.

(Added Pub. L. 98-525, title XII, §1233(a), Oct. 19, 1984, 98 Stat. 2600, §2384a; renumbered §3242 and amended Pub. L. 116-283, div. A, title XVIII, §1813(c), Jan. 1, 2021, 134 Stat. 4179.)

AMENDMENTS

2021—Pub. L. 116-283, §1813(c), renumbered section 2384a of this title as this section.

Subsec. (a). Pub. L. 116-283, §1813(c)(1), inserted heading, in par. (1), substituted “section 3063” for “section 2303(a)” and reformatted subpars. (A) and (B) to add line breaks before each subpar. designation, and, in par. (2), realigned margin.

Subsec. (b). Pub. L. 116-283, §1813(c)(2), inserted heading.

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.

**§ 3243. Encouragement of new competitors: qualification requirement**

(a) QUALIFICATION REQUIREMENT DEFINED.—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 ESTABLISHING QUALIFICATION REQUIREMENT.—Except as provided in sub-

section (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 paragraph (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) APPLICABILITY, WAIVER AUTHORITY, AND REFERRAL OF OFFERS.—

(1) APPLICABILITY.—Subsection (b) 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) WAIVER AUTHORITY.—

(A) SUBMISSION OF DETERMINATION OF UNREASONABLENESS.—Except as provided in subparagraph (C), 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.

(B) AUTHORITY TO GRANT WAIVER.—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.