

phones, and Radiotelegraphs. For complete classification of this Act to the Code, see section 609 of Title 47 and Tables.

CHANGE OF NAME

In par. (7), "United States Postal Service" substituted for "Post Office Department" pursuant to Pub. L. 91-375, §§4(a), 6(o), Aug. 12, 1970, 84 Stat. 773, 783, which are set out as notes preceding section 101 of Title 39, Postal Service, and under section 201 of Title 39, respectively, which abolished Post Office Department, transferred its functions to United States Postal Service, and provided that references in other laws to Post Office Department shall be considered a reference to United States Postal Service.

§ 357. Definitions

For the purposes of this chapter—

(a) "Secretary" means Secretary of Labor.

(b) The term "service employee" means any person engaged in the performance of a contract entered into by the United States and not exempted under section 356 of this title, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States (other than any person employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in part 541 of title 29, Code of Federal Regulations, as of July 30, 1976, and any subsequent revision of those regulations); and shall include all such persons regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons.

(c) The term "compensation" means any of the payments or fringe benefits described in section 351 of this title.

(d) The term "United States" when used in a geographical sense shall include any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf lands as defined in the Outer Continental Shelf Lands Act, American Samoa, Guam, Wake Island, Eniwetok Atoll, Kwajalein Atoll, Johnston Island, and Canton Island, but shall not include any other territory under the jurisdiction of the United States or any United States base or possession within a foreign country.

(Pub. L. 89-286, §8, Oct. 22, 1965, 79 Stat. 1036; Pub. L. 93-57, §1, July 6, 1973, 87 Stat. 140; Pub. L. 94-489, §3, Oct. 13, 1976, 90 Stat. 2358.)

REFERENCES IN TEXT

The Outer Continental Shelf Lands Act, referred to in subsec. (d), is act Aug. 7, 1953, ch. 345, 67 Stat. 462, as amended, which is classified generally to subchapter III (§1331 et seq.) of chapter 29 of Title 43, Public Lands. For complete classification of this Act to the Code, see Short Title note set out under section 1331 of Title 43 and Tables.

AMENDMENTS

1976—Subsec. (b). Pub. L. 94-489 substituted provision defining service employees to include all employees, but excluding bona fide executive, administrative, and professional employees, for provision defining service employees as guards, watchmen, any person engaged in a recognized trade or craft, or in unskilled, semiskilled, or skilled manual labor occupations; and any other employee including a foreman or supervisor in a position having trade, craft, or laboring experience as the paramount requirement.

1973—Subsec. (d). Pub. L. 93-57 defined "United States" to include Canton Island.

EFFECTIVE DATE OF 1973 AMENDMENT

Section 2 of Pub. L. 93-57 provided that: "The amendment made hereby [amending this section] shall be effective with respect to all contracts entered into at any time after the date of enactment [July 6, 1973]."

§ 358. Wage and fringe benefit determinations of Secretary

It is the intent of the Congress that determinations of minimum monetary wages and fringe benefits for the various classes of service employees under the provisions of paragraphs (1) and (2) of section 351¹ of this title should be made with respect to all contracts subject to this chapter, as soon as it is administratively feasible to do so. In any event, the Secretary shall make such determinations with respect to at least the following contracts subject to this chapter which are entered into during the applicable fiscal year:

(1) For the fiscal year ending June 30, 1973, all contracts under which more than twenty-five service employees are to be employed.

(2) For the fiscal year ending June 30, 1974, all contracts, under which more than twenty service employees are to be employed.

(3) For the fiscal year ending June 30, 1975, all contracts under which more than fifteen service employees are to be employed.

(4) For the fiscal year ending June 30, 1976, all contracts under which more than ten service employees are to be employed.

(5) On or after July 1, 1976, all contracts under which more than five service employees are to be employed.

(Pub. L. 89-286, §10, as added Pub. L. 92-473, §5, Oct. 9, 1972, 86 Stat. 790; amended Pub. L. 94-273, §29, Apr. 21, 1976, 90 Stat. 380.)

AMENDMENTS

1976—Par. (5). Pub. L. 94-273 substituted "On or after July 1, 1976" for "For the fiscal year ending June 30, 1977, and for each fiscal year thereafter".

CHAPTER 7—OFFICE OF FEDERAL PROCUREMENT POLICY

Sec.	
401, 402.	Repealed.
403.	Definitions.
404.	Establishment of Office of Federal Procurement Policy; appointment of Administrator.
405.	Authority and functions of the Administrator.
405a.	Uniform Federal procurement regulations and procedures.
405b.	Conflict of interest standards for individuals providing consulting services.
405c.	Ethics safeguards related to contractor conflicts of interest.
406.	Administrative powers.
407.	Repealed.
408.	Applicability of existing laws.
409.	Repealed.
410.	Authorization of appropriations.
411.	Delegation of authority by Administrator.
412.	Comptroller General's access to information from Administrator; rule making procedure.

¹ So in original. Probably should be section "351(a)".

Sec.	
413.	Tests of innovative procurement methods and procedures.
414.	Chief Acquisition Officers and senior procurement executives.
414a.	Personnel evaluation.
414b.	Chief Acquisition Officers Council.
415.	Repealed.
416.	Procurement notice.
417.	Record requirements.
417a.	Procurement data.
417b.	Database for Federal agency contract and grant officers and suspension and debarment officials.
418.	Advocates for competition.
418a.	Rights in technical data.
418b.	Publication of proposed regulations.
419.	Contracting functions performed by Federal personnel.
420.	Repealed.
421.	Federal Acquisition Regulatory Council.
422.	Cost Accounting Standards Board.
423.	Restrictions on disclosing and obtaining contractor bid or proposal information or source selection information.
424.	Repealed.
425.	Contract clauses and certifications.
426.	Use of electronic commerce in Federal procurement.
426a.	Repealed.
427.	Simplified acquisition procedures.
428.	Procedures applicable to purchases below micro-purchase threshold.
428a.	Special emergency procurement authority.
429.	List of laws inapplicable to contracts not greater than simplified acquisition threshold in Federal Acquisition Regulation.
430.	List of laws inapplicable to procurements of commercial items in Federal Acquisition Regulation.
431.	Commercially available off-the-shelf item acquisitions: lists of inapplicable laws in Federal Acquisition Regulation.
431a.	Inflation adjustment of acquisition-related dollar thresholds.
432.	Value engineering.
433.	Acquisition workforce.
433a.	Federal acquisition workforce improvements.
434.	Modular contracting for information technology.
435.	Levels of compensation of certain contractor personnel not allowable as costs under certain contracts.
436.	Protection of constitutional rights of contractors.
437.	Incentives for efficient performance of services contracts.
438.	Civilian Board of Contract Appeals.
439.	Public-private competition required before conversion to contractor performance.
440.	Contingency Contracting Corps.

§§ 401, 402. Repealed. Pub. L. 104-106, div. D, title XLIII, § 4305(a)(2), Feb. 10, 1996, 110 Stat. 665

Section 401, Pub. L. 93-400, §2, Aug. 30, 1974, 88 Stat. 796; Pub. L. 96-83, §2, Oct. 10, 1979, 93 Stat. 648; Pub. L. 98-191, §3, Dec. 1, 1983, 97 Stat. 1325; Pub. L. 100-679, §2(a), Nov. 17, 1988, 102 Stat. 4055; Pub. L. 103-355, title I, §1091(a), Oct. 13, 1994, 108 Stat. 3272, stated policy of United States Government relating to procurement of property and services.

Section 402, Pub. L. 93-400, §3, Aug. 30, 1974, 88 Stat. 796; Pub. L. 100-679, §2(b), Nov. 17, 1988, 102 Stat. 4055, stated findings of Congress and purpose of this chapter.

EFFECTIVE DATE OF REPEAL

For effective date and applicability of repeal, see section 4401 of Pub. L. 104-106, set out as an Effective Date of 1996 Amendment note under section 251 of this title.

EFFECTIVE DATE OF 1979 AMENDMENT

Section 12 of Pub. L. 96-83 provided that: "Except to the extent otherwise provided therein, the amendments made by this Act [see Short Title of 1979 Amendment note below] shall take effect on October 1, 1979."

SHORT TITLE OF 2003 AMENDMENT

Pub. L. 108-136, div. A, title XIV, §1401, Nov. 24, 2003, 117 Stat. 1663, provided that: "This title [enacting sections 414b, 428a, and 437 of this title, amending sections 403, 414, 433, and 436 of this title, section 2855 of Title 10, Armed Forces, and section 1115 of Title 31, Money and Finance, enacting provisions set out as notes under sections 253, 253a, 405, 428a, and 433 of this title and section 1103 of Title 40, Public Buildings, Property, and Works, amending provisions set out as notes under section 264 of this title, section 2304 of Title 10, and section 501 of Title 31, and repealing provisions set out as a note under section 2302 of Title 10] may be cited as the 'Services Acquisition Reform Act of 2003'."

SHORT TITLE OF 1988 AMENDMENT

Section 1 of Pub. L. 100-679 provided that: "This Act [enacting sections 421 to 424 of this title, amending this section, sections 402, 403, 405, 410, and 420 of this title, sections 5312 to 5315, 8331, 8401, 8701, and 8901 of Title 5, Government Organization and Employees, and section 541 of former Title 40, Public Buildings, Property, and Works, repealing section 2168 of Title 50, Appendix, War and National Defense, and enacting provisions set out as notes under sections 405 and 423 of this title and section 5312 of Title 5] may be cited as the 'Office of Federal Procurement Policy Act Amendments of 1988'."

SHORT TITLE OF 1983 AMENDMENT

Section 1 of Pub. L. 98-191 provided: "That this Act [enacting sections 413 to 415 of this title, amending this section, sections 5, 6a-1, 252, 403, 405, 407, 409, 410, and 411 of this title, section 831h of Title 16, Conservation, and sections 474, 481, and 487 of former Title 40, Public Buildings, Property, and Works] may be cited as the 'Office of Federal Procurement Policy Act Amendments of 1983'."

SHORT TITLE OF 1979 AMENDMENT

Section 1(a) of Pub. L. 96-83 provided that: "This Act [amending this section, sections 403, 405, 407, and 409 to 412 of this title, and sections 474, 481, and 487 of former Title 40, Public Buildings, Property and Works, and enacting provisions set out as notes under this section and section 405a of this title] may be cited as the 'Office of Federal Procurement Policy Act Amendments of 1979'."

SHORT TITLE

Section 1(a) of Pub. L. 93-400, as amended by Pub. L. 103-355, title X, §10005(a)(1), Oct. 13, 1994, 108 Stat. 3406, provided that: "This Act [enacting this chapter and amending section 5315 of Title 5, Government Organization and Employees, and sections 474, 481, and 487 of former Title 40, Public Buildings, Property, and Works] may be cited as the 'Office of Federal Procurement Policy Act'."

STYLISTIC CONSISTENCY

Section 10005(b)(1) of Pub. L. 103-355 provided that: "The Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.) is amended so that the section designation and section heading of each section of such Act is in the same form and typeface as the section designation and heading of this section [108 Stat. 3406]."

REQUIREMENTS FOR USE OF APPROPRIATIONS BY EXECUTIVE AGENCIES FOR SERVICES BY CONTRACT

Pub. L. 102-394, title V, §502, Oct. 6, 1992, 106 Stat. 1825, provided that: "No part of any appropriation contained in this Act or subsequent Departments of Labor, Health and Human Services, and Education, and Relat-

ed Agencies Appropriations Acts shall be expended by an executive agency, as referred to in the Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.), pursuant to any obligation for services by contract, unless such executive agency has awarded and entered into such contract in full compliance with such Act and regulations promulgated thereunder.”

Similar provisions were contained in the following prior appropriation acts:

Pub. L. 102-170, title V, §502, Nov. 26, 1991, 105 Stat. 1140.

Pub. L. 101-517, title V, §502, Nov. 5, 1990, 104 Stat. 2221.

Pub. L. 101-166, title V, §502, Nov. 21, 1989, 103 Stat. 1189.

Pub. L. 100-202, §101(h) [title V, §502], Dec. 22, 1987, 101 Stat. 1329-256, 1329-287.

Pub. L. 99-500, §101(i) [H.R. 5233, title V, §502], Oct. 18, 1986, 100 Stat. 1783-287, and Pub. L. 99-591, §101(i) [H.R. 5233, title V, §502], Oct. 30, 1986, 100 Stat. 3341-287.

Pub. L. 99-178, title V, §502, Dec. 12, 1985, 99 Stat. 1132.

Pub. L. 98-619, title V, §502, Nov. 8, 1984, 98 Stat. 3332.

Pub. L. 98-139, title V, §502, Oct. 31, 1983, 97 Stat. 899.

Pub. L. 97-377, title I, §101(e)(1) [title V, §502], Dec. 21, 1982, 96 Stat. 1878, 1904.

EX. ORD. NO. 12073. FEDERAL PROCUREMENT IN LABOR SURPLUS AREAS

Ex. Ord. No. 12073, Aug. 16, 1978, 43 F.R. 36873, provided:

By the authority vested in me as President by the Constitution of the United States of America, and in order to strengthen the economic base of our Nation, it is hereby ordered as follows:

1-1. PROCUREMENTS IN LABOR SURPLUS AREAS

1-101. Executive agencies shall emphasize procurement set-asides in labor surplus areas in order to strengthen our Nation's economy.

1-102. Labor surplus area procurements shall be consistent with this Order and, to the extent funds are available, the priorities of Section 15 of the Small Business Act, as amended by Public Law 95-89 (15 U.S.C. 644).

1-2. ADMINISTRATOR OF GENERAL SERVICES

1-201. The Administrator shall coordinate with and advise State and local officials with regard to Federal efforts to encourage procurements in labor surplus areas with the aim of fostering economic development in labor surplus areas.

1-202. The Administrator shall establish specific labor surplus area procurement targets for Executive agencies in consultation with the heads of those agencies.

1-203. In cooperation with the heads of Executive agencies, the Administrator shall encourage the use of set-asides or other appropriate methods for meeting procurement targets in labor surplus areas.

1-204. The Administrator shall report every six months to the President on the progress of the agencies in achieving the procurement targets.

1-3. AGENCY RESPONSIBILITIES

1-301. The Secretary of Labor shall classify and designate labor markets which are labor surplus areas. The Secretary shall provide labor market data to the heads of agencies and State and local officials in order to promote the development of business opportunities in labor surplus areas.

1-302. The heads of Executive agencies shall cooperate with the Administrator in carrying out his responsibilities for labor surplus area programs and shall provide the information necessary for setting procurement targets and recording achievement. They shall keep the Administrator informed of plans and programs which affect labor surplus procurements, with particular attention to opportunities for minority firms.

1-303. In accord with Section 6 of the Office of Federal Procurement Policy Act (41 U.S.C. 405), the Adminis-

trator for Federal Procurement Policy shall be responsible for the overall direction and oversight of the policies affecting procurement programs for labor surplus areas.

JIMMY CARTER.

EXECUTIVE ORDER NO. 12092

Ex. Ord. No. 12092, Nov. 1, 1978, 43 F.R. 51375, as amended by Ex. Ord. No. 12161, Sept. 28, 1979, 44 F.R. 56663, which related to the prohibition against inflationary procurement practices, was revoked by Ex. Ord. No. 12288, Jan. 29, 1981, 46 F.R. 10135.

EXECUTIVE ORDER NO. 12352

Ex. Ord. No. 12352, Mar. 17, 1982, 47 F.R. 12125, which related to Federal procurement reform to support mission accomplishment more effectively, was revoked by Ex. Ord. No. 12931, §4, Oct. 13, 1994, 59 F.R. 52388, set out below.

EXECUTIVE ORDER NO. 12818

Ex. Ord. No. 12818, Oct. 23, 1992, 57 F.R. 48713, which prohibited executive agencies from requiring labor agreements on Federal or federally funded construction projects, was revoked by Ex. Ord. No. 12836, §1, Feb. 1, 1993, 58 F.R. 7045, which was itself revoked as it relates to notification of employee rights concerning payment of union dues or fees by Ex. Ord. No. 13201, §11, Feb. 17, 2001, 66 F.R. 11221, which was itself revoked by Ex. Ord. No. 13496, §13, Jan. 30, 2009, 74 F.R. 6110, set out as a note under section 254 of this title, and as it relates to project agreements by Ex. Ord. No. 13202, §8, Feb. 17, 2001, 66 F.R. 11226, which was itself revoked by Ex. Ord. No. 13502, §8, Feb. 6, 2009, 74 F.R. 6986, set out as a note under section 251 of this title.

EX. ORD. NO. 12931. FEDERAL PROCUREMENT REFORM

Ex. Ord. No. 12931, Oct. 13, 1994, 59 F.R. 52387, 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 spending of public funds through fundamental reforms in Government procurement, it is hereby ordered as follows:

SECTION 1. To make procurement more effective in support of mission accomplishment and consistent with recommendations of the National Performance Review, heads of executive agencies engaged in the procurement of supplies and services shall:

(a) Review agency procurement rules, reporting requirements, contractual requirements, certification procedures, and other administrative procedures over and above those required by statute, and, where practicable, replace them with guiding principles that encourage and reward innovation;

(b) Review existing and planned agency programs to assure that such programs meet agency mission needs;

(c) Ensure that procurement organizations focus on measurable results and on increased attention to understanding and meeting customer needs;

(d) Increase the use of commercially available items where practicable, place more emphasis on past contractor performance, and promote best value rather than simply low cost in selecting sources for supplies and services;

(e) Ensure that simplified acquisition procedures are used, to the maximum extent practicable, for procurements under the simplified acquisition threshold in order to reduce administrative burdens and more effectively support the accomplishment of agency missions;

(f) Expand the use of the Government purchase card by the agency and take maximum advantage of the micro-purchase authority provided in the Federal Acquisition Streamlining Act of 1994 [Pub. L. 103-355, see Short Title of 1994 Amendment note set out under section 251 of this title] by delegating the authority, to the maximum extent practicable, to the offices that will be using the supplies or services to be purchased;

(g) Establish clear lines of contracting authority and accountability;

(h) Establish career education programs for procurement professionals, including requirements for successful completion of educational requirements or mandatory training for entry level positions and for promotion to higher level positions, in order to ensure a highly qualified procurement work force;

(i) Designate a Procurement Executive with agency-wide responsibility to oversee development of procurement goals, guidelines, and innovation, measure and evaluate procurement office performance against stated goals, enhance career development of the procurement work force, and advise the agency heads whether goals are being achieved; and

(j) Review existing and planned information technology acquisitions and contracts to ensure that the agency receives the best value with regard to price and technology, and consider alternatives in cases where best value is not being obtained.

SEC. 2. The Director of the Office of Personnel Management, in consultation with the heads of executive agencies, shall ensure that personnel policies and classification standards meet the needs of executive agencies for a professional procurement work force.

SEC. 3. The Administrator of the Office of Federal Procurement Policy, after consultation with the Director of the Office of Management and Budget, shall work jointly with the heads of executive agencies to provide broad policy guidance and overall leadership necessary to achieve procurement reform, including, but not limited to:

- (a) Coordinating Government-wide efforts;
- (b) Assisting executive agencies in streamlining guidance for procurement processes;
- (c) Identifying desirable Government-wide procurement system criteria; and
- (d) Identifying major inconsistencies in law and policies relating to procurement that impose unnecessary burdens on the private sector and Federal procurement officials, and, following coordination with executive agencies, submitting necessary legislative initiatives to the Office of Management and Budget for the resolution of such inconsistencies.

SEC. 4. Executive Order No. 12352 is revoked.

WILLIAM J. CLINTON.

EXECUTIVE ORDER NO. 12969

Ex. Ord. No. 12969, Aug. 8, 1995, 60 F.R. 40989, which provided for Federal agencies to contract with companies that report in a public manner on toxic chemicals released to the environment, was revoked by Ex. Ord. No. 13148, §901, Apr. 21, 2000, 65 F.R. 24604, formerly set out as a note under section 4321 of Title 42, The Public Health and Welfare.

STREAMLINING PROCUREMENT THROUGH ELECTRONIC
COMMERCE

Memorandum of President of the United States, Oct. 28, 1993, 58 F.R. 58095, provided:

Memorandum for the Heads of Executive Departments and Agencies [and] the President's Management Council

The Federal Government spends \$200 billion annually buying goods and services. Unfortunately, the red tape and burdensome paperwork of the current procurement system increases costs, produces unnecessary delays, and reduces Federal work force productivity. Moving to an electronic commerce system to simplify and streamline the purchasing process will promote customer service and cost-effectiveness. The electronic exchange of acquisition information between the private sector and the Federal Government also will increase competition by improving access to Federal contracting opportunities for the more than 300,000 vendors currently doing business with the Government, particularly small businesses, as well as many other vendors who find access to bidding opportunities difficult under the current system. For these reasons, I am committed to

fundamentally altering and improving the way the Federal Government buys goods and services by ensuring that electronic commerce is implemented for appropriate Federal purchases as quickly as possible.

1. OBJECTIVES.

The objectives of this electronic commerce initiative are to:

(a) exchange procurement information—such as solicitations, offers, contracts, purchase orders, invoices, payments, and other contractual documents—electronically between the private sector and the Federal Government to the maximum extent practical;

(b) provide businesses, including small, small disadvantaged, and women-owned businesses, with greater access to Federal procurement opportunities;

(c) ensure that potential suppliers are provided simplified access to the Federal Government's electronic commerce system;

(d) employ nationally and internationally recognized data formats that serve to broaden and ease the electronic interchange of data; and

(e) use agency and industry systems and networks to enable the Government and potential suppliers to exchange information and access Federal procurement data.

2. IMPLEMENTATION.

The President's Management Council, in coordination with the Office of Federal Procurement Policy of the Office of Management and Budget, and in consultation with appropriate Federal agencies with applicable technical and functional expertise, as necessary, shall provide overall leadership, management oversight, and policy direction to implement electronic commerce in the executive branch through the following actions:

(a) by March 1994, define the architecture for the Government-wide electronic commerce acquisition system and identify executive departments or agencies responsible for developing, implementing, operating, and maintaining the Federal electronic system;

(b) by September 1994, establish an initial electronic commerce capability to enable the Federal Government and private vendors to electronically exchange standardized requests for quotations, quotes, purchase orders, and notice of awards and begin Government-wide implementation;

(c) by July 1995, implement a full scale Federal electronic commerce system that expands initial capabilities to include electronic payments, document interchange, and supporting databases; and

(d) by January 1997, complete Government-wide implementation of electronic commerce for appropriate Federal purchases, to the maximum extent possible.

This implementation schedule should be accelerated where practicable.

The head of each executive department or agency shall:

(a) ensure that budgetary resources are available, within approved budget levels, for electronic commerce implementation in each respective department or agency;

(b) assist the President's Management Council in implementing the electronic commerce system as quickly as possible in accordance with the schedules established herein; and

(c) designate one or more senior level employees to assist the President's Management Council and serve as a point of contact for the development and implementation of the Federal electronic commerce system within each respective department or agency.

3. NO PRIVATE RIGHTS CREATED.

This directive is for the internal management of the executive branch and does not create any right or benefit, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

The Director of the Office of Management and Budget is authorized and directed to publish this memorandum in the Federal Register.

WILLIAM J. CLINTON.

§ 403. Definitions

As used in this chapter:

(1) The term “executive agency” means—

(A) an executive department specified in section 101 of title 5;

(B) a military department specified in section 102 of such title;

(C) an independent establishment as defined in section 104(1) of such title; and

(D) a wholly owned Government corporation fully subject to the provisions of chapter 91 of title 31.

(2) The term “procurement” includes all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout.

(3) The term “procurement system” means the integration of the procurement process, the professional development of procurement personnel, and the management structure for carrying out the procurement function.

(4) The term “standards” means the criteria for determining the effectiveness of the procurement system by measuring the performance of the various elements of such system.

(5) The term “competitive procedures” means procedures under which an agency enters into a contract pursuant to full and open competition.

(6) The term “full and open competition”, when used with respect to a procurement, means that all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement.

(7) The term “responsible source” means a prospective contractor who—

(A) has adequate financial resources to perform the contract or the ability to obtain such resources;

(B) is able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and Government business commitments;

(C) has a satisfactory performance record;

(D) has a satisfactory record of integrity and business ethics;

(E) has the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain such organization, experience, controls, and skills;

(F) has the necessary production, construction, and technical equipment and facilities, or the ability to obtain such equipment and facilities; and

(G) is otherwise qualified and eligible to receive an award under applicable laws and regulations.

(8) The term “technical data” means recorded information (regardless of the form or method of the recording) of a scientific or technical nature (including computer software documentation) relating to supplies procured by an agency. Such term does not include computer software or financial, administrative, cost or pricing, or management data or other information incidental to contract administration.

(9)(A) The term “major system” means a combination of elements that will function to-

gether to produce the capabilities required to fulfill a mission need, which elements may include hardware, equipment, software or any combination thereof, but excludes construction or other improvements to real property; and

(B) a system shall be considered a major system if (i) the Department of Defense is responsible for the system and the total expenditures for research, development, test and evaluation for the system are estimated to be more than \$75,000,000 (based on fiscal year 1980 constant dollars) or the eventual total expenditure for procurement of more than \$300,000,000 (based on fiscal year 1980 constant dollars); (ii) a civilian agency is responsible for the system and total expenditures for the system are estimated to exceed \$750,000 (based on fiscal year 1980 constant dollars) or the dollar threshold for a “major system” established by the agency pursuant to Office of Management and Budget (OMB) Circular A-109, entitled “Major Systems Acquisitions”, whichever is greater; or (iii) the system is designated a “major system” by the head of the agency responsible for the system.

(10) The term “item”, “item of supply”, or “supplies” means any individual part, component, subassembly, assembly, or subsystem integral to a major system, and other property which may be replaced during the service life of the system, and includes spare parts and replenishment spare parts, but does not include packaging or labeling associated with shipment or identification of an “item”.

(11) The term “simplified acquisition threshold” means \$100,000.

(12) The term “commercial item” means any of the following:

(A) Any item, other than real property, that is of a type customarily used by the general public or by nongovernmental entities for purposes other than governmental purposes, and that—

(i) has been sold, leased, or licensed to the general public; or

(ii) has been offered for sale, lease, or license to the general public.

(B) Any item that evolved from an item described in subparagraph (A) through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Federal Government solicitation.

(C) Any item that, but for—

(i) modifications of a type customarily available in the commercial marketplace, or

(ii) minor modifications made to meet Federal Government requirements,

would satisfy the criteria in subparagraph (A) or (B).

(D) Any combination of items meeting the requirements of subparagraph (A), (B), (C), or (E) that are of a type customarily combined and sold in combination to the general public.

(E) Installation services, maintenance services, repair services, training services, and other services if—

(i) the services are procured for support of an item referred to in subparagraph (A), (B), (C), or (D), regardless of whether such services are provided by the same source or at the same time as the item; and

(ii) the source of the services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the Federal Government.

(F) Services offered and sold competitively, in substantial quantities, in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions.

(G) Any item, combination of items, or service referred to in subparagraphs (A) through (F) notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor.

(H) A nondevelopmental item, if the procuring agency determines, in accordance with conditions set forth in the Federal Acquisition Regulation, that the item was developed exclusively at private expense and has been sold in substantial quantities, on a competitive basis, to multiple State and local governments.

(13) The term “nondevelopmental item” means any of the following:

(A) Any commercial item.

(B) Any previously developed item of supply that is in use by a department or agency of the United States, a State or local government, or a foreign government with which the United States has a mutual defense cooperation agreement.

(C) Any item of supply described in subparagraph (A) or (B) that requires only minor modification or modification of the type customarily available in the commercial marketplace in order to meet the requirements of the procuring department or agency.

(D) Any item of supply currently being produced that does not meet the requirements of subparagraph (A), (B), or (C) solely because the item is not yet in use.

(14) The term “component” means any item supplied to the Federal Government as part of an end item or of another component.

(15) The term “commercial component” means any component that is a commercial item.

(16) The term “acquisition”—

(A) means the process of acquiring, with appropriated funds, by contract for purchase or lease, property or services (including construction) that support the missions and goals of an executive agency, from the point at which the requirements of the executive agency are established in consultation with the chief acquisition officer of the executive agency; and

(B) includes—

(i) the process of acquiring property or services that are already in existence, or

that must be created, developed, demonstrated, and evaluated;

(ii) the description of requirements to satisfy agency needs;

(iii) solicitation and selection of sources;

(iv) award of contracts;

(v) contract performance;

(vi) contract financing;

(vii) management and measurement of contract performance through final delivery and payment; and

(viii) technical and management functions directly related to the process of fulfilling agency requirements by contract.

(17) The term “Federal Acquisition Regulatory Council” means the Federal Acquisition Regulatory Council established under section 421 of this title.

(Pub. L. 93-400, § 4, Aug. 30, 1974, 88 Stat. 797; Pub. L. 96-83, § 3, Oct. 10, 1979, 93 Stat. 649; Pub. L. 98-191, § 4, Dec. 1, 1983, 97 Stat. 1326; Pub. L. 98-369, div. B, title VII, § 2731, July 18, 1984, 98 Stat. 1195; Pub. L. 98-577, title I, § 102, Oct. 30, 1984, 98 Stat. 3067; Pub. L. 100-679, § 3(c), Nov. 17, 1988, 102 Stat. 4056; Pub. L. 101-510, div. A, title VIII, § 806(a)(1), Nov. 5, 1990, 104 Stat. 1592; Pub. L. 103-355, title IV, § 4001, title VIII, § 8001, Oct. 13, 1994, 108 Stat. 3338, 3384; Pub. L. 104-106, div. D, title XLII, § 4204, Feb. 10, 1996, 110 Stat. 655; Pub. L. 106-65, div. A, title VIII, § 805, Oct. 5, 1999, 113 Stat. 705; Pub. L. 108-136, div. A, title XIV, §§ 1411, 1433, Nov. 24, 2003, 117 Stat. 1663, 1673; Pub. L. 108-375, div. A, title VIII, § 807(b), Oct. 28, 2004, 118 Stat. 2011.)

REFERENCES IN TEXT

This chapter, referred to in text, was in the original “this Act”, meaning Pub. L. 93-400, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 401 of this title and Tables.

CODIFICATION

Section 2731 of Pub. L. 98-369 directed in part that this section be redesignated as section 4 of Pub. L. 93-400 to correct an inconsistency in the language of the amendment by Pub. L. 98-191, which amended this section generally but referred to it as “Sec. 3”. Since this section was enacted as section 4 of Pub. L. 93-400 no change was required.

AMENDMENTS

2004—Par. (17). Pub. L. 108-375 added par. (17).

2003—Par. (12)(F). Pub. L. 108-136, § 1433, inserted “or specific outcomes to be achieved” after “performed”.

Par. (16). Pub. L. 108-136, § 1411, added par. (16).

1999—Par. (12)(E). Pub. L. 106-65 amended subpar. (E) generally. Prior to amendment, subpar. (E) read as follows: “Installation services, maintenance services, repair services, training services, and other services if such services are procured for support of an item referred to in subparagraph (A), (B), (C), or (D) and if the source of such services—

“(i) offers such services to the general public and the Federal Government contemporaneously and under similar terms and conditions; and

“(ii) offers to use the same work force for providing the Federal Government with such services as the source uses for providing such services to the general public.”

1996—Par. (12)(F). Pub. L. 104-106 inserted “or market” after “catalog”.

1994—Pub. L. 103-355, § 8001(b)(1), substituted “this chapter:” for “this chapter—” in introductory provisions.

Pars. (1) to (3). Pub. L. 103-355, §8001(b)(2), (3), substituted “The term” for “the term” and period for semicolon at end.

Par. (4). Pub. L. 103-355, §8001(b)(2), (4), substituted “The term” for “the term” and period for “; and” at end.

Pars. (5) to (9). Pub. L. 103-355, §8001(b)(2), (3), substituted “The term” for “the term” and period for semicolon at end.

Par. (10). Pub. L. 103-355, §8001(b)(2), (4), substituted “The term” for “the term” and period for “; and” at end.

Par. (11). Pub. L. 103-355, §8001(b)(2), which directed substitution of “The term” for “the term” in par. (11), could not be executed because phrase “the term” did not appear subsequent to amendment by Pub. L. 103-355, §4001. See below.

Pub. L. 103-355, §4001, amended par. (11) generally. Prior to amendment, par. (11) read as follows: “the term ‘small purchase threshold’ means \$25,000, adjusted on October 1 of each year divisible by 5 to the amount equal to \$25,000 in constant fiscal year 1990 dollars (rounded to the nearest \$1,000).”

Pars. (12) to (15). Pub. L. 103-355, §8001(a), added pars. (12) to (15).

1990—Par. (11). Pub. L. 101-510 added par. (11).

1988—Pars. (4) to (11). Pub. L. 100-679 redesignated pars. (5) to (11) as (4) to (10), respectively, and struck out former par. (4) which defined “single system of Government-wide procurement regulations” for purposes of this chapter.

1984—Pars. (6) to (8). Pub. L. 98-369 added pars. (6) to (8).

Pars. (9) to (11). Pub. L. 98-577 added pars. (9) to (11).

1983—Pub. L. 98-191 amended section generally, restating definitions of “executive agency” and “procurement” and inserting definitions of “procurement system”, “single-system of Government-wide procurement regulations”, and “standards”.

1979—Pub. L. 96-83 designated existing provisions as subsec. (a) and added subsec. (b).

EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104-106, see section 4401 of Pub. L. 104-106, set out as a note under section 251 of this title.

EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103-355, see section 10001 of Pub. L. 103-355, set out as a note under section 251 of this title.

EFFECTIVE DATE OF 1979 AMENDMENT

Amendment by Pub. L. 96-83 effective Oct. 1, 1979, see section 12 of Pub. L. 96-83, set out as a note under section 401 of this title.

MODIFICATION OF FEDERAL ACQUISITION REGULATIONS

Section 2752 of Pub. L. 98-369 provided that: “Not later than March 31, 1985, the single Government-wide procurement regulation referred to in section 4(4)(A) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(4)(A)) shall be modified to conform to the requirements of this title [title VII of Pub. L. 98-369, §§2701-2753, July 18, 1984, 98 Stat. 1175-1203] and the amendments made by this title [see Short Title of 1984 Amendment note set out under section 251 of this title].”

§ 404. Establishment of Office of Federal Procurement Policy; appointment of Administrator

(a) There is in the Office of Management and Budget an Office of Federal Procurement Policy (hereinafter referred to as the “Office”) to provide overall direction of Government-wide procurement policies, regulations, procedures, and forms for executive agencies and to promote

economy, efficiency, and effectiveness in the procurement of property and services by the executive branch of the Federal Government.

(b) There shall be at the head of the Office an Administrator for Federal Procurement Policy (hereinafter referred to as the “Administrator”), who shall be appointed by the President, by and with the advice and consent of the Senate.

(Pub. L. 93-400, §5, Aug. 30, 1974, 88 Stat. 797; Pub. L. 104-106, div. D, title XLIII, §4305(a)(1), Feb. 10, 1996, 110 Stat. 665.)

AMENDMENTS

1996—Subsec. (a). Pub. L. 104-106 amended subsec. (a) generally. Prior to amendment, subsec. (a) read as follows: “There is established in the Office of Management and Budget an office to be known as the Office of Federal Procurement Policy (hereinafter referred to as the ‘Office’).”

EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104-106, see section 4401 of Pub. L. 104-106, set out as a note under section 251 of this title.

§ 405. Authority and functions of the Administrator

(a) Development of procurement policy; leadership

The Administrator shall provide overall direction of procurement policy and leadership in the development of procurement systems of the executive agencies. To the extent that the Administrator considers appropriate, in carrying out the policies and functions set forth in this chapter, and with due regard for applicable laws and the program activities of the executive agencies, the Administrator may prescribe Government-wide procurement policies. These policies shall be implemented in a single Government-wide procurement regulation called the Federal Acquisition Regulation and shall be followed by executive agencies in the procurement of—

- (1) property other than real property in being;
- (2) services, including research and development; and
- (3) construction, alteration, repair, or maintenance of real property.

(b) Government-wide procurement regulations

In any instance in which the Administrator determines that the Department of Defense, the National Aeronautics and Space Administration, and the General Services Administration are unable to agree on or fail to issue Government-wide regulations, procedures and forms in a timely manner, including any such regulations, procedures, and forms as are necessary to implement prescribed policy initiated by the Administrator under subsection (a) of this section, the Administrator shall, with due regard for applicable laws and the program activities of the executive agencies and consistent with the policies and functions set forth in this chapter, prescribe Government-wide regulations, procedures and forms which shall be followed by executive agencies in the procurement of—

- (1) property other than real property in being;
- (2) services, including research and development; and

(3) construction, alteration, repair, or maintenance of real property.

(c) Noninterference with executive agencies

The authority of the Administrator under this chapter shall not be construed to—

(1) impair or interfere with the determination by executive agencies of their need for, or their use of, specific property, services, or construction, including particular specifications therefor; or

(2) interfere with the determination by executive agencies of specific actions in the award or administration of procurement contracts.

(d) Enumeration of included functions

The functions of the Administrator shall include—

(1) providing leadership and ensuring action by the executive agencies in the establishment, development and maintenance of the single system of simplified Government-wide procurement regulations and resolving differences among the executive agencies in the development of simplified Government-wide procurement regulations, procedures and forms;

(2) coordinating the development of Government-wide procurement system standards that shall be implemented by the executive agencies in their procurement systems;

(3) providing leadership and coordination in the formulation of the executive branch position on legislation relating to procurement;

(4)(A) providing for and directing the activities of the computer-based Federal Procurement Data System (including recommending to the Administrator of General Services a sufficient budget for such activities), which shall be located in the General Services Administration, in order to adequately collect, develop, and disseminate procurement data; and

(B) ensuring executive agency compliance with the record requirements of section 417 of this title;

(5) providing for and directing the activities of the Federal Acquisition Institute (including recommending to the Administrator of General Services a sufficient budget for such activities), which shall be located in the General Services Administration, in order to—

(A) foster and promote the development of a professional acquisition workforce Government-wide;

(B) promote and coordinate Government-wide research and studies to improve the procurement process and the laws, policies, methods, regulations, procedures, and forms relating to acquisition by the executive agencies;

(C) collect data and analyze acquisition workforce data from the Office of Personnel Management, the heads of executive agencies, and, through periodic surveys, from individual employees;

(D) periodically analyze acquisition career fields to identify critical competencies, duties, tasks, and related academic prerequisites, skills, and knowledge;

(E) coordinate and assist agencies in identifying and recruiting highly qualified candidates for acquisition fields;

(F) develop instructional materials for acquisition personnel in coordination with private and public acquisition colleges and training facilities;

(G) evaluate the effectiveness of training and career development programs for acquisition personnel;

(H) promote the establishment and utilization of academic programs by colleges and universities in acquisition fields;

(I) facilitate, to the extent requested by agencies, interagency intern and training programs; and

(J) perform other career management or research functions as directed by the Administrator;

(6) administering the provisions of section 433 of this title;

(7) establishing criteria and procedures to ensure the effective and timely solicitation of the viewpoints of interested parties in the development of procurement policies, regulations, procedures, and forms;

(8) developing standard contract forms and contract language in order to reduce the Government's cost of procuring property and services and the private sector's cost of doing business with the Government;

(9) providing for a Government-wide award to recognize and promote vendor excellence;

(10) providing for a Government-wide award to recognize and promote excellence in officers and employees of the Federal Government serving in procurement-related positions;

(11) developing policies, in consultation with the Administrator of the Small Business Administration, that ensure that small businesses, qualified HUBZone small business concerns (as defined in section 632(p) of title 15), small businesses owned and controlled by socially and economically disadvantaged individuals, and small businesses owned and controlled by women are provided with the maximum practicable opportunities to participate in procurements that are conducted for amounts below the simplified acquisition threshold;

(12) developing policies that will promote achievement of goals for participation by small businesses, qualified HUBZone small business concerns (as defined in section 632(p) of title 15), small businesses owned and controlled by socially and economically disadvantaged individuals, and small businesses owned and controlled by women; and

(13) completing action, as appropriate, on the recommendations of the Commission on Government Procurement.

(e) Consultation; assistance of existing executive agencies; advisory committees and inter-agency groups

In carrying out the functions set forth in subsection (d) of this section, the Administrator—

(1) shall consult with the affected executive agencies, including the Small Business Administration;

(2) may, with the concurrence of the heads of affected executive agencies, designate an executive agency or executive agencies to assist in the performance of such functions; and

(3) may establish advisory committees or other interagency groups to assist in providing for the establishment, development, and maintenance of a single system of simplified Government-wide procurement regulations and to assist in the performance of any of the other functions which the Administrator considers appropriate.

(f) Oversight of regulations promulgated by other agencies relating to procurement

The Administrator, with the concurrence of the Director of the Office of Management and Budget, and with consultation with the head of the agency or agencies concerned, may deny the promulgation of or rescind any Government-wide regulation or final rule or regulation of any executive agency relating to procurement if the Administrator determines that such rule or regulation is inconsistent with any policies, regulations, or procedures issued pursuant to subsection (a) of this section.

(g) Assignment, delegation, or transfer of functions prohibited

Except as otherwise provided by law, no duties, functions, or responsibilities, other than those expressly assigned by this chapter, shall be assigned, delegated, or transferred to the Administrator.

(h) Real property procurement; Office of Management and Budget

Nothing in this chapter shall be construed to—

(1) impair or affect the authorities or responsibilities conferred by the Federal Property and Administrative Services Act of 1949¹ with respect to the procurement of real property; or

(2) limit the current authorities and responsibilities of the Director of the Office of Management and Budget.

(i) Recipients of Federal grants or assistance

(1) With due regard to applicable laws and the program activities of the executive agencies administering Federal programs of grants or assistance, the Administrator may prescribe Government-wide policies, regulations, procedures, and forms which the Administrator considers appropriate and which shall be followed by such executive agencies in providing for the procurement, to the extent required under such programs, of property or services referred to in clauses (1), (2), and (3) of subsection (a) of this section by recipients of Federal grants or assistance under such programs.

(2) Nothing in paragraph (1) shall be construed to—

(A) permit the Administrator to authorize procurement or supply support, either directly or indirectly, to recipients of Federal grants or assistance; or

(B) authorize any action by such recipients contrary to State and local laws, in the case of programs to provide Federal grants or assistance to States and political subdivisions.

(j) Policy regarding consideration of contractor past performance

(1) The Administrator shall prescribe for executive agencies guidance regarding consideration

of the past contract performance of offerors in awarding contracts. The guidance shall include—

(A) standards for evaluating past performance with respect to cost (when appropriate), schedule, compliance with technical or functional specifications, and other relevant performance factors that facilitate consistent and fair evaluation by all executive agencies;

(B) policies for the collection and maintenance of information on past contract performance that, to the maximum extent practicable, facilitate automated collection, maintenance, and dissemination of information and provide for ease of collection, maintenance, and dissemination of information by other methods, as necessary;

(C) policies for ensuring that—

(i) offerors are afforded an opportunity to submit relevant information on past contract performance, including performance under contracts entered into by the executive agency concerned, contracts entered into by other departments and agencies of the Federal Government, contracts entered into by agencies of State and local governments, and contracts entered into by commercial customers; and

(ii) such information submitted by offerors is considered; and

(D) the period for which information on past performance of offerors may be maintained and considered.

(2) In the case of an offeror with respect to which there is no information on past contract performance or with respect to which information on past contract performance is not available, the offeror may not be evaluated favorably or unfavorably on the factor of past contract performance.

(k) Annual reporting requirement

The Administrator shall submit to Congress, on an annual basis, an assessment of the progress made in executive agencies in implementing the policy regarding major acquisitions that is stated in section 263(a) of this title. The Administrator shall use data from existing management systems in making the assessment.

(Pub. L. 93-400, § 6, Aug. 30, 1974, 88 Stat. 797; Pub. L. 96-83, § 4, Oct. 10, 1979, 93 Stat. 649; Pub. L. 98-191, § 5, Dec. 1, 1983, 97 Stat. 1326; Pub. L. 98-369, div. B, title VII, § 2732(b)(1), July 18, 1984, 98 Stat. 1199; Pub. L. 100-679, § 3(a), Nov. 17, 1988, 102 Stat. 4055; Pub. L. 103-355, title I, § 1091(b)(2), title V, §§ 5051(b), 5091, title VII, § 7108, Oct. 13, 1994, 108 Stat. 3272, 3351, 3361, 3378; Pub. L. 104-106, div. D, title XLIII, §§ 4307(b), 4321(h)(1), (2), 4322(a)(1), div. E, title LVI, § 5607(d), Feb. 10, 1996, 110 Stat. 668, 675, 677, 702; Pub. L. 104-201, div. A, title X, § 1074(f)(1), Sept. 23, 1996, 110 Stat. 2661; Pub. L. 105-85, div. A, title VIII, § 851(b), title X, § 1073(g)(2)(B), Nov. 18, 1997, 111 Stat. 1851, 1906; Pub. L. 105-135, title VI, § 604(f)(1), Dec. 2, 1997, 111 Stat. 2634.)

REFERENCES IN TEXT

The Federal Property and Administrative Services Act of 1949, referred to in subsec. (h)(1), is act June 30, 1949, ch. 288, 63 Stat. 377, as amended. Except for title

¹ See References in Text note below.

III of the Act, which is classified generally to subchapter IV (§251 et seq.) of chapter 4 of this title, the Act was repealed and reenacted by Pub. L. 107-217, §§1, 6(b), Aug. 21, 2002, 116 Stat. 1062, 1304, as chapters 1 to 11 of Title 40, Public Buildings, Property, and Works.

AMENDMENTS

1997—Subsec. (d)(5)(J). Pub. L. 105-85, §1073(g)(2)(B)(i), substituted semicolon for period at end.

Subsec. (d)(6). Pub. L. 105-85, §1073(g)(2)(B)(ii), realigned margins.

Subsec. (d)(11). Pub. L. 105-135, §604(f)(1)(A), inserted “qualified HUBZone small business concerns (as defined in section 632(p) of title 15),” after “ensure that small businesses.”

Subsec. (d)(12). Pub. L. 105-135, §604(f)(1)(B), inserted “qualified HUBZone small business concerns (as defined in section 632(p) of title 15),” after “participation by small businesses.”

Pub. L. 105-85, §1073(g)(2)(B)(iii), substituted “small businesses” for “small business” after “individuals, and”.

Subsec. (k). Pub. L. 105-85, §851(b), inserted “regarding major acquisitions that is” after “implementing the policy”.

1996—Subsec. (b). Pub. L. 104-106, §4322(a)(1), struck out second comma after “subsection (a) of this section”.

Subsec. (d)(5)(A). Pub. L. 104-106, §4307(b)(2)(A), substituted “the development of a professional acquisition workforce Government-wide” for “Government-wide career management programs for a professional procurement work force”.

Subsec. (d)(5)(B). Pub. L. 104-106, §4307(b)(2)(B)(i), substituted “acquisition by the” for “procurement by the”.

Subsec. (d)(5)(C) to (J). Pub. L. 104-106, §4307(b)(2)(B)(ii), (iii), added subpars. (C) to (J) and struck out former subpar. (C) which read as follows: “establish policies and procedures for the establishment and implementation of education and training programs authorized by this chapter, including the establishment and implementation of training, in conjunction with the General Services Administration, for critical procurement personnel designed to increase the participation of small business concerns owned and controlled by socially and economically disadvantaged individuals, women, and other minorities in procurement activities conducted by an executive agency.”

Subsec. (d)(6). Pub. L. 104-106, §4307(b)(3), added par. (6). Former par. (6) redesignated (7).

Subsec. (d)(7) to (10). Pub. L. 104-106, §4307(b)(1), redesignated pars. (6) to (9) as (7) to (10), respectively. Former par. (10) redesignated (11).

Subsec. (d)(11). Pub. L. 104-106, §4321(h)(2), which directed substitution of “small businesses” for “small business”, could not be executed because the words “small business” did not appear.

Pub. L. 104-106, §4307(b)(1), redesignated par. (10) as (11). Former par. (11) redesignated (12).

Subsec. (d)(12). Pub. L. 104-106, §4307(b)(1), redesignated par. (11) as (12). Former par. (12) redesignated (13).

Subsec. (d)(13). Pub. L. 104-106, §4321(h)(1), which directed transferring par. (12) to end of subsec. (d), was executed by transferring par. (13) to end of subsec. (d) to reflect the probable intent of Congress and the redesignation of par. (12) as (13) by Pub. L. 104-106, §4307(b)(1). See below.

Pub. L. 104-106, §4307(b)(1), redesignated par. (12) as (13).

Subsec. (f). Pub. L. 104-201 struck out “the policies set forth in section 401 of this title or” after “inconsistent with”.

Subsec. (h)(1). Pub. L. 104-106, §5607(d), struck out “of automatic data processing and telecommunications equipment and services or” after “with respect to the procurement”.

1994—Subsec. (d)(5)(C). Pub. L. 103-355, §7108(b), added subpar. (C).

Subsec. (d)(8), (9). Pub. L. 103-355, §5091, added pars. (8) and (9) at end. Former par. (8) redesignated (12).

Subsec. (d)(10), (11). Pub. L. 103-355, §7108(a), added pars. (10) and (11).

Subsec. (d)(12). Pub. L. 103-355, §5091(2), redesignated pars. (8) and (12).

Subsec. (j). Pub. L. 103-355, §1091(b)(2), added subsec. (j).

Subsec. (k). Pub. L. 103-355, §5051(b), added subsec. (k).

1988—Subsec. (a). Pub. L. 100-679, §3(a)(1), substituted “procurement policies. These policies shall be implemented in a single Government-wide procurement regulation called the Federal Acquisition Regulation and shall be” for “procurement policies which shall be implemented in the single system of Government-wide procurement regulations and shall be”.

Subsec. (b). Pub. L. 100-679, §3(a)(2), inserted “, including any such regulations, procedures, and forms as are necessary to implement prescribed policy initiated by the Administrator under subsection (a) of this section,” after “timely manner” and substituted “Administrator shall” for “Administrator may”.

Subsec. (d)(4). Pub. L. 100-679, §3(a)(3), added par. (4) and struck out former par. (4) which read as follows: “providing for a computer-based Federal Procurement Data System which shall be located in the General Services Administration (acting as executive agent for the Administrator) and shall collect, develop, and disseminate procurement data;”.

Subsec. (d)(5). Pub. L. 100-679, §3(a)(3), added par. (5) and struck out former par. (5) which read as follows: “providing for a Federal Acquisition Institute which shall be located in the General Services Administration (acting as executive agent for the Administrator) and shall—

“(A) foster and promote Government-wide career management programs for a professional procurement work force; and

“(B) promote and coordinate Government-wide research and studies to improve the procurement process and the laws, policies, methods, regulations, procedures, and forms relating to procurement by the executive agencies;”.

Subsec. (f). Pub. L. 100-679, §3(a)(4), substituted “The Administrator, with the concurrence of the Director of the Office of Management and Budget, and with consultation with the head of the agency or agencies concerned,” for “The Director of the Office of Management and Budget”.

1984—Subsec. (e). Pub. L. 98-369 substituted “subsection (d)” for “subsection (c)”.

1983—Pub. L. 98-191 amended section generally, revising and restating as subsecs. (a), (c), (d), (e), (g), (h), and (i) provisions of former subsecs. (a), (f), (d), (e), (g), (j), and (b), respectively, and by inserting provisions set out in new subsecs. (b) and (f).

1979—Subsec. (a). Pub. L. 96-83, §4(a), substituted provisions setting forth the responsibilities of the Administrator with respect to the development and implementation of procurement policies, the coordination of programs to improve the quality and performance of personnel, and the development of a uniform procurement system, for provisions setting forth responsibility of the Administrator for overall direction of procurement policy, and functions with respect to issuance of policy, regulations, procedures, and forms.

Subsec. (c). Pub. L. 96-83, §4(b), substituted provisions relating to development and proposal of a central management system, for provisions setting forth limitation of authority to procurement from appropriated funds and provisions relating to a study and report of procurement from nonappropriated funds.

Subsec. (d). Pub. L. 96-83, §4(c), substituted provisions setting forth the review, development, etc., functions of the Administrator with respect to procurement policies, regulations, procedures, and forms, procurement data, procurement personnel, and procurement contracts, for provisions setting forth the establishment, monitoring, etc., functions of the Administrator

with respect to uniform procurement regulations, procurement policies, regulations, procedures, and forms, procurement data, and procurement personnel.

Subsec. (e). Pub. L. 96-83, §4(d), substituted provisions relating to consultation functions of the Administrator with respect to the development and implementation of the uniform procurement system, for provisions relating to the consultation functions of the Administrator with respect to the development of policies, regulations, procedures and forms to be authorized or prescribed by such Administrator.

Subsecs. (h) to (j). Pub. L. 96-83, §4(e), added subsecs. (h) to (j).

EFFECTIVE DATE OF 1997 AMENDMENT

Amendment by Pub. L. 105-135 effective Oct. 1, 1997, see section 3 of Pub. L. 105-135 set out as a note under section 631 of Title 15, Commerce and Trade.

EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by sections 4307(b), 4321(h)(1), (2), and 4322(a)(1) of Pub. L. 104-106, see section 4401 of Pub. L. 104-106, set out as a note under section 251 of this title.

Amendment by section 5607(d) of Pub. L. 104-106 effective 180 days after Feb. 10, 1996, see section 5701 of Pub. L. 104-106, Feb. 10, 1996, 110 Stat. 702.

EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103-355, see section 10001 of Pub. L. 103-355, set out as a note under section 251 of this title.

EFFECTIVE DATE OF 1979 AMENDMENT

Amendment by Pub. L. 96-83 effective Oct. 1, 1979, see section 12 of Pub. L. 96-83, set out as a note under section 401 of this title.

ENHANCED TRANSPARENCY ON INTERAGENCY CONTRACTING AND OTHER TRANSACTIONS

Pub. L. 110-417, [div. A], title VIII, §874(a), Oct. 14, 2008, 122 Stat. 4558, provided that: "Not later than one year after the date of the enactment of this Act [Oct. 14, 2008], the Director of the Office of Management and Budget shall direct appropriate revisions to the Federal Procurement Data System or any successor system to facilitate the collection of complete, timely, and reliable data on interagency contracting actions and on transactions other than contracts, grants, and cooperative agreements issued pursuant to section 2371 of title 10, United States Code, or similar authorities. The Director shall ensure that data, consistent with what is collected for contract actions, is obtained on—

"(1) interagency contracting actions, including data at the task or delivery-order level; and

"(2) other transactions, including the initial award and any subsequent modifications awarded or orders issued (other than transactions that are reported through the Federal Assistance Awards Data System)."

PILOT PROGRAM TO INVENTORY COST AND SIZE OF SERVICE CONTRACTS

Pub. L. 110-161, div. D, title VII, §748, Dec. 26, 2007, 121 Stat. 2035, provided that: "No later than 180 days after enactment of this Act [Dec. 26, 2007], the Office of Management and Budget shall establish a pilot program to develop and implement an inventory to track the cost and size (in contractor manpower equivalents) of service contracts, particularly with respect to contracts that have been performed poorly by a contractor because of excessive costs or inferior quality, as determined by a contracting officer within the last five years, involve inherently governmental functions, or were undertaken without competition. The pilot program shall be established in at least three Cabinet-level departments, based on varying levels of annual contracting for services, as reported by the Federal

Procurement Data System's Federal Procurement Report for fiscal year 2005, including at least one Cabinet-level department that contracts out annually for \$10,000,000,000 or more in services, at least one Cabinet-level department that contracts out annually for between \$5,000,000,000 and \$9,000,000,000 in services, and at least one Cabinet-level department that contracts out annually for under \$5,000,000,000 in services."

FEDERAL SUPPORT FOR ENHANCEMENT OF STATE AND LOCAL ANTI-TERRORISM RESPONSE CAPABILITIES

Pub. L. 108-136, div. A, title VIII, §803, Nov. 24, 2003, 117 Stat. 1541, provided that:

"(a) PROCUREMENTS OF ANTI-TERRORISM TECHNOLOGIES AND SERVICES BY STATE AND LOCAL GOVERNMENTS.—The Administrator for Federal Procurement Policy shall establish a program under which States and units of local government may procure through contracts entered into by the Department of Defense or the Department of Homeland Security anti-terrorism technologies or anti-terrorism services for the purpose of preventing, detecting, identifying, deterring, or recovering from acts of terrorism.

"(b) AUTHORITIES.—Under the program, the Secretary of Defense and the Secretary of Homeland Security may, but shall not be required to, award contracts using the procedures established by the Administrator of General Services for the multiple awards schedule program of the General Services Administration.

"(c) DEFINITION.—In this section, the term 'State or local government' has the meaning provided in section 502(c)(3) of title 40, United States Code."

STATUTORY AND REGULATORY REVIEW

Pub. L. 108-136, div. A, title XIV, §1423, Nov. 24, 2003, 117 Stat. 1669, as amended by Pub. L. 109-163, div. A, title VIII, §843, Jan. 6, 2006, 119 Stat. 3389, provided that:

"(a) ESTABLISHMENT.—Not later than 90 days after the date of the enactment of this Act [Nov. 24, 2003], the Administrator for Federal Procurement Policy shall establish an advisory panel to review laws and regulations regarding the use of commercial practices, performance-based contracting, the performance of acquisition functions across agency lines of responsibility, and the use of Governmentwide contracts.

"(b) MEMBERSHIP.—The panel shall be composed of at least nine individuals who are recognized experts in acquisition law and Government acquisition policy. In making appointments to the panel, the Administrator shall—

"(1) consult with the Secretary of Defense, the Administrator of General Services, the Committees on Armed Services and Government Reform [now Oversight and Government Reform] of the House of Representatives, and the Committees on Armed Services and Governmental Affairs of the Senate; and

"(2) ensure that the members of the panel reflect the diverse experiences in both the public and private sectors, including academia.

"(c) DUTIES.—The panel shall—

"(1) review all Federal acquisition laws and regulations, and, to the extent practicable, governmentwide acquisition policies, with a view toward ensuring effective and appropriate use of commercial practices and performance-based contracting; and

"(2) make any recommendations for the modification of such laws, regulations, or policies that are considered necessary as a result of such review—

"(A) to protect the best interests of the Federal Government;

"(B) to ensure the continuing financial and ethical integrity of acquisitions by the Federal Government; and

"(C) to amend or eliminate any provisions in such laws, regulations, or policies that are unnecessary for the effective, efficient, and fair award and administration of contracts for the acquisition by the Federal Government of goods and services.

“(d) REPORT.—Not later than 18 months after the establishment of the panel, the panel shall submit to the Administrator and to the Committees on Armed Services and Government Reform [now Oversight and Government Reform] of the House of Representatives and the Committees on Armed Services and Governmental Affairs of the Senate a report containing a detailed statement of the findings, conclusions, and recommendations of the panel.”

CENTER OF EXCELLENCE IN SERVICE CONTRACTING

Pub. L. 108-136, div. A, title XIV, §1431(b), Nov. 24, 2003, 117 Stat. 1671, provided that: “Not later than 180 days after the date of the enactment of this Act [Nov. 24, 2003], the Administrator for Federal Procurement Policy shall establish a center of excellence in contracting for services. The center of excellence shall assist the acquisition community by identifying, and serving as a clearinghouse for, best practices in contracting for services in the public and private sectors.”

REPORTING OF BUNDLED CONTRACT OPPORTUNITIES

Section 414 of title IV of Pub. L. 105-135 provided that:

“(a) DATA COLLECTION REQUIRED.—The Federal Procurement Data System described in section 6(d)(4)(A) of the Office of Federal Procurement Policy Act (41 U.S.C. 405(d)(4)(A)) shall be modified to collect data regarding bundling of contract requirements when the contracting officer anticipates that the resulting contract price, including all options, is expected to exceed \$5,000,000. The data shall reflect a determination made by the contracting officer regarding whether a particular solicitation constitutes a contract bundling.

“(b) DEFINITIONS.—In this section, the term ‘bundling of contract requirements’ has the meaning given that term in section 3(o) of the Small Business Act (15 U.S.C. 632(o)) (as added by section 412 of this subtitle).”

CONGRESSIONAL FINDINGS REGARDING CONSIDERATION OF PAST CONTRACT PERFORMANCE

Section 1091(b)(1) of Pub. L. 103-355 provided that: “Congress makes the following findings:

“(A) Past contract performance of an offeror is one of the relevant factors that a contracting official of an executive agency should consider in awarding a contract.

“(B) It is appropriate for a contracting official to consider past contract performance of an offeror as an indicator of the likelihood that the offeror will successfully perform a contract to be awarded by that official.”

RESULTS-ORIENTED ACQUISITION PROCESS

Section 5052 of Pub. L. 103-355 provided that:

“(a) DEVELOPMENT OF PROCESS REQUIRED.—The Administrator for Federal Procurement Policy, in consultation with the heads of appropriate Federal agencies, shall develop results-oriented acquisition process guidelines for implementation by agencies in acquisitions of property and services by the Federal agencies. The process guidelines shall include the identification of quantitative measures and standards for determining the extent to which an acquisition of items other than commercial items by a Federal agency satisfies the needs for which the items are being acquired.

“(b) INAPPLICABILITY OF PROCESS TO DEPARTMENT OF DEFENSE.—The process guidelines developed pursuant to subsection (a) may not be applied to the Department of Defense.”

DEVELOPMENT OF DEFINITIONS REGARDING CERTAIN SMALL BUSINESS CONCERNS

Pub. L. 103-355, title VII, §7107, Oct. 13, 1994, 108 Stat. 3376, directed the Administrator for Federal Procurement Policy to conduct a comprehensive review of Federal laws in effect on Nov. 1, 1994, to identify and catalogue provisions defining small business concerns owned and controlled by socially and economically dis-

advantaged individuals, minority-owned small business concerns, and small business concerns owned and controlled by women, for purposes of authorizing the participation of such small business concerns as prime contractors or subcontractors in contracts awarded directly by the Federal Government or subcontracts awarded under such contracts, or contracts and subcontracts funded, in whole or in part, by Federal financial assistance under grants, cooperative agreements, or other forms of Federal assistance. The Administrator was to develop uniform definitions and agency certification standards and procedures for qualification as a small business concern, and submit to Congress, not later than May 1, 1996, a report on the results of the review, the actions taken, and the Administrator’s recommendations.

DATA COLLECTION THROUGH FEDERAL PROCUREMENT DATA SYSTEM

Section 10004 of Pub. L. 103-355 provided that:

“(a) DATA COLLECTION REQUIRED.—The Federal Procurement Data System described in section 6(d)(4)(A) of the Office of Federal Procurement Policy Act (41 U.S.C. 405(d)(4)(A)) shall be modified to collect from contracts in excess of the simplified acquisition threshold data identifying the following matters:

“(1) Contract awards made pursuant to competitions conducted pursuant to section 2323 of title 10, United States Code, or section 7102 of the Federal Acquisition Streamlining Act of 1994 [Pub. L. 103-355, 15 U.S.C. 644 note].

“(2) Awards to business concerns owned and controlled by women.

“(3) Number of offers received in response to a solicitation.

“(4) Task order contracts.

“(5) Contracts for the acquisition of commercial items.

“(b) DEFINITION.—In this section, the term ‘simplified acquisition threshold’ has the meaning given such term in section 4(11) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(11)).”

PROFIT METHODOLOGY STUDY

Section 7 of Pub. L. 100-679 provided that:

“(a) IN GENERAL.—The Administrator shall conduct a study to develop a consistent methodology which executive agencies should use for measuring the profits earned by government contractors on procurements, other than procurements where the price is based on adequate price competition or on established catalog or market prices of commercial items sold in substantial quantities to the general public.

“(b) CONTRACTORS’ FINANCIAL DATA.—The methodology developed under subsection (a) shall include adequate procedures for verifying and maintaining the confidentiality of contractors’ financial data.”

§ 405a. Uniform Federal procurement regulations and procedures

The Administrator of the Office of Federal Procurement Policy is authorized and directed, pursuant to the authority conferred by Public Law 93-400 [41 U.S.C. 401 et seq.] and subject to the procedures set forth in such Public Law, to promulgate a single, simplified, uniform Federal procurement regulation and to establish procedures for insuring compliance with such provisions by all Federal agencies. In formulating such regulations and procedures the Administrator of the Office of Federal Procurement Policy shall, in consultation with the Small Business Administration, conduct analyses of the impact on small business concerns resulting from revised procurement regulations, and incorporate into revised procurement regulations simplified bidding, contract performance, and

contract administration procedures for small business concerns.

(Pub. L. 95-507, title II, §222, Oct. 24, 1978, 92 Stat. 1771.)

REFERENCES IN TEXT

Public Law 93-400, referred to in text, is Pub. L. 93-400, Aug. 30, 1974, 88 Stat. 796, as amended, known as the Office of Federal Procurement Policy Act, which is classified principally to this chapter (§401 et seq.). For complete classification of this Act to the Code, see Short Title note set out under section 401 of this title and Tables.

CODIFICATION

Section was not enacted as part of the Office of Federal Procurement Policy Act which comprises this chapter.

SUPERSEURE OF INCONSISTENT STATUTORY PROVISIONS

Pub. L. 96-83, §11, Oct. 10, 1979, 93 Stat. 652, provided that: "The provisions of the Act [Pub. L. 93-400, Aug. 30, 1974, 88 Stat. 796, see Short Title note set out under section 401 of this title] as amended by this Act [see Short Title of 1979 Amendment note set out under section 401 of this title] shall supersede the provisions of section 222 of the Act of October 24, 1978, entitled 'An Act to amend the Small Business Act and the Small Business Investment Act of 1958' (41 U.S.C. 405a) to the extent they are inconsistent therewith."

DEFINITIONS

The definitions in section 637c of Title 15, Commerce and Trade, apply to this section.

§ 405b. Conflict of interest standards for individuals providing consulting services

(a) Issuance of policy and regulations

Not later than 90 days after October 1, 1988, the Administrator of the Office of Federal Procurement Policy shall issue a policy, and not later than 180 days thereafter Government-wide regulations shall be issued under the Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.) which set forth—

(1) conflict of interest standards for persons who provide consulting services described in subsection (b) of this section; and

(2) procedures, including such registration, certification, and enforcement requirements as may be appropriate, to promote compliance with such standards.

(b) Services subject to regulations

The regulations required by subsection (a) of this section shall apply to the following types of consulting services:

(1) advisory and assistance services provided to the Government to the extent necessary to identify and evaluate the potential for conflicts of interest that could be prejudicial to the interests of the United States;

(2) services related to support of the preparation or submission of bids and proposals for Federal contracts to the extent that inclusion of such services in such regulations is necessary to identify and evaluate the potential for conflicts of interest that could be prejudicial to the interests of the United States; and

(3) such other services related to Federal contracts as may be specified in the regulations prescribed under subsection (a) of this

section to the extent necessary to identify and evaluate the potential for conflicts of interest that could be prejudicial to the interests of the United States.

(c) Report to Congress by Comptroller General on effectiveness of regulations

The Comptroller General shall report to Congress not later than one year after October 1, 1988, his assessment of the effectiveness of the regulations prescribed under this section.

(d) Intelligence activities exemption; annual report by Director of Central Intelligence

Intelligence activities as defined in section 3.4(e) of Executive order 12333 or a comparable definitional section in any successor order may be exempt from the regulations required by subsection (a) of this section: *Provided*, That the Director of Central Intelligence shall report to the Intelligence and Appropriations Committees of the Congress no later than January 1, 1990, and annually thereafter delineating those activities and organizations which have been exempted from the regulations required by subsection (a) of this section in accordance with the provisions of this subsection.

(e) Adverse effect determination by President prior to issuance of regulations; report to Congressional committees; voiding of regulations requirement

The President shall, before issuance of the regulations required by subsection (a) of this section, determine if the promulgation of such regulations would have a significantly adverse effect on the accomplishment of the mission of the Department of Defense or other Federal Government agencies: *Provided*, That if the President determines that the regulations required by subsection (a) of this section would have such an adverse effect, the President shall so report to the appropriate committees of the Senate and the House of Representatives, stating in full the reasons for such a determination: *Provided further*, That in the event of submission of a report to the committees containing an adverse effect determination, the requirement for the regulations prescribed by subsection (a) of this section shall be null and void.

(Pub. L. 100-463, title VIII, §8141, Oct. 1, 1988, 102 Stat. 2270-47.)

REFERENCES IN TEXT

The Office of Federal Procurement Policy Act, referred to in subsec. (a), is Pub. L. 93-400, Aug. 30, 1974, 88 Stat. 796, as amended, which is classified principally to this chapter (§401 et seq.). For complete classification of this Act to the Code, see Short Title note set out under section 401 of this title.

Executive order 12333, referred to in subsec. (d), is set out as a note under section 401 of Title 50, War and National Defense.

CODIFICATION

Section was enacted as part of the Department of Defense Appropriations Act, 1989, and not as part of the Office of Federal Procurement Policy Act which comprises this chapter.

CHANGE OF NAME

Reference to the Director of Central Intelligence or the Director of the Central Intelligence Agency in the

Director's capacity as the head of the intelligence community deemed to be a reference to the Director of National Intelligence. Reference to the Director of Central Intelligence or the Director of the Central Intelligence Agency in the Director's capacity as the head of the Central Intelligence Agency deemed to be a reference to the Director of the Central Intelligence Agency. See section 1081(a), (b) of Pub. L. 108-458, set out as a note under section 401 of Title 50, War and National Defense.

TERMINATION OF REPORTING REQUIREMENTS

For termination, effective May 15, 2000, of provisions of law requiring submittal to Congress of any annual, semiannual, or other regular periodic report listed in House Document No. 103-7 (in which a report required under subsec. (d) of this section is listed on page 156), see section 3003 of Pub. L. 104-66, as amended, set out as a note under section 1113 of Title 31, Money and Finance.

§ 405c. Ethics safeguards related to contractor conflicts of interest

(a) Policy on personal conflicts of interest by employees of Federal Government contractors

Not later than 270 days after October 14, 2008, the Administrator for Federal Procurement Policy shall develop and issue a standard policy to prevent personal conflicts of interest by contractor employees performing acquisition functions closely associated with inherently governmental functions (including the development, award, and administration of Government contracts) for or on behalf of a Federal agency or department.

(1) Elements of policy

The policy required under subsection (a) shall—

(A) provide a definition of the term “personal conflict of interest” as it relates to contractor employees performing acquisition functions closely associated with inherently governmental functions; and

(B) require each contractor whose employees perform acquisition functions closely associated with inherently governmental functions to—

(i) identify and prevent personal conflicts of interest for employees of the contractor who are performing such functions;

(ii) prohibit contractor employees who have access to non-public government information obtained while performing such functions from using such information for personal gain;

(iii) report any personal conflict-of-interest violation by such an employee to the applicable contracting officer or contracting officer's representative as soon as it is identified;

(iv) maintain effective oversight to verify compliance with personal conflict-of-interest safeguards;

(v) have procedures in place to screen for potential conflicts of interest for all employees performing such functions; and

(vi) take appropriate disciplinary action in the case of employees who fail to comply with policies established pursuant to this section.

(2) Contract clause

(A) The Administrator shall develop a personal conflicts-of-interest clause or a set of

clauses for inclusion in solicitations and contracts (and task or delivery orders) for the performance of acquisition functions closely associated with inherently governmental functions that sets forth the personal conflicts-of-interest policy developed under this subsection and that sets forth the contractor's responsibilities under such policy.

(B) Subparagraph (A) shall take effect 300 days after October 14, 2008, and shall apply to—

(i) contracts entered into on or after that effective date; and

(ii) task or delivery orders awarded on or after that effective date, regardless of whether the contracts pursuant to which such task or delivery orders are awarded are entered before, on, or after October 14, 2008.

(3) Applicability

(A) Except as provided in subparagraph (B), this subsection shall apply to any contract for an amount in excess of the simplified acquisition threshold (as defined in section 403(11) of this title) if the contract is for the performance of acquisition functions closely associated with inherently governmental functions.

(B) If only a portion of a contract described in subparagraph (A) is for the performance of acquisition functions described in that subparagraph, then this subsection applies only to that portion of the contract.

(b) Review of Federal acquisition regulation relating to conflicts of interest

(1) Review

Not later than 12 months after October 14, 2008, the Administrator for Federal Procurement Policy, in consultation with the Director of the Office of Government Ethics, shall review the Federal Acquisition Regulation to—

(A) identify contracting methods, types and services that raise heightened concerns for potential personal and organizational conflicts of interest; and

(B) determine whether revisions to the Federal Acquisition Regulation are necessary to—

(i) address personal conflicts of interest by contractor employees with respect to functions other than those described in subsection (a); or

(ii) achieve sufficiently rigorous, comprehensive, and uniform government-wide policies to prevent and mitigate organizational conflicts of interest in Federal contracting.

(2) Regulatory revisions

If the Administrator determines pursuant to the review under paragraph (1)(B) that revisions to the Federal Acquisition Regulation are necessary, the Administrator shall work with the Federal Acquisition Regulatory Council to prescribe appropriate revisions to the regulations, including the development of appropriate contract clauses.

(3) Report

Not later than March 1, 2010, the Administrator shall submit to the Committees on Armed Services of the Senate and House of

Representatives, the Committee on Homeland Security and Governmental Affairs in the Senate, and the Committee on Oversight and Government Reform of the House of Representatives a report setting forth such findings and determinations under subparagraphs (A) and (B) of paragraph (1), together with an assessment of any revisions to the Federal Acquisition Regulation that may be necessary.

(c) Best practices

The Administrator for Federal Procurement Policy shall, in consultation with the Director of the Office Government Ethics, develop and maintain a repository of best practices relating to the prevention and mitigation of organizational and personal conflicts of interest in Federal contracting.

(Pub. L. 110-417, [div. A], title VIII, §841, Oct. 14, 2008, 122 Stat. 4537.)

CODIFICATION

Section was enacted as part of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, and not as part of the Office of Federal Procurement Policy Act which comprises this chapter.

§ 406. Administrative powers

Upon the request of the Administrator, each executive agency is directed to—

(1) make its services, personnel, and facilities available to the Office to the greatest practicable extent for the performance of functions under this chapter; and

(2) except when prohibited by law, furnish to the Administrator and give him access to all information and records in its possession which the Administrator may determine to be necessary for the performance of the functions of the Office.

(Pub. L. 93-400, §7, Aug. 30, 1974, 88 Stat. 798.)

§ 407. Repealed. Pub. L. 104-106, div. D, title XLIII, § 4305(b), Feb. 10, 1996, 110 Stat. 665

Section, Pub. L. 93-400, §8, Aug. 30, 1974, 88 Stat. 798; Pub. L. 96-83, §5, Oct. 10, 1979, 93 Stat. 651; Pub. L. 98-191, §8(a), Dec. 1, 1983, 97 Stat. 1331, related to responsiveness to Congress.

EFFECTIVE DATE OF REPEAL

For effective date and applicability of repeal, see section 4401 of Pub. L. 104-106, set out as an Effective Date of 1996 Amendment note under section 251 of this title.

§ 408. Applicability of existing laws

The authority of an executive agency under any other law to prescribe policies, regulations, procedures, and forms for procurement is subject to the authority conferred in section 405 of this title.

(Pub. L. 93-400, §9, Aug. 30, 1974, 88 Stat. 799.)

§ 409. Repealed. Pub. L. 104-106, div. D, title XLIII, § 4305(c)(1), Feb. 10, 1996, 110 Stat. 665

Section, Pub. L. 93-400, §10, Aug. 30, 1974, 88 Stat. 799; Pub. L. 96-83, §6, Oct. 10, 1979, 93 Stat. 651; Pub. L. 98-191, §8(b), Dec. 1, 1983, 97 Stat. 1331, related to continuation in effect of procurement policies, regulations, procedures, and forms in effect on Dec. 1, 1983.

EFFECTIVE DATE OF REPEAL

For effective date and applicability of repeal, see section 4401 of Pub. L. 104-106, set out as an Effective Date of 1996 Amendment note under section 251 of this title.

§ 410. Authorization of appropriations

There is authorized to be appropriated for the Office of Federal Procurement Policy each fiscal year such sums as may be necessary for carrying out the responsibilities of that office for such fiscal year.

(Pub. L. 93-400, §11, Aug. 30, 1974, 88 Stat. 799; Pub. L. 96-83, §7, Oct. 10, 1979, 93 Stat. 651; Pub. L. 98-191, §6, Dec. 1, 1983, 97 Stat. 1329; Pub. L. 100-679, §3(b), Nov. 17, 1988, 102 Stat. 4056; Pub. L. 104-106, div. D, title XLIII, §4305(c)(2), Feb. 10, 1996, 110 Stat. 665.)

AMENDMENTS

1996—Pub. L. 104-106 amended section generally. Prior to amendment, section read as follows: “There are authorized to be appropriated to carry out the provisions of this chapter, and for no other purpose, \$4,500,000 for the fiscal year ending September 30, 1984, and such sums as may be necessary for each succeeding fiscal year.”

1988—Pub. L. 100-679 substituted “such sums as may be necessary for each succeeding fiscal year” for “for each of the three succeeding fiscal years”.

1983—Pub. L. 98-191 amended section generally, substituting provisions authorizing appropriations of \$4,500,000 for the fiscal year ending Sept. 30, 1984, and for each of the three succeeding fiscal years for provisions authorizing appropriations of \$4,000,000 for the fiscal year ending Sept. 30, 1980, and for each of the three succeeding fiscal years and requiring that future authorization of appropriations to carry out the purposes of this chapter be referred to the Senate Committee on Governmental Affairs.

1979—Pub. L. 96-83 substituted provisions authorizing appropriations of \$4,000,000 for the fiscal year ending Sept. 30, 1980, and for each of the three succeeding fiscal years, such funds not to be used for any other purpose, with one-third of the appropriations to be made available to the Federal Acquisition Institute, for provisions authorizing appropriations of not to exceed \$2,000,000 for the fiscal year ending June 30, 1975, of which not to exceed \$150,000 was to be available for the purposes of former section 405(d)(4) of this title, and such other sums as necessary for each of the four fiscal years thereafter, and substituted “Governmental Affairs” for “Government Operations”.

EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104-106, see section 4401 of Pub. L. 104-106, set out as a note under section 251 of this title.

EFFECTIVE DATE OF 1979 AMENDMENT

Amendment by Pub. L. 96-83 effective Oct. 1, 1979, see section 12 of Pub. L. 96-83, set out as a note under section 401 of this title.

§ 411. Delegation of authority by Administrator

(a) The Administrator may delegate, and authorize successive redelegations of, any authority, function, or power of the Administrator under this chapter (other than the authority to provide overall direction of Federal procurement policy and to prescribe policies and regulations to carry out such policy), to any other executive agency with the consent of the head of such executive agency or at the direction of the President.

(b) The Administrator may make and authorize such delegations within the Office as he determines to be necessary to carry out the provisions of this chapter.

(Pub. L. 93-400, §12, Aug. 30, 1974, 88 Stat. 799; Pub. L. 96-83, §8, Oct. 10, 1979, 93 Stat. 652; Pub. L. 98-191, §8(c), Dec. 1, 1983, 97 Stat. 1331.)

AMENDMENTS

1983—Subsec. (a). Pub. L. 98-191 substituted “The Administrator may delegate, and authorize successive re-delegations of, any authority, function, or power of the Administrator under this chapter (other than the authority to provide overall direction of Federal procurement policy and to prescribe policies and regulations to carry out such policy), to any other executive agency with the consent of the head of such executive agency or at the direction of the President” for “The Administrator may delegate, and authorize successive re-delegations of, any authority, function, or power under this chapter, other than his basic authority to provide overall leadership in the development of Federal procurement policy, to any other executive agency with the consent of such agency or at the direction of the President”.

1979—Subsec. (a). Pub. L. 96-83 substituted provisions respecting delegation of the leadership role in the development of policy, for provisions respecting delegation of the direction of policy and the authority to prescribe rules and regulations to effectuate that policy.

EFFECTIVE DATE OF 1979 AMENDMENT

Amendment by Pub. L. 96-83 effective Oct. 1, 1979, see section 12 of Pub. L. 96-83, set out as a note under section 401 of this title.

§ 412. Comptroller General's access to information from Administrator; rule making procedure

(a) The Administrator and personnel in his Office shall furnish such information as the Comptroller General may require for the discharge of his responsibilities. For this purpose, the Comptroller General or his representatives shall have access to all books, documents, papers, and records of the Office.

(b) The Administrator shall, by regulation, require that formal meetings of the Office, as designated by him, for the purpose of developing procurement policies and regulations shall be open to the public, and that public notice of each such meeting shall be given not less than ten days prior thereto.

(Pub. L. 93-400, §14, Aug. 30, 1974, 88 Stat. 800; Pub. L. 96-83, §9, Oct. 10, 1979, 93 Stat. 652.)

AMENDMENTS

1979—Subsec. (b). Pub. L. 96-83 substituted “developing” for “establishing”.

EFFECTIVE DATE OF 1979 AMENDMENT

Amendment by Pub. L. 96-83 effective Oct. 1, 1979, see section 12 of Pub. L. 96-83, set out as a note under section 401 of this title.

§ 413. Tests of innovative procurement methods and procedures

(a) The Administrator may develop innovative procurement methods and procedures to be tested by selected executive agencies. In developing any program to test innovative procurement methods and procedures under this subsection, the Administrator shall consult with the heads of executive agencies to—

(1) ascertain the need for and specify the objectives of such program;

(2) develop the guidelines and procedures for carrying out such program and the criteria to be used in measuring the success of such program;

(3) evaluate the potential costs and benefits which may be derived from the innovative procurement methods and procedures tested under such program;

(4) select the appropriate executive agencies or components of executive agencies to carry out such program;

(5) specify the categories and types of products or services to be procured under such program; and

(6) develop the methods to be used to analyze the results of such program.

A program to test innovative procurement methods and procedures may not be carried out unless approved by the heads of the executive agencies selected to carry out such program.

(b) If the Administrator determines that it is necessary to waive the application of any provision of law in order to carry out a proposed program to test innovative procurement methods and procedures under subsection (a) of this section, the Administrator shall transmit notice of the proposed program to the Committee on Government Operations of the House of Representatives and the Committee on Governmental Affairs of the Senate and request that such committees take such action as may be necessary to provide that such provision of law does not apply with respect to the proposed program. The notification to Congress shall include a description of the proposed program (including the scope and purpose of the proposed program), the procedures to be followed in carrying out the proposed program, the provisions of law affected and any provision of law the application of which must be waived in order to carry out the proposed program, and the executive agencies involved in carrying out the proposed program.

(Pub. L. 93-400, §15, as added Pub. L. 98-191, §7, Dec. 1, 1983, 97 Stat. 1329; amended Pub. L. 104-201, div. A, title X, §1074(f)(2), Sept. 23, 1996, 110 Stat. 2661.)

PRIOR PROVISIONS

A prior section 15 of Pub. L. 93-400 amended sections 474, 481, and 487 of former Title 40, Public Buildings, Property, and Works.

AMENDMENTS

1996—Subsec. (a). Pub. L. 104-201 struck out after first sentence “The innovative procurement methods and procedures tested under this subsection shall be consistent with the policies set forth in section 401 of this title.”

CHANGE OF NAME

Committee on Governmental Affairs of Senate changed to Committee on Homeland Security and Governmental Affairs of Senate, effective Jan. 4, 2005, by Senate Resolution No. 445, One Hundred Eighth Congress, Oct. 9, 2004.

Committee on Government Operations of House of Representatives treated as referring to Committee on Government Reform and Oversight of House of Representatives by section 1(a) of Pub. L. 104-14, set out as a note preceding section 21 of Title 2, The Congress.

Committee on Government Reform and Oversight of House of Representatives changed to Committee on Government Reform of House of Representatives by House Resolution No. 5, One Hundred Sixth Congress, Jan. 6, 1999. Committee on Government Reform of House of Representatives changed to Committee on Oversight and Government Reform of House of Representatives by House Resolution No. 6, One Hundred Tenth Congress, Jan. 5, 2007.

TEST PROGRAM FOR EXECUTIVE AGENCIES

Pub. L. 103-355, title V, §5061, Oct. 13, 1994, 108 Stat. 3352, as amended by Pub. L. 104-106, div. D, title XLIII, §4302(a), Feb. 10, 1996, 110 Stat. 658; Pub. L. 105-85, div. A, title VIII, §850(f)(1), Nov. 18, 1997, 111 Stat. 1849, provided that:

“(a) IN GENERAL.—The Administrator for Federal Procurement Policy (in this section referred to as the ‘Administrator’) may conduct a program of tests of alternative and innovative procurement procedures. To the extent consistent with this section, such program shall be conducted consistent with section 15 of the Office of Federal Procurement Policy Act (41 U.S.C. 413). No more than 6 such tests shall be conducted under the authority of this subsection, and not more than 1 such test shall be conducted under such authority in an agency.

“(b) DESIGNATION OF AGENCIES.—Each test conducted pursuant to subsection (a) shall be carried out in not more than 2 specific procuring activities in an agency designated by the Administrator. Each agency so designated shall select the procuring activities participating in the test with the approval of the Administrator and shall designate a procurement testing official who shall be responsible for the conduct and evaluation of tests within that agency.

“(c) TEST REQUIREMENTS AND LIMITATIONS.—(1) Each test conducted under subsection (a)—

“(A) shall be developed and structured by the Administrator or by the agency senior procurement executive designated pursuant to section 16(3) of the Office of Federal Procurement Policy Act ([former] 41 U.S.C. 414(3)) in close coordination with the Administrator; and

“(B) shall be limited to specific programs of agencies or specific acquisitions.

“(2) The total estimated life-cycle cost to the Federal Government for each test conducted under subsection (a) may not exceed \$100,000,000.

“(3)(A) Except as provided in subparagraph (B), each contract awarded in conducting the tests under subsection (a) (including the cost of options if all options were to be exercised) may not exceed \$5,000,000.

“(B) For one of the tests conducted under subsection (a), the amount of each contract awarded in conducting the test (including options) may exceed \$5,000,000.

“(4) The program of tests conducted under subsection (a) shall include, either as a test or as part of a test, the use of the electronic commerce capability required by section 30 of the Office of Federal Procurement Policy Act [41 U.S.C. 426] for procurement actions in amounts greater than the simplified acquisition threshold.

“(d) LIMITATION ON TOTAL VALUE OF CONTRACTS UNDER PROGRAM.—(1) The Administrator shall ensure that the total amount obligated under contracts awarded pursuant to the program under this section does not exceed \$600,000,000. In calculating such amount, the Administrator shall not include any contract awarded for the test conducted by the National Aeronautics and Space Administration pursuant to section 5062 of this Act [42 U.S.C. 2473 note].

“(2) The Administrator shall monitor the value of contracts awarded pursuant to the program under this section.

“(3) No contract may be awarded under the program under this section if the award of the contract would result in obligation of more than \$600,000,000 under contracts awarded pursuant to the program under this section.

“(e) PROCEDURES AUTHORIZED.—Tests conducted under this section may include any of the following procedures:

“(1) Publication of agency needs before drafting of a solicitation.

“(2) Issuance of draft solicitations for comment.

“(3) Streamlined solicitations that specify as the evaluation factors the minimum factors necessary, require sources to submit the minimum information necessary, provide abbreviated periods for submission of offers, and specify page limitations for offers.

“(4) Limitation of source selection factors to—

“(A) cost to the Federal Government;

“(B) past experience and performance; and

“(C) quality of the content of the offer.

“(5) Evaluation of proposals by small teams of highly qualified people over a period not greater than 30 days.

“(6) Restriction of competitions to sources determined capable in a precompetition screening process, provided that the screening process affords all interested sources a fair opportunity to be considered.

“(7) Restriction of competitions to sources of pre-evaluated products, provided that the preevaluation process affords all interested sources a fair opportunity to be considered.

“(8) Alternative notice and publication requirements.

“(9) A process in which—

“(A) the competitive process is initiated by publication in the Commerce Business Daily of a notice that—

“(i) contains a synopsis of the functional and performance needs of the executive agency conducting the test, and, for purposes of guidance only, other specifications; and

“(ii) invites any interested source to submit information or samples showing the suitability of its product for meeting those needs, together with a price quotation, or, if appropriate, showing the source’s technical capability, past performance, product supportability, or other qualifications (including, as appropriate, information regarding rates and other cost-related factors);

“(B) contracting officials develop a request for proposals (including appropriate specifications and evaluation criteria) after reviewing the submissions of interested sources and, if the officials determine necessary, after consultation with those sources; and

“(C) a contract is awarded after a streamlined competition that is limited to all sources that timely provided product information in response to the notice or, if appropriate, to those sources determined most capable based on the qualification-based factors included in an invitation to submit information pursuant to subparagraph (A).

“(f) MEASURABLE TEST CRITERIA.—The Administrator shall require each agency conducting a test pursuant to subsection (a) to establish, to the maximum extent practicable, measurable criteria for evaluation of the effects of the procedure or technique to be tested.

“(g) TEST PLAN.—At least 270 days before a test may be conducted under this section, the Administrator shall—

“(1) provide a detailed test plan, including lists of any regulations that are to be waived, and any written determination under subsection (h)(1)(B) to the Committee on Government Operations [now Committee on Oversight and Government Reform] of the House of Representatives and the Committee on Governmental Affairs [now Committee on Homeland Security and Governmental Affairs] of the Senate;

“(2) provide a copy of the plan to the appropriate authorization and appropriations committees of the House of Representatives and the Senate; and

“(3) publish the plan in the Federal Register and provide an opportunity for public comment.

“(h) WAIVER OF PROCUREMENT REGULATIONS.—(1) For purposes of a test conducted under subsection (a), the Administrator may waive—

“(A) any provision of the Federal Acquisition Regulation that is not required by statute; and

“(B) any provision of the Federal Acquisition Regulation that is required by a provision of law described in paragraph (2), the waiver of which the Administrator determines in writing to be necessary to conduct any test of any of the procedures described in subsection (e).

“(2) The provisions of law referred to in paragraph (1) are as follows:

“(A) The following provisions of title 10, United States Code:

“(i) Section 2304.

“(ii) Section 2305.

“(iii) Section 2319.

“(B) Subsections (e), (f), and (g) of section 8 of the Small Business Act (15 U.S.C. 637).

“(C) The following provisions of the Revised Statutes:

“(i) Section 3709 (41 U.S.C. 5).

“(ii) Section 3710 (41 U.S.C. 8).

“(iii) Section 3735 (41 U.S.C. 13).

“(D) The following provisions of the Federal Property and Administrative Services Act of 1949:

“(i) Section 303 (41 U.S.C. 253).

“(ii) Section 303A (41 U.S.C. 253a).

“(iii) Section 303B (41 U.S.C. 253b).

“(iv) Section 303C (41 U.S.C. 253c).

“(v) Section 310 (41 U.S.C. 260).

“(E) The following provisions of the Office of Federal Procurement Policy Act:

“(i) Section 4(6) (41 U.S.C. 403(6)).

“(ii) Section 18 (41 U.S.C. 416).

“(3) If the Administrator determines that the conduct of a test requires the waiver of a law not listed in paragraph (2) or requires approval of an estimated dollar amount not permitted under subsection (c)(4), the Administrator may propose legislation to authorize the waiver or grant the approval. Before proposing such legislation, the Administrator may provide and publish a test plan as described in subsection (g).

“(i) REPORT.—Not later than 6 months after completion of a test conducted under subsection (a), the Comptroller General shall submit to Congress a report for the test setting forth in detail the results of the test, including such recommendations as the Comptroller General considers appropriate.

“(j) COMMENCEMENT AND EXPIRATION OF AUTHORITY.—The authority to conduct a test under subsection (a) in an agency and to award contracts under such a test shall take effect on January 1, 1997, and shall expire on January 1, 2001. A contract entered into before such authority expires in an agency pursuant to a test shall remain in effect, in accordance with the terms of the contract, the notwithstanding of expiration the authority to conduct the test under this section.

“(k) RULE OF CONSTRUCTION.—Nothing in this section shall be construed as authorizing the appropriation or obligation of funds for the tests conducted pursuant to subsection (a).”

§ 414. Chief Acquisition Officers and senior procurement executives

(a) Establishment of agency Chief Acquisition Officers

(1)¹ The head of each executive agency described in section 901(b)(1) (other than the Department of Defense) or section 901(b)(2)(C) of title 31 with a Chief Financial Officer appointed or designated under section 901(a) of such title shall appoint or designate a non-career employee as Chief Acquisition Officer for the agency, who shall—

(A) have acquisition management as that official's primary duty; and

(B) advise and assist the head of the executive agency and other agency officials to ensure that the mission of the executive agency is achieved through the management of the agency's acquisition activities.

(b) Authority and functions of agency Chief Acquisition Officers

The functions of each Chief Acquisition Officer shall include—

(1) monitoring the performance of acquisition activities and acquisition programs of the executive agency, evaluating the performance of those programs on the basis of applicable performance measurements, and advising the head of the executive agency regarding the appropriate business strategy to achieve the mission of the executive agency;

(2) increasing the use of full and open competition in the acquisition of property and services by the executive agency by establishing policies, procedures, and practices that ensure that the executive agency receives a sufficient number of sealed bids or competitive proposals from responsible sources to fulfill the Government's requirements (including performance and delivery schedules) at the lowest cost or best value considering the nature of the property or service procured;

(3) increasing appropriate use of performance-based contracting and performance specifications;

(4) making acquisition decisions consistent with all applicable laws and establishing clear lines of authority, accountability, and responsibility for acquisition decisionmaking within the executive agency;

(5) managing the direction of acquisition policy for the executive agency, including implementation of the unique acquisition policies, regulations, and standards of the executive agency;

(6) developing and maintaining an acquisition career management program in the executive agency to ensure that there is an adequate professional workforce; and

(7) as part of the strategic planning and performance evaluation process required under section 306 of title 5 and sections 1105(a)(28), 1115, 1116, and 9703 of title 31—

(A) assessing the requirements established for agency personnel regarding knowledge and skill in acquisition resources management and the adequacy of such requirements for facilitating the achievement of the performance goals established for acquisition management;

(B) in order to rectify any deficiency in meeting such requirements, developing strategies and specific plans for hiring, training, and professional development; and

(C) reporting to the head of the executive agency on the progress made in improving acquisition management capability.

(c) Senior procurement executive

(1) The head of each executive agency shall designate a senior procurement executive who shall be responsible for management direction of the procurement system of the executive agency, including implementation of the unique procurement policies, regulations, and standards of the executive agency.

¹ So in original. No par. (2) has been enacted.

(2) In the case of an executive agency for which a Chief Acquisition Officer has been appointed or designated under subsection (a) of this section, the head of such executive agency shall either—

(A) designate the Chief Acquisition Officer as the senior procurement executive for the executive agency; or

(B) ensure that the senior procurement executive designated for the executive agency under paragraph (1) reports directly to the Chief Acquisition Officer without intervening authority.

(Pub. L. 93-400, §16, as added Pub. L. 98-191, §7, Dec. 1, 1983, 97 Stat. 1330; amended Pub. L. 98-369, div. B, title VII, §2732(b)(2), July 18, 1984, 98 Stat. 1199; Pub. L. 108-136, div. A, title XIV, §1421(a)(1), Nov. 24, 2003, 117 Stat. 1666.)

AMENDMENTS

2003—Pub. L. 108-136 amended section generally. Prior to amendment, section related to executive agency responsibilities.

1984—Par. (1). Pub. L. 98-369 substituted “increase the use of full and open competition in the procurement of property or services by the executive agency by establishing policies, procedures, and practices that assure that the executive agency receives a sufficient number of sealed bids or competitive proposals from responsible sources to fulfill the Government’s requirements (including performance and delivery schedules) at the lowest reasonable cost considering the nature of the property or service procured;” for “increase the use of effective competition in procurement by the executive agency;”.

§ 414a. Personnel evaluation

The head of each executive agency that is subject to the provisions of title III of the Federal Property and Administrative Services Act of 1949 [41 U.S.C. 251 et seq.] shall ensure, with respect to the employees of that agency whose primary duties and responsibilities pertain to the award of contracts subject to the provisions of this Act, that the performance appraisal system applicable to such employees affords appropriate recognition to, among other factors, efforts—

(1) to increase competition and achieve cost savings through the elimination of procedures that unnecessarily inhibit full and open competition;

(2) to further the purposes of the Small Business and Federal Procurement Competition Enhancement Act of 1984 and the Defense Procurement Reform Act of 1984; and

(3) to further such other objectives and purposes of the Federal acquisition system as may be authorized by law.

(Pub. L. 98-577, title V, §502, Oct. 30, 1984, 98 Stat. 3085.)

REFERENCES IN TEXT

The Federal Property and Administrative Services Act of 1949, as amended, referred to in provision preceding par. (1), is act June 30, 1949, ch. 288, 63 Stat. 377, as amended. Title III of the Act is classified generally to subchapter IV (§251 et seq.) of chapter 4 of this title. For complete classification of this Act to the Code, see Tables.

This Act and the Small Business and Federal Procurement Competition Enhancement Act of 1984, referred to in provision preceding par. (1) and par. (2), is Pub. L. 98-577, Oct. 30, 1984, 98 Stat. 3066. For complete

classification of this Act to the Code, see Short Title note set out under section 251 of this title and Tables.

The Defense Procurement Reform Act of 1984, referred to in par. (2), is Pub. L. 98-525, title XII, Oct. 19, 1984, 98 Stat. 2588. For complete classification of this Act to the Code, see Short Title of 1984 Amendment note set out under section 2302 of Title 10, Armed Forces, and Tables.

CODIFICATION

Section was enacted as part of the Small Business and Federal Procurement Competition Enhancement Act of 1984, and not as part of the Office of Federal Procurement Policy Act which comprises this chapter.

§ 414b. Chief Acquisition Officers Council

(a) Establishment

There is established in the executive branch a Chief Acquisition Officers Council.

(b) Membership

The members of the Council shall be as follows:

(1) The Deputy Director for Management of the Office of Management and Budget, who shall act as Chairman of the Council.

(2) The Administrator for Federal Procurement Policy.

(3) The Under Secretary of Defense for Acquisition, Technology, and Logistics.

(4) The chief acquisition officer of each executive agency that is required to have a chief acquisition officer under section 414 of this title and the senior procurement executive of each military department.

(5) Any other senior agency officer of each executive agency, appointed by the head of the agency in consultation with the Chairman, who can effectively assist the Council in performing the functions set forth in subsection (e) of this section and supporting the associated range of acquisition activities.

(c) Leadership; support

(1) The Administrator for Federal Procurement Policy shall lead the activities of the Council on behalf of the Deputy Director for Management.

(2)(A) The Vice Chairman of the Council shall be selected by the Council from among its members.

(B) The Vice Chairman shall serve a 1-year term, and may serve multiple terms.

(3) The Administrator of General Services shall provide administrative and other support for the Council.

(d) Principal forum

The Council is designated the principal inter-agency forum for monitoring and improving the Federal acquisition system.

(e) Functions

The Council shall perform functions that include the following:

(1) Develop recommendations for the Director of the Office of Management and Budget on Federal acquisition policies and requirements.

(2) Share experiences, ideas, best practices, and innovative approaches related to Federal acquisition.

(3) Assist the Administrator in the identification, development, and coordination of

multiagency projects and other innovative initiatives to improve Federal acquisition.

(4) Promote effective business practices that ensure the timely delivery of best value products to the Federal Government and achieve appropriate public policy objectives.

(5) Further integrity, fairness, competition, openness, and efficiency in the Federal acquisition system.

(6) Work with the Office of Personnel Management to assess and address the hiring, training, and professional development needs of the Federal Government related to acquisition.

(7) Work with the Administrator and the Federal Acquisition Regulatory Council to promote the business practices referred to in paragraph (4) and other results of the functions carried out under this subsection.

(Pub. L. 93-400, §16A, as added Pub. L. 108-136, div. A, title XIV, §1422(a), Nov. 24, 2003, 117 Stat. 1668.)

§ 415. Repealed. Pub. L. 103-355, title VI, § 6003, Oct. 13, 1994, 108 Stat. 3364

Section, Pub. L. 93-400, §17, as added Pub. L. 98-191, §7, Dec. 1, 1983, 97 Stat. 1330, directed Administrator to conduct studies and issue report by Apr. 1, 1984, to Congressional committees on extent of competition in award of subcontracts by Federal prime contractors.

EFFECTIVE DATE OF REPEAL

For effective date and applicability of repeal, see section 10001 of Pub. L. 103-355, set out as an Effective Date of 1994 Amendment note under section 251 of this title.

§ 416. Procurement notice

(a) Covered executive agency activities; publication of notice; time limitations

(1) Except as provided in subsection (c) of this section—

(A) an executive agency intending to—

(i) solicit bids or proposals for a contract for property or services for a price expected to exceed \$25,000; or

(ii) place an order, expected to exceed \$25,000, under a basic agreement, basic ordering agreement, or similar arrangement,

shall publish a notice of solicitation described in subsection (b) of this section;

(B) an executive agency intending to solicit bids or proposals for a contract for property or services for a price expected to exceed \$10,000, but not to exceed \$25,000, shall post, for a period of not less than ten days, in a public place at the contracting office issuing the solicitation a notice of solicitation described in subsection (b) of this section; and

(C) an executive agency awarding a contract for property or services for a price exceeding \$25,000, or placing an order referred to in clause (A)(ii) exceeding \$25,000, shall furnish for publication by the Secretary of Commerce a notice announcing the award or order if there is likely to be any subcontract under such contract or order.

(2)(A) A notice of solicitation required to be published under paragraph (1) may be published—

(i) by electronic means that meets the requirements for accessibility under paragraph (7); or

(ii) by the Secretary of Commerce in the Commerce Business Daily.

(B) The Secretary of Commerce shall promptly publish in the Commerce Business Daily each notice or announcement received under this subsection for publication by that means.

(3) Whenever an executive agency is required by paragraph (1)(A) to publish a notice of solicitation, such executive agency may not—

(A) issue the solicitation earlier than 15 days after the date on which the notice is published; or

(B) in the case of a contract or order expected to be greater than the simplified acquisition threshold, establish a deadline for the submission of all bids or proposals in response to the notice required by paragraph (1)(A) that—

(i) in the case of an order under a basic agreement, basic ordering agreement, or similar arrangement, is earlier than the date 30 days after the date the notice required by paragraph (1)(A)(ii) is published;

(ii) in the case of a solicitation for research and development, is earlier than the date 45 days after the date the notice required by paragraph (1)(A)(i) is published; or

(iii) in any other case, is earlier than the date 30 days after the date the solicitation is issued.

(4) An executive agency intending to solicit offers for a contract for which a notice of solicitation is required to be posted under paragraph (1)(B) shall ensure that contracting officers consider each responsive offer timely received from an offeror.

(5) An executive agency shall establish a deadline for the submission of all bids or proposals in response to a solicitation with respect to which no such deadline is provided by statute. Each deadline for the submission of offers shall afford potential offerors a reasonable opportunity to respond.

(6) The Administrator shall prescribe regulations defining limited circumstances in which flexible deadlines can be used under paragraph (3) for the issuance of solicitations and the submission of bids or proposals for the procurement of commercial items.

(7) A publication of a notice of solicitation by electronic means meets the requirements for accessibility under this paragraph if the notice is electronically accessible in a form that allows convenient and universal user access through the single Government-wide point of entry designated in the Federal Acquisition Regulation.

(b) Contents of notice

Each notice of solicitation required by subsection (a) or (B) of subsection (a)(1) shall include—

(1) an accurate description of the property or services to be contracted for, which description (A) shall not be unnecessarily restrictive of competition, and (B) shall include, as appropriate, the agency nomenclature, National Stock Number or other part number, and a

brief description of the item's form, fit, or function, physical dimensions, predominant material of manufacture, or similar information that will assist a prospective contractor to make an informed business judgment as to whether a copy of the solicitation should be requested;

(2) provisions that—

(A) state whether the technical data required to respond to the solicitation will not be furnished as part of such solicitation, and identify the source in the Government, if any, from which the technical data may be obtained; and

(B) state whether an offeror, its product, or service must meet a qualification requirement in order to be eligible for award, and, if so, identify the office from which the qualification requirement may be obtained;

(3) the name, business address, and telephone number of the contracting officer;

(4) a statement that all responsible sources may submit a bid, proposal, or quotation (as appropriate) which shall be considered by the agency;

(5) in the case of a procurement using procedures other than competitive procedures, a statement of the reason justifying the use of such procedures and the identity of the intended source; and

(6) in the case of a contract in an amount estimated to be greater than \$25,000 but not greater than the simplified acquisition threshold, or a contract for the procurement of commercial items using special simplified procedures—

(A) a description of the procedures to be used in awarding the contract; and

(B) a statement specifying the periods for prospective offerors and the contracting officer to take the necessary preaward and award actions.

(c) Exempted, etc., activities of executive agency

(1) A notice is not required under subsection (a)(1) of this section if—

(A) the proposed procurement is for an amount not greater than the simplified acquisition threshold and is to be conducted by—

(i) using widespread electronic public notice of the solicitation in a form that allows convenient and universal user access through a single, Government-wide point of entry; and

(ii) permitting the public to respond to the solicitation electronically;

(B) the notice would disclose the executive agency's needs and the disclosure of such needs would compromise the national security;

(C) the proposed procurement would result from acceptance of—

(i) any unsolicited proposal that demonstrates a unique and innovative research concept and the publication of any notice of such unsolicited research proposal would disclose the originality of thought or innovativeness of the proposal or would disclose proprietary information associated with the proposal; or

(ii) a proposal submitted under section 638 of title 15;

(D) the procurement is made against an order placed under a requirements contract, a task order contract, or a delivery order contract;

(E) the procurement is made for perishable subsistence supplies;

(F) the procurement is for utility services, other than telecommunication services, and only one source is available;

(G) the procurement is for the services of an expert for use in any litigation or dispute (including any reasonably foreseeable litigation or dispute) involving the Federal Government in any trial, hearing, or proceeding before any court, administrative tribunal, or agency, or in any part of an alternative dispute resolution process, whether or not the expert is expected to testify; or

(H) the procurement is by the Secretary of Homeland Security pursuant to the special procedures provided in section 393(c) of title 6.

(2) The requirements of subsection (a)(1)(A) of this section do not apply to any procurement under conditions described in paragraph (2), (3), (4), (5), or (7) of section 253(c) of this title or paragraph (2), (3), (4), (5), or (7) of section 2304(c) of title 10.

(3) The requirements of subsection (a)(1)(A) of this section shall not apply in the case of any procurement for which the head of the executive agency makes a determination in writing, after consultation with the Administrator for Federal Procurement Policy and the Administrator of the Small Business Administration, that it is not appropriate or reasonable to publish a notice before issuing a solicitation.

(d) Availability of complete solicitation package; payment of fee

An executive agency shall make available to any business concern, or the authorized representative of such concern, the complete solicitation package for any on-going procurement announced pursuant to a notice of solicitation under subsection (a) of this section. An executive agency may require the payment of a fee, not exceeding the actual cost of duplication, for a copy of such package.

(Pub. L. 93-400, §18, as added Pub. L. 98-369, div. B, title VII, §2732(a), July 18, 1984, 98 Stat. 1195; amended Pub. L. 98-577, title III, §303(a), Oct. 30, 1984, 98 Stat. 3077; Pub. L. 99-500, §101(c) [title X, §922(b), (d)(2)], Oct. 18, 1986, 100 Stat. 1783-82, 1783-151, 1783-152, and Pub. L. 99-591, §101(c) [title X, §922(b), (d)(2)], Oct. 30, 1986, 100 Stat. 3341-82, 3341-151, 3341-152; Pub. L. 99-661, div. A, title IX, formerly title IV, §922(b), (d)(2), Nov. 14, 1986, 100 Stat. 3931, 3932; renumbered title IX, Pub. L. 100-26, §3(5), Apr. 21, 1987, 101 Stat. 273; Pub. L. 101-510, div. A, title VIII, §806(d), Nov. 5, 1990, 104 Stat. 1592; Pub. L. 103-355, title I, §1055(b)(1), title IV, §§4201(b), (c), 4202(a)-(c), title VIII, §8302, title IX, §9001(b), Oct. 13, 1994, 108 Stat. 3265, 3344, 3398, 3402; Pub. L. 104-106, div. D, title XLI, §4101(c), title XLII, §4202(d), title XLIII, §§4310, 4321(h)(3), Feb. 10, 1996, 110 Stat. 642, 654, 670, 675; Pub. L. 105-85, div. A, title VIII, §850(e)(2), Nov. 18, 1997, 111 Stat. 1849; Pub. L.

105-261, div. A, title X, § 1069(d)(1), Oct. 17, 1998, 112 Stat. 2136; Pub. L. 106-398, § 1 [[div. A], title VIII, § 810(a), (b)], Oct. 30, 2000, 114 Stat. 1654, 1654A-209; Pub. L. 107-296, title VIII, § 833(c)(2), Nov. 25, 2002, 116 Stat. 2226.)

CODIFICATION

Pub. L. 99-591 is a corrected version of Pub. L. 99-500.

AMENDMENTS

2002—Subsec. (c)(1)(H). Pub. L. 107-296 added subpar. (H).

2000—Subsec. (a)(1)(A). Pub. L. 106-398, § 1 [[div. A], title VIII, § 810(a)(1)], substituted “publish” for “furnish for publication by the Secretary of Commerce” in concluding provisions.

Subsec. (a)(2). Pub. L. 106-398, § 1 [[div. A], title VIII, § 810(a)(2)], added par. (2) and struck out former par. (2) which read as follows: “The Secretary of Commerce shall publish promptly in the Commerce Business Daily each notice required by paragraph (1).”

Subsec. (a)(3). Pub. L. 106-398, § 1 [[div. A], title VIII, § 810(b)], substituted “publish a notice of solicitation” for “furnish a notice to the Secretary of Commerce” in introductory provisions and struck out “by the Secretary of Commerce” after “notice is published” in subpar. (A).

Subsec. (a)(7). Pub. L. 106-398, § 1 [[div. A], title VIII, § 810(a)(3)], added par. (7).

1998—Subsec. (c)(1)(A)(ii). Pub. L. 105-261 substituted a semicolon for period at end.

1997—Subsec. (c)(1). Pub. L. 105-85 added subpar. (A), redesignated subpars. (C) to (H) as (B) to (G), respectively, and struck out former subpars. (A) and (B) which read as follows:

“(A) the proposed procurement is for an amount not greater than the simplified acquisition threshold and is to be made through a system with interim FACNET capability certified pursuant to section 426a(a)(1) of this title or with full FACNET capability certified pursuant to section 426a(a)(2) of this title;

“(B)(i) the proposed procurement is for an amount not greater than \$250,000 and is to be made through a system with full FACNET capability certified pursuant to section 426a(a)(2) of this title; and

“(ii) a certification has been made pursuant to section 426a(b) of this title that Government-wide FACNET capability has been implemented;”

1996—Subsec. (a)(1)(B). Pub. L. 104-106, § 4101(c)(B), inserted “for a price expected to exceed \$10,000, but not to exceed \$25,000,” after “property or services”.

Pub. L. 104-106, § 4101(c)(A), substituted “subsection (b) of this section; and” for “subsection (f) of this section—” and struck out cls. (i) and (ii) which read as follows:

“(i) in the case of an executive agency other than the Department of Defense, if the contract is for a price expected to exceed \$10,000, but not to exceed \$25,000; and

“(ii) in the case of the Department of Defense, if the contract is for a price expected to exceed \$5,000, but not to exceed \$25,000; and”.

Subsec. (a)(6). Pub. L. 104-106, § 4202(d)(1)(A), inserted “issuance of solicitations and the” after “paragraph (3) for the”.

Subsec. (b)(5). Pub. L. 104-106, § 4321(h)(3), inserted “and” after “source;”.

Subsec. (b)(6). Pub. L. 104-106, § 4202(d)(1)(B), substituted “threshold, or a contract for the procurement of commercial items using special simplified procedures—” for “threshold—”.

Subsec. (c)(1)(E). Pub. L. 104-106, § 4310, inserted “, a task order contract, or a delivery order contract” after “requirements contract”.

1994—Subsec. (a)(1). Pub. L. 103-355, § 4202(a)(1), substituted “\$25,000” for “the small purchase threshold” wherever appearing.

Subsec. (a)(1)(A). Pub. L. 103-355, § 9001(b)(1), substituted “notice of solicitation” for “notice” in concluding provisions.

Subsec. (a)(3)(B). Pub. L. 103-355, § 4202(a)(2), inserted “in the case of a contract or order expected to be greater than the simplified acquisition threshold,” before “establish a deadline”.

Subsec. (a)(4), (5). Pub. L. 103-355, § 4201(b), (c), added pars. (4) and (5).

Subsec. (a)(6). Pub. L. 103-355, § 8302, added par. (6).

Subsec. (b)(6). Pub. L. 103-355, § 4202(b), added par. (6).

Subsec. (c)(1)(A) to (E). Pub. L. 103-355, § 4202(c), added subpars. (A) and (B) and redesignated former subpars. (A) to (C) as (C) to (E), respectively. Former subpars. (D) and (E) redesignated (F) and (G), respectively.

Subsec. (c)(1)(F). Pub. L. 103-355, § 4202(c)(1), redesignated subpar. (D) as (F). Former subpar. (F) redesignated (H).

Pub. L. 103-355, § 1055(b)(1), added subpar. (F).

Subsec. (c)(1)(G), (H). Pub. L. 103-355, § 4202(c)(1), redesignated subpars. (E) and (F) as (G) and (H), respectively.

Subsec. (d). Pub. L. 103-355, § 9001(b)(2), substituted “a notice of solicitation under subsection (a)” for “a notice under subsection (e)” in first sentence.

1990—Subsec. (a)(1)(A). Pub. L. 101-510 substituted “the small purchase threshold; or” for “\$25,000;” in cl. (i), substituted “the small purchase threshold” for “\$25,000” and a comma for “; or” in cl. (ii), and struck out cl. (iii) which read as follows: “solicit bids or proposals for a contract for property or services for a price expected to exceed \$10,000, if there is not a reasonable expectation that at least two offers will be received from responsive and responsible offerors.”

Subsec. (a)(1)(B), (C). Pub. L. 101-510, § 806(d)(1), substituted “the small purchase threshold” for “\$25,000” wherever appearing.

1986—Subsec. (a)(1)(A). Pub. L. 99-500 and Pub. L. 99-591, § 101(c) [title X, § 922(b)(1)], and Pub. L. 99-661, § 922(b)(1), amended subpar. (A) identically, substituting “\$25,000” for “\$10,000” in cls. (i) and (ii) and adding cl. (iii).

Subsec. (a)(1)(B), (C). Pub. L. 99-500 and Pub. L. 99-591, § 101(c) [title X, § 922(b)(2), (3)], and Pub. L. 99-661, § 922(b)(2), (3), amended par. (1) identically, adding subpar. (B) and redesignating former subpar. (B) as (C).

Subsec. (b). Pub. L. 99-500 and Pub. L. 99-591, § 101(c) [title X, § 922(d)(2)], and Pub. L. 99-661, § 922(d)(2), amended subsec. (b) identically, substituting “subparagraph (A) or (B) of subsection (a)(1)” for “subsection (a)(1)(A)”.

1984—Subsec. (a)(1)(A). Pub. L. 98-577 designated existing provisions as cl. (i) and added cl. (ii).

Subsec. (a)(1)(B). Pub. L. 98-577 inserted “, or placing an order referred to in clause (A)(ii) exceeding \$25,000,” before “shall furnish”.

Subsec. (a)(3)(B). Pub. L. 98-577 designated existing provisions as cl. (i), substituted provisions relating to an order under a basic agreement for former provisions which related to all bids, and added cls. (ii) and (iii).

Subsec. (b)(1). Pub. L. 98-577 designated existing provisions as subpar. (A) and added subpar. (B).

Subsec. (b)(2). Pub. L. 98-577 added par. (2). Former par. (2), which related to information about the officer or employee of the executive agency who may be contacted for purposes of obtaining a copy of the solicitation, was struck out.

Subsec. (c)(1)(B). Pub. L. 98-577 designated existing provisions as cl. (i) and added cl. (ii).

Subsec. (c)(1)(E). Pub. L. 98-577 added subpar. (E).

Subsec. (d). Pub. L. 98-577 added subsec. (d).

EFFECTIVE DATE OF 2002 AMENDMENT

Amendment by Pub. L. 107-296 effective 60 days after Nov. 25, 2002, see section 4 of Pub. L. 107-296, set out as an Effective Date note under section 101 of Title 6, Domestic Security.

EFFECTIVE DATE OF 2000 AMENDMENT

Amendment by Pub. L. 106-398 effective Oct. 1, 2000, and applicable with respect to solicitations issued on or after that date, see section 1 [[div. A], title VIII,

§810(e)] of Pub. L. 106-398, set out as a note under section 637 of Title 15, Commerce and Trade.

EFFECTIVE DATE OF 1997 AMENDMENT

Amendment by Pub. L. 105-85 effective 180 days after Nov. 18, 1997, see section 850(g) of Pub. L. 105-85, set out as a note under section 2302c of Title 10, Armed Forces.

EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104-106, see section 4401 of Pub. L. 104-106, set out as a note under section 251 of this title.

EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103-355, see section 10001 of Pub. L. 103-355, set out as a note under section 251 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Section 303(b) of Pub. L. 98-577 provided that: "The amendment made by subsection (a) [amending this section] shall take effect with respect to any solicitation issued after March 31, 1985."

EFFECTIVE DATE

Section applicable to any solicitation for bids or proposals issued after Mar. 31, 1985, see section 2751 of Pub. L. 98-369, set out as an Effective Date of 1984 Amendment note under section 251 of this title.

IMPLEMENTATION OF AMENDMENT BY PUB. L. 105-85

Amendment by Pub. L. 105-85 to be implemented in a manner consistent with any applicable international agreements, see section 850(e)(3) of Pub. L. 105-85, set out as a note under section 637 of Title 15, Commerce and Trade.

APPLICABILITY TO TENNESSEE VALLEY AUTHORITY

Section 303(c) of Pub. L. 98-577 provided that: "The provisions of the amendments made by subsection (a) of this section [amending this section] shall apply to the Tennessee Valley Authority only with respect to procurements to be paid from appropriated funds."

§ 417. Record requirements

(a) Establishment and maintenance of computer file by executive agency; time period coverage

Each executive agency shall establish and maintain for a period of five years a computer file, by fiscal year, containing unclassified records of all procurements greater than the simplified acquisition threshold in such fiscal year.

(b) Contents

The record established under subsection (a) of this section shall include—

(1) with respect to each procurement carried out using competitive procedures—

- (A) the date of contract award;
- (B) information identifying the source to whom the contract was awarded;
- (C) the property or services obtained by the Government under the procurement; and
- (D) the total cost of the procurement;

(2) with respect to each procurement carried out using procedures other than competitive procedures—

- (A) the information described in clauses (1)(A), (1)(B), (1)(C), and (1)(D);
- (B) the reason under section 253(c) of this title or section 2304(c) of title 10, as the case may be, for the use of such procedures; and

(C) the identity of the organization or activity which conducted the procurement.

(c) Record categories

The information that is included in such record pursuant to subsection (b)(1) of this section and relates to procurements resulting in the submission of a bid or proposal by only one responsible source shall be separately categorized from the information relating to other procurements included in such record. The record of such information shall be designated "noncompetitive procurements using competitive procedures".

(d) Transmission and data entry of information

The head of each executive agency shall ensure the accuracy of the information included in the record established and maintained by such agency under subsection (a) and shall transmit in a timely manner such information to the General Services Administration for entry into the Federal Procurement Data System referred to in section 405(d)(4) of this title, or any successor system.

(Pub. L. 93-400, §19, as added Pub. L. 98-369, div. B, title VII, §2732(a), July 18, 1984, 98 Stat. 1197; amended Pub. L. 103-355, title IV, §4403, Oct. 13, 1994, 108 Stat. 3349; Pub. L. 110-417, [div. A], title VIII, §874(b), Oct. 14, 2008, 122 Stat. 4558.)

AMENDMENTS

2008—Subsec. (d). Pub. L. 110-417 amended subsec. (d) generally. Prior to amendment, text read as follows: "The information included in the record established and maintained under subsection (a) of this section shall be transmitted to the General Services Administration and shall be entered in the Federal Procurement Data System referred to in section 405(d)(4) of this title."

1994—Subsec. (a). Pub. L. 103-355 substituted "procurements greater than the simplified acquisition threshold" for "procurements, other than small purchases,".

EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103-355, see section 10001 of Pub. L. 103-355, set out as a note under section 251 of this title.

EFFECTIVE DATE

Section applicable to any solicitation for bids or proposals issued after Mar. 31, 1985, see section 2751 of Pub. L. 98-369, set out as an Effective Date of 1984 Amendment note under section 251 of this title.

§ 417a. Procurement data

(a) Reporting

Each Federal agency shall report to the Office of Federal Procurement Policy the number of qualified HUBZone small business concerns, the number of small businesses owned and controlled by women, and the number of small business concerns owned and controlled by socially and economically disadvantaged businesses, by gender, that are first time recipients of contracts from such agency. The Office of Federal Procurement Policy shall take such actions as may be appropriate to ascertain for each fiscal year the number of such small businesses that have newly entered the Federal market.

(b) Definitions

For purposes of this section the terms "small business concern owned and controlled by

women” and “small business concerns owned and controlled by socially and economically disadvantaged individuals” shall be given the same meaning as those terms are given under section 637(d) of title 15 and section 204 of this Act, and the term “qualified HUBZone small business concern” has the meaning given that term in section 632(p) of title 15.¹

(Pub. L. 100-533, title V, § 502, Oct. 25, 1988, 102 Stat. 2697; Pub. L. 105-135, title VI, § 604(f)(2), Dec. 2, 1997, 111 Stat. 2634.)

REFERENCES IN TEXT

Section 204 of this Act, referred to in subsec. (b), is section 204 of Pub. L. 100-533, which is set out as a note under section 637 of Title 15, Commerce and Trade.

CODIFICATION

Section was enacted as part of the Women’s Business Ownership Act of 1988, and not as part of the Office of Federal Procurement Policy Act which comprises this chapter.

AMENDMENTS

1997—Subsec. (a). Pub. L. 105-135, § 604(f)(2)(A), inserted “the number of qualified HUBZone small business concerns,” after “report to the Office of Federal Procurement Policy” and a comma after “controlled by women”.

Subsec. (b). Pub. L. 105-135, § 604(f)(2)(B), inserted “, and the term ‘qualified HUBZone small business concern’ has the meaning given that term in section 632(p) of title 15.” before period at end.

EFFECTIVE DATE OF 1997 AMENDMENT

Amendment by Pub. L. 105-135 effective Oct. 1, 1997, see section 3 of Pub. L. 105-135, set out as a note under section 631 of Title 15, Commerce and Trade.

§ 417b. Database for Federal agency contract and grant officers and suspension and debarment officials

(a) In general

Subject to the authority, direction, and control of the Director of the Office of Management and Budget, the Administrator of General Services shall establish, not later than one year after October 14, 2008, and maintain a database of information regarding the integrity and performance of certain persons awarded Federal agency contracts and grants for use by Federal agency officials having authority over contracts and grants.

(b) Persons covered

The database shall cover the following:

(1) Any person awarded a Federal agency contract or grant in excess of \$500,000, if any information described in subsection (c) exists with respect to such person.

(2) Any person awarded such other category or categories of Federal agency contract as the Federal Acquisition Regulation may provide, if such information exists with respect to such person.

(c) Information included

With respect to a covered person the database shall include information (in the form of a brief description) for the most recent 5-year period regarding the following:

(1) Each civil or criminal proceeding, or any administrative proceeding, in connection with the award or performance of a contract or grant with the Federal Government with respect to the person during the period to the extent that such proceeding results in the following dispositions:

(A) In a criminal proceeding, a conviction.

(B) In a civil proceeding, a finding of fault and liability that results in the payment of a monetary fine, penalty, reimbursement, restitution, or damages of \$5,000 or more.

(C) In an administrative proceeding, a finding of fault and liability that results in—

(i) the payment of a monetary fine or penalty of \$5,000 or more; or

(ii) the payment of a reimbursement, restitution, or damages in excess of \$100,000.

(D) To the maximum extent practicable and consistent with applicable laws and regulations, in a criminal, civil, or administrative proceeding, a disposition of the matter by consent or compromise with an acknowledgment of fault by the person if the proceeding could have led to any of the outcomes specified in subparagraph (A), (B), or (C).

(2) Each Federal contract and grant awarded to the person that was terminated in such period due to default.

(3) Each Federal suspension and debarment of the person in that period.

(4) Each Federal administrative agreement entered into by the person and the Federal Government in that period to resolve a suspension or debarment proceeding.

(5) Each final finding by a Federal official in that period that the person has been determined not to be a responsible source under subparagraph (C) or (D) of section 403(7) of this title.

(6) Such other information as shall be provided for purposes of this section in the Federal Acquisition Regulation.

(7) To the maximum extent practical, information similar to the information covered by paragraphs (1) through (4) in connection with the award or performance of a contract or grant with a State government.

(d) Requirements relating to information in database

(1) Direct input and update

The Administrator shall design and maintain the database in a manner that allows the appropriate Federal agency officials to directly input and update information in the database relating to actions such officials have taken with regard to contractors or grant recipients.

(2) Timeliness and accuracy

The Administrator shall develop policies to require—

(A) the timely and accurate input of information into the database;

(B) the timely notification of any covered person when information relevant to the person is entered into the database; and

¹ So in original.

(C) opportunities for any covered person to submit comments pertaining to information about such person for inclusion in the database.

(e) Use of database

(1) Availability to government officials

The Administrator shall ensure that the information in the database is available to appropriate acquisition officials of Federal agencies, to such other government officials as the Administrator determines appropriate, and, upon request, to the Chairman and Ranking Member of the committees of Congress having jurisdiction.

(2) Review and assessment of data

(A) In general

Before awarding a contract or grant in excess of the simplified acquisition threshold under section 403(11) of this title, the Federal agency official responsible for awarding the contract or grant shall review the database and shall consider all information in the database with regard to any offer or proposal, and, in the case of a contract, shall consider other past performance information available with respect to the offeror in making any responsibility determination or past performance evaluation for such offeror.

(B) Documentation in contract file

The contract file for each contract of a Federal agency in excess of the simplified acquisition threshold shall document the manner in which the material in the database was considered in any responsibility determination or past performance evaluation.

(f) Disclosure in applications

Not later than one year after October 14, 2008, the Federal Acquisition Regulation shall be amended to require that persons with Federal agency contracts and grants valued in total greater than \$10,000,000 shall—

(1) submit to the Administrator, in a manner determined appropriate by the Administrator, the information subject to inclusion in the database as listed in subsection (c) current as of the date of submittal of such information under this subsection; and

(2) update such information on a semiannual basis.

(g) Rulemaking

The Administrator shall promulgate such regulations as may be necessary to carry out this section.

(Pub. L. 110-417, [div. A], title VIII, §872, Oct. 14, 2008, 122 Stat. 4555.)

CODIFICATION

Section was enacted as part of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, and not as part of the Office of Federal Procurement Policy Act which comprises this chapter.

§ 418. Advocates for competition

(a) Establishment, designation, etc., in executive agency

(1) There is established in each executive agency an advocate for competition.

(2) The head of each executive agency shall—

(A) designate for the executive agency and for each procuring activity of the executive agency one officer or employee serving in a position authorized for such executive agency on July 18, 1984 (other than the senior procurement executive designated pursuant to section 414(3)¹ of this title) to serve as the advocate for competition;

(B) not assign such officers or employees any duties or responsibilities that are inconsistent with the duties and responsibilities of the advocates for competition; and

(C) provide such officers or employees with such staff or assistance as may be necessary to carry out the duties and responsibilities of the advocate for competition, such as persons who are specialists in engineering, technical operations, contract administration, financial management, supply management, and utilization of small and disadvantaged business concerns.

(b) Duties and functions

The advocate for competition of an executive agency shall—

(1) be responsible for challenging barriers to and promoting full and open competition in the procurement of property and services by the executive agency;

(2) review the procurement activities of the executive agency;

(3) identify and report to the senior procurement executive of the executive agency designated pursuant to section 414(3)¹ of this title—

(A) opportunities and actions taken to achieve full and open competition in the procurement activities of the executive agency; and

(B) any condition or action which has the effect of unnecessarily restricting competition in the procurement actions of the executive agency; and²

(4) prepare and transmit to such senior procurement executive an annual report describing—

(A) such advocate's activities under this section;

(B) new initiatives required to increase competition; and

(C) barriers to full and open competition that remain;

(5) recommend to the senior procurement executive of the executive agency goals and the plans for increasing competition on a fiscal year basis;

(6) recommend to the senior procurement executive of the executive agency a system of personal and organizational accountability for competition, which may include the use of recognition and awards to motivate program managers, contracting officers, and others in authority to promote competition in procurement programs; and

(7) describe other ways in which the executive agency has emphasized competition in

¹ See References in Text note below.

² So in original. The word "and" probably should not appear.

programs for procurement training and research.

(c) Responsibilities

The advocate for competition for each procuring activity shall be responsible for promoting full and open competition, promoting the acquisition of commercial items, and challenging barriers to such acquisition, including such barriers as unnecessarily restrictive statements of need, unnecessarily detailed specifications, and unnecessarily burdensome contract clauses.

(Pub. L. 93-400, §20, as added Pub. L. 98-369, div. B, title VII, §2732(a), July 18, 1984, 98 Stat. 1197; amended Pub. L. 103-355, title VIII, §8303(a), Oct. 13, 1994, 108 Stat. 3398.)

REFERENCES IN TEXT

Section 414 of this title, referred to in subsecs. (a)(2)(A) and (b)(3), was amended generally by Pub. L. 108-136, div. A, title XIV, §1421(a)(1), Nov. 24, 2003, 117 Stat. 1666, and, as so amended, no longer contains a par. (3). See section 414(c)(1) of this title.

AMENDMENTS

1994—Subsec. (c). Pub. L. 103-355 amended subsec. (c) generally. Prior to amendment, subsec. (c) read as follows: “The advocate for competition for each procuring activity shall be responsible for challenging barriers to and promoting full and open competition in the procuring activity, including unnecessarily detailed specifications and unnecessarily restrictive statements of need.”

EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103-355, see section 10001 of Pub. L. 103-355, set out as a note under section 251 of this title.

EFFECTIVE DATE

Section applicable to any solicitation for bids or proposals issued after Mar. 31, 1985, see section 2751 of Pub. L. 98-369, set out as an Effective Date of 1984 Amendment note under section 251 of this title.

§ 418a. Rights in technical data

(a) Regulations; legitimate proprietary interest of United States

The legitimate proprietary interest of the United States and of a contractor in technical or other data shall be defined in regulations prescribed as part of the single system of Government-wide procurement regulations as defined in section 403(4)¹ of this title. Such regulations may not impair any right of the United States or of any contractor with respect to patents or copyrights or any other right in technical data otherwise established by law. Such regulations shall provide, with respect to executive agencies that are subject to the provisions of title III of the Federal Property and Administrative Services Act of 1949 [41 U.S.C. 251 et seq.], that the United States may not require persons who have developed products or processes offered or to be offered for sale to the public as a condition for the procurement of such products or processes by the United States, to provide to the United States technical data relating to the design, development, or manufacture of such products or processes (except for such data as may be nec-

essary for the United States to operate and maintain the product or use the process if obtained by the United States as an element of performance under the contract).

(b) Unlimited rights; technical data; developed with Federal funds; unrestricted, royalty-free right to use; rights under law

(1) Except as otherwise expressly provided by Federal statute, the regulations prescribed pursuant to subsection (a) of this section shall provide, with respect to executive agencies that are subject to the provisions of title III of the Federal Property and Administrative Services Act of 1949 [41 U.S.C. 251 et seq.], that the United States shall have unlimited rights in technical data developed exclusively with Federal funds if delivery of such data—

(A) was required as an element of performance under a contract; and

(B) is needed to ensure the competitive acquisition of supplies or services that will be required in substantial quantities in the future.

(2) Except as otherwise expressly provided by Federal statute, the regulations prescribed pursuant to subsection (a) of this section shall provide, with respect to executive agencies that are subject to the provisions of title III of the Federal Property and Administrative Services Act of 1949 [41 U.S.C. 251 et seq.], that the United States (and each agency thereof) shall have an unrestricted, royalty-free right to use, or to have its contractors use, for governmental purposes (excluding publication outside the Government) technical data developed exclusively with Federal funds.

(3) The requirements of paragraphs (1) and (2) shall be in addition to and not in lieu of any other rights that the United States may have pursuant to law.

(c) Factors; regulations

The following factors shall be considered in prescribing regulations pursuant to subsection (a) of this section:

(1) Whether the item or process to which the technical data pertains was developed—

(A) exclusively with Federal funds;

(B) exclusively at private expense; or

(C) in part with Federal funds and in part at private expense.

(2) The statement of congressional policy and objectives in section 200 of title 35, the statement of purposes in section 2(b) of the Small Business Innovation Development Act of 1982 (Public Law 97-219; 15 U.S.C. 638 note), and the declaration of policy in section 631 of title 15.

(3) The interest of the United States in increasing competition and lowering costs by developing and locating alternative sources of supply and manufacture.

(d) Provisions; contracts; regulations

Regulations prescribed under subsection (a) of this section shall require that a contract for property or services entered into by an executive agency contain appropriate provisions relating to technical data, including provisions—

(1) defining the respective rights of the United States and the contractor or sub-

¹ See References in Text note below.

contractor (at any tier) regarding any technical data to be delivered under the contract;

(2) specifying the technical data, if any, to be delivered under the contract and delivery schedules for such delivery;

(3) establishing or referencing procedures for determining the acceptability of technical data to be delivered under the contract;

(4) establishing separate contract line items for the technical data, if any, to be delivered under the contract;

(5) to the maximum practicable extent, identifying, in advance of delivery, technical data which is to be delivered with restrictions on the right of the United States to use such data;

(6) requiring the contractor to revise any technical data delivered under the contract to reflect engineering design changes made during the performance of the contract and affecting the form, fit, and function of the items specified in the contract and to deliver such revised technical data to an agency within a time specified in the contract;

(7) requiring the contractor to furnish written assurance at the time the technical data is delivered or is made available that the technical data is complete and accurate and satisfies the requirements of the contract concerning technical data;

(8) establishing remedies to be available to the United States when technical data required to be delivered or made available under the contract is found to be incomplete or inadequate or to not satisfy the requirements of the contract concerning technical data; and

(9) authorizing the head of the agency to withhold payments under the contract (or exercise such other remedies as the head of the agency considers appropriate) during any period if the contractor does not meet the requirements of the contract pertaining to the delivery of technical data.

(Pub. L. 93-400, § 21, as added Pub. L. 98-577, title III, § 301(a), Oct. 30, 1984, 98 Stat. 3074; amended Pub. L. 99-145, title IX, § 961(d)(2), Nov. 8, 1985, 99 Stat. 704.)

REFERENCES IN TEXT

Section 403(4) of this title, referred to in subsec. (a), which defined "single system of Government-wide procurement regulations", was repealed, and par. (5) of section 403 of this title was redesignated as par. (4), by Pub. L. 100-679, § 3(c), Nov. 17, 1988, 102 Stat. 4056.

The Federal Property and Administrative Services Act of 1949, as amended, referred to in subsecs. (a) and (b)(1), (2), is act June 30, 1949, ch. 288, 63 Stat. 377, as amended. Title III of the Act is classified generally to subchapter IV (§ 251 et seq.) of chapter 4 of this title. For complete classification of this Act to the Code, see Tables.

PRIOR PROVISIONS

A prior section 21 of Pub. L. 93-400, as added Pub. L. 98-369, div. B, title VII, § 2732(a), July 18, 1984, 98 Stat. 1198, was renumbered section 23 by Pub. L. 98-577 and is classified to section 419 of this title.

AMENDMENTS

1985—Subsec. (c)(1). Pub. L. 99-145 substituted "the item or process to which the technical data pertains" for "the technical data".

EFFECTIVE DATE

Section 301(c) of Pub. L. 98-577, as amended Pub. L. 99-145, title IX, § 961(d)(3), Nov. 8, 1985, 99 Stat. 704, provided that: "The amendment made by subsection (a) [enacting this section] shall take effect on the date of enactment of this Act [Oct. 30, 1984]. The regulations required by such amendment shall be issued not later than October 19, 1985."

§ 418b. Publication of proposed regulations

(a) Effective date; procurement policy, regulations, procedure or form; publication in Federal Register

Except as provided in subsection (d) of this section, no procurement policy, regulation, procedure, or form (including amendments or modifications thereto) relating to the expenditure of appropriated funds that has (1) a significant effect beyond the internal operating procedures of the agency issuing the procurement policy, regulation, procedure or form, or (2) a significant cost or administrative impact on contractors or offerors, may take effect until 60 days after the procurement policy, regulation, procedure, or form is published for public comment in the Federal Register pursuant to subsection (b) of this section. Notwithstanding the preceding sentence, such a policy, regulation, procedure, or form may take effect earlier than 60 days after the publication date when there are compelling circumstances for the earlier effective date, but in no event may that effective date be less than 30 days after the publication date.

(b) Publication in Federal Register

Subject to subsection (c) of this section, the head of the agency shall cause to be published in the Federal Register a notice of the proposed procurement policy, regulation, procedure, or form and provide for a public comment period for receiving and considering the views of all interested parties on such proposal. The length of such comment period may not be less than 30 days.

(c) Notice; proposed policy; contents

Any notice of a proposed procurement policy, regulation, procedure, or form prepared for publication in the Federal Register shall include—

(1) the text of the proposal or, if it is impracticable to publish the full text of the proposal, a summary of the proposal and a statement specifying the name, address, and telephone number of the officer or employee of the executive agency from whom the full text may be obtained; and

(2) a request for interested parties to submit comments on the proposal and shall include the name and address of the officer or employee of the Government designated to receive such comments.

(d) Waiver

(1) The requirements of subsections (a) and (b) of this section may be waived by the officer authorized to issue a procurement policy, regulation, procedure, or form if urgent and compelling circumstances make compliance with such requirements impracticable.

(2) A procurement policy, regulation, procedure, or form with respect to which the requirements of subsections (a) and (b) of this section

are waived under paragraph (1) shall be effective on a temporary basis if—

(A) a notice of such procurement policy, regulation, procedure, or form is published in the Federal Register and includes a statement that the procurement policy, regulation, procedure, or form is temporary; and

(B) provision is made for a public comment period of 30 days beginning on the date on which the notice is published.

(3) After considering the comments received, the head of the agency waiving the requirements of subsections (a) and (b) of this section under paragraph (1) may issue the final procurement policy, regulation, procedure, or form.

(Pub. L. 93-400, § 22, as added Pub. L. 98-577, title III, § 302(a), Oct. 30, 1984, 98 Stat. 3076; amended Pub. L. 103-355, title V, § 5092, Oct. 13, 1994, 108 Stat. 3362; Pub. L. 104-106, div. D, title XLIII, § 4321(a)(9), Feb. 10, 1996, 110 Stat. 671.)

AMENDMENTS

1996—Subsec. (d)(3). Pub. L. 104-106 made technical correction to directory language of Pub. L. 103-355, § 5092(b). See 1994 Amendment note below.

1994—Subsec. (a). Pub. L. 103-355, § 5092(a), substituted “60 days” for “30 days” and inserted at end “Notwithstanding the preceding sentence, such a policy, regulation, procedure, or form may take effect earlier than 60 days after the publication date when there are compelling circumstances for the earlier effective date, but in no event may that effective date be less than 30 days after the publication date.”

Subsec. (d). Pub. L. 103-355, § 5092(b), as amended by Pub. L. 104-106, designated second sentence of subsec. (d)(2) as subsec. (d)(3).

EFFECTIVE DATE OF 1996 AMENDMENT

Section 4321(a) of Pub. L. 104-106 provided that the amendment made by that section is effective as of Oct. 13, 1994, and as if included in Pub. L. 103-355 as enacted.

EFFECTIVE DATE

Section 302(b) of Pub. L. 98-577 provided that: “The procedures required by the amendment made by subsection (a) [enacting this section] shall apply with respect to procurement policies, regulations, procedures, or forms that an agency issues in final form on or after the date which is 30 days after the date of enactment of this Act [Oct. 30, 1984].”

§ 419. Contracting functions performed by Federal personnel

(a) Limitation on payment for advisory and assistance services

(1) No person who is not a person described in subsection (b) of this section may be paid by an executive agency for services to conduct evaluations or analyses of any aspect of a proposal submitted for an acquisition unless personnel described in subsection (b) of this section with adequate training and capabilities to perform such evaluations and analyses are not readily available within the agency or another Federal agency, as determined in accordance with standards and procedures prescribed in the Federal Acquisition Regulation.

(2) In the administration of this subsection, the head of each executive agency shall determine in accordance with the standards and procedures set forth in the Federal Acquisition Regulation whether—

(A) a sufficient number of personnel described in subsection (b) of this section within the agency or another Federal agency are readily available to perform a particular evaluation or analysis for the head of the executive agency making the determination; and

(B) the readily available personnel have the training and capabilities necessary to perform the evaluation or analysis.

(b) Covered personnel

For purposes of subsection (a) of this section, the personnel described in this subsection are as follows:

(1) An employee, as defined in section 2105 of title 5.

(2) A member of the Armed Forces of the United States.

(3) A person assigned to a Federal agency pursuant to subchapter VI of chapter 33 of title 5.

(c) Rule of construction

Nothing in this section is intended to affect the relationship between the Federal Government and a federally funded research and development center.

(Pub. L. 93-400, § 23, as added Pub. L. 103-355, title VI, § 6002(a), Oct. 13, 1994, 108 Stat. 3363.)

PRIOR PROVISIONS

A prior section 419, Pub. L. 93-400, § 23, formerly § 21, as added Pub. L. 98-369, div. B, title VII, § 2732(a), July 18, 1984, 98 Stat. 1198; renumbered § 23, Pub. L. 98-577, title III, § 301(a), Oct. 30, 1984, 98 Stat. 3074, related to annual report to be submitted to Congress by agency heads concerning actions taken to increase competition for contracts and reduce number and dollar value of noncompetitive contracts, prior to repeal by Pub. L. 103-355, title I, § 1092.

EFFECTIVE DATE

For effective date and applicability of section, see section 10001 of Pub. L. 103-355, set out as an Effective Date of 1994 Amendment note under section 251 of this title.

REQUIREMENT FOR GUIDANCE AND REGULATIONS

Section 6002(b) of Pub. L. 103-355 provided that: “The Federal Acquisition Regulatory Council established by section 25(a) of the Office of Federal Procurement Policy Act (41 U.S.C. 421(a)) shall—

“(1) review part 37 of title 48 of the Code of Federal Regulations as it relates to the use of advisory and assistance services; and

“(2) provide guidance and promulgate regulations regarding—

“(A) what actions Federal agencies are required to take to determine whether expertise is readily available within the Federal Government before contracting for advisory and technical services to conduct acquisitions; and

“(B) the manner in which personnel with expertise may be shared with agencies needing expertise for such acquisitions.”

§ 420. Repealed. Pub. L. 103-355, title II, § 2191, Oct. 13, 1994, 108 Stat. 3315

Section, Pub. L. 93-400, § 24, as added Pub. L. 99-234, title II, § 201, Jan. 2, 1986, 99 Stat. 1759; amended Pub. L. 100-679, § 12, Nov. 17, 1988, 102 Stat. 4070, related to limits on allowable travel expenses of Government contractors.

§ 421. Federal Acquisition Regulatory Council

(a) Establishment

There is established a Federal Acquisition Regulatory Council (hereinafter in this section referred to as the “Council”) to assist in the direction and coordination of Government-wide procurement policy and Government-wide procurement regulatory activities in the Federal Government.

(b) Membership

(1) The Council shall consist of the Administrator for Federal Procurement Policy and—

(A) the Secretary of Defense,

(B) the Administrator of National Aeronautics and Space; and

(C) the Administrator of General Services.

(2) Notwithstanding section 121(d)(1) and (2) of title 40, the officials specified in subparagraphs (A), (B), and (C) of paragraph (1) may designate to serve on and attend meetings of the Council in place of that official (A) the official assigned by statute with the responsibility for acquisition policy in each of their respective agencies or, in the case of the Secretary of Defense, an official at an organizational level not lower than an Assistant Secretary of Defense within the Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics; or (B) if no official of such agency is assigned by statute with the responsibility for acquisition policy for that agency, the official designated pursuant to section 414(3)¹ of this title. No other official or employee may be designated to serve on the Council.

(c) Functions

(1) Subject to the provisions of section 405 of this title, the General Services Administration, the Department of Defense, and the National Aeronautics and Space Administration, pursuant to their respective authorities under title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251, et seq.), chapters 4 and 137 of title 10, and the National Aeronautics and Space Act of 1958 (42 U.S.C. 2451, et seq.), shall jointly issue and maintain in accordance with subsection (f) of this section a single Government-wide procurement regulation, to be known as the “Federal Acquisition Regulation”.

(2) Any other regulations relating to procurement issued by an executive agency shall be limited to (A) regulations essential to implement Government-wide policies and procedures within the agency, and (B) additional policies and procedures required to satisfy the specific and unique needs of the agency.

(3) The Administrator, in consultation with the Council, shall ensure that procurement regulations promulgated by executive agencies are consistent with the Federal Acquisition Regulation and in accordance with any policies issued pursuant to section 405(a) of this title.

(4)(A) Under procedures established by the Administrator, a person may request the Administrator to review any regulation relating to procurement on the basis that such regulation is inconsistent with the Federal Acquisition Regulation.

(B) Unless the request is frivolous or does not, on its face, state a valid basis for such review, the Administrator shall complete such a review not later than 60 days after receiving the request. The time for completion of the review may be extended if the Administrator determines that an additional period of review is required. The Administrator shall advise the requester of the reasons for the extension and the date by which the review will be completed.

(5) If the Administrator determines that a regulation relating to procurement is inconsistent with the Federal Acquisition Regulation or that the regulation should otherwise be revised to remove an inconsistency with any policies issued under section 405(a) of this title, the Administrator shall rescind or deny the promulgation of the regulation or take such other action authorized under section 405 of this title as may be necessary to remove the inconsistency. If the Administrator determines that such a regulation, although not inconsistent with the Federal Acquisition Regulation or such policies, should be revised to improve compliance with such Regulation or policies, the Administrator shall take such action authorized under section 405 of this title as may be necessary and appropriate.

(6) The decisions of the Administrator shall be in writing and made publicly available. The Administrator shall provide a listing of such decisions in the annual report to Congress required by section 407¹ of this title.

(d) Additional responsibilities of membership

Subject to the authority, direction, and control of the head of the agency concerned, each official who represents an agency on the Council pursuant to subsection (b) of this section shall—

(1) approve or disapprove all regulations that are, after 60 days after November 17, 1988, proposed for public comment, promulgated in final form, or otherwise made effective by such agency relating to procurement before such regulation may be promulgated in final form, or otherwise made effective, except that such official may grant an interim approval, without review, for not more than 60 days for a procurement regulation in urgent and compelling circumstances;

(2) carry out the responsibilities of such agency set forth in chapter 35 of title 44 for each information collection request (as that term is defined in section 3502(11)¹ of title 44) that relates to procurement rules or regulations; and

(3) eliminate or reduce (A) any redundant or unnecessary levels of review and approval, in the procurement system of such agency, and (B) redundant or unnecessary procurement regulations which are unique to that agency.

The authority to review and approve or disapprove regulations under paragraph (1) of this subsection may not be delegated to any person outside the office of the official who represents the agency on the Council pursuant to subsection (b) of this section.

(e) Governing policies

All actions of the Council and of members of the Council shall be in accordance with and furtherance of the policies prescribed under section 405(a) of this title.

¹ See References in Text note below.

(f) General authority with respect to FAR

Subject to section 405(b) of this title, the Council shall manage, coordinate, control, and monitor the maintenance of, and issuance of and changes in, the Federal Acquisition Regulation.

(Pub. L. 93-400, § 25, as added Pub. L. 100-679, § 4, Nov. 17, 1988, 102 Stat. 4056; amended Pub. L. 101-510, div. A, title VIII, § 807, Nov. 5, 1990, 104 Stat. 1593; Pub. L. 104-106, div. D, title XLIII, § 4322(a)(2), Feb. 10, 1996, 110 Stat. 677; Pub. L. 104-201, div. A, title VIII, § 822, title X, § 1074(f)(3), Sept. 23, 1996, 110 Stat. 2609, 2661; Pub. L. 105-85, div. A, title VIII, § 841(d), Nov. 18, 1997, 111 Stat. 1843; Pub. L. 106-65, div. A, title IX, § 911(a)(1), Oct. 5, 1999, 113 Stat. 717.)

REFERENCES IN TEXT

Section 414 of this title, referred to in subsec. (b)(2), was amended generally by Pub. L. 108-136, div. A, title XIV, § 1421(a)(1), Nov. 24, 2003, 117 Stat. 1666, and, as so amended, no longer contains a par. (3). See section 414(c)(1) of this title.

The Federal Property and Administrative Services Act of 1949, referred to in subsec. (c)(1), is act June 30, 1949, ch. 288, 63 Stat. 377, as amended. Title III of the Act is classified generally to subchapter IV (§ 251 et seq.) of chapter 4 of this title. For complete classification of this Act to the Code, see Tables.

The National Aeronautics and Space Act of 1958, referred to in subsec. (c)(1), is Pub. L. 85-568, July 29, 1958, 72 Stat. 426, as amended, which is classified principally to chapter 26 (§ 2451 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 2451 of Title 42 and Tables.

Section 407 of this title, referred to in subsec. (c)(6), was repealed by Pub. L. 104-106, div. D, title XLIII, § 4305(b), Feb. 10, 1996, 110 Stat. 665.

Section 3502 of title 44, referred to in subsec. (d)(2), which in par. (11) defined “information collection request”, was omitted in the general amendment of chapter 35 of Title 44, Public Printing and Documents, by Pub. L. 104-13, § 2, May 22, 1995, 109 Stat. 163. Pub. L. 104-13 enacted a new section 3502 of Title 44 which does not define “information collection request”.

CODIFICATION

“Section 121(d)(1) and (2) of title 40” substituted in subsec. (b)(2) for “section 205(d) of the Federal Property and Administrative Services Act of 1949” on authority of Pub. L. 107-217, § 5(c), Aug. 21, 2002, 116 Stat. 1303, the first section of which enacted Title 40, Public Buildings, Property, and Works.

AMENDMENTS

1999—Subsec. (b)(2). Pub. L. 106-65 substituted “Under Secretary of Defense for Acquisition, Technology, and Logistics” for “Under Secretary of Defense for Acquisition and Technology”.

1997—Subsec. (g). Pub. L. 105-85 struck out subsec. (g) which required the Administrator for Federal Procurement to publish an annual report relating to the development of procurement regulations.

1996—Subsec. (b)(2). Pub. L. 104-106 substituted “Under Secretary of Defense for Acquisition and Technology” for “Under Secretary of Defense for Acquisition”.

Subsec. (c)(3). Pub. L. 104-201, § 1074(f)(3)(A)(i), struck out “the policies set forth in section 401 of this title or” after “in accordance with”.

Subsec. (c)(5). Pub. L. 104-201, § 1074(f)(3)(A)(ii), struck out “or the policies set forth in section 401 of this title” after “section 405(a) of this title”.

Subsec. (e). Pub. L. 104-201, § 1074(f)(3)(B), struck out “the policies of section 401 of this title and” after “and furtherance of”.

Subsec. (g)(1). Pub. L. 104-201, § 822(1), substituted “every 12 months” for “within 6 months after November 17, 1988, and every 6 months thereafter” and inserted “and” after the semicolon at end.

Subsec. (g)(2)(H). Pub. L. 104-201, § 822(2), substituted a period for “; and” at end.

Subsec. (g)(3). Pub. L. 104-201, § 822(3), struck out par. (3) which read as follows: “report to Congress within 180 days after November 17, 1988, in consultation with the Administrator of the Office of Information and Regulatory Affairs, regarding—

“(A) the extent of the paperwork burden created by the Federal procurement process, and

“(B) the extent to which the Federal procurement system can be streamlined to reduce unnecessary paperwork while at the same time maintaining record-keeping and reporting requirements necessary to ensure the integrity and accountability of the system.”

1990—Subsec. (b)(2). Pub. L. 101-510 inserted before semicolon at end of cl. (A) “or, in the case of the Secretary of Defense, an official at an organizational level not lower than an Assistant Secretary of Defense within the Office of the Under Secretary of Defense for Acquisition”.

EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104-106, see section 4401 of Pub. L. 104-106, set out as a note under section 251 of this title.

JUSTIFICATION AND APPROVAL OF SOLE-SOURCE CONTRACTS

Pub. L. 111-84, div. A, title VIII, § 811, Oct. 28, 2009, 123 Stat. 2405, provided that:

“(a) IN GENERAL.—Not later than 180 days after the date of the enactment of this Act [Oct. 28, 2009], the Federal Acquisition Regulation shall be revised to provide that the head of an agency may not award a sole-source contract in a covered procurement for an amount exceeding \$20,000,000 unless—

“(1) the contracting officer for the contract justifies the use of a sole-source contract in writing;

“(2) the justification is approved by the appropriate official designated to approve contract awards for dollar amounts that are comparable to the amount of the sole-source contract; and

“(3) the justification and related information are made public as provided in sections 2304(f)(1)(C) and 2304(f) of title 10, United States Code, or sections 303(f)(1)(C) and 303(j) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253(f)(1)(C) and 253(j)), as applicable.

“(b) ELEMENTS OF JUSTIFICATION.—The justification of a sole-source contract required pursuant to subsection (a) shall include the following:

“(1) A description of the needs of the agency concerned for the matters covered by the contract.

“(2) A specification of the statutory provision providing the exception from the requirement to use competitive procedures in entering into the contract.

“(3) A determination that the use of a sole-source contract is in the best interest of the agency concerned.

“(4) A determination that the anticipated cost of the contract will be fair and reasonable.

“(5) Such other matters as the head of the agency concerned shall specify for purposes of this section.

“(c) DEFINITIONS.—In this section:

“(1) COVERED PROCUREMENT.—The term ‘covered procurement’ means either of the following:

“(A) A procurement described in section 2304(f)(2)(D)(ii) of title 10, United States Code.

“(B) A procurement described in section 303(f)(2)(D)(ii) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253(f)(2)(D)(ii)).

“(2) HEAD OF AN AGENCY.—The term ‘head of an agency’—

“(A) in the case of a covered procurement as defined in paragraph (1)(A), has the meaning provided in section 2302(1) of title 10, United States Code; and

“(B) in the case of a covered procurement as defined in paragraph (1)(B), has the meaning provided the term ‘agency head’ in section 309(a) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 259(a)).

“(3) APPROPRIATE OFFICIAL.—The term ‘appropriate official’ means—

“(A) in the case of a covered procurement as defined in paragraph (1)(A), an official designated in section 2304(f)(1)(B) of title 10, United States Code; and

“(B) in the case of a covered procurement as defined in paragraph (1)(B), an official designated in section 303(f)(1)(B) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253(f)(1)(B)).”

STATUS OF DIRECTOR OF DEFENSE PROCUREMENT

Pub. L. 102-190, div. A, title VIII, §809, Dec. 5, 1991, 105 Stat. 1423, as amended by Pub. L. 103-160, div. A, title IX, §904(f), Nov. 30, 1993, 107 Stat. 1729; Pub. L. 106-65, div. A, title IX, §911(a)(1), Oct. 5, 1999, 113 Stat. 717, provided that: “For the purposes of the amendment made by section 807 of the National Defense Authorization Act for Fiscal Year 1991 (Public Law 101-510; 104 Stat. 1593) to section 25(b)(2) of the Office of Federal Procurement Policy Act (41 U.S.C. 421(b)(2)), the Director of Defense Procurement of the Department of Defense shall be considered to be an official at an organizational level of an Assistant Secretary of Defense within the Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics.”

§ 422. Cost Accounting Standards Board

(a) Establishment; membership; terms

(1) There is established within the Office of Federal Procurement Policy an independent board to be known as the “Cost Accounting Standards Board” (hereinafter referred to as the “Board”). The Board shall consist of 5 members, including the Administrator, who shall serve as Chairman, and 4 members, all of whom shall have experience in Government contract cost accounting, and who shall be appointed as follows:

(A) two representatives of the Federal Government—

(i) one of whom shall be a representative of the Department of Defense and be appointed by the Secretary of Defense; and

(ii) one of whom shall be an officer or employee of the General Services Administration appointed by the Administrator of General Services; and

(B) two individuals from the private sector, each of whom shall be appointed by the Administrator and—

(i) one of whom shall be a representative of industry; and

(ii) one of whom shall be particularly knowledgeable about cost accounting problems and systems.

(2)(A) The term of office of each of the members of the Board, other than the Administrator for Federal Procurement Policy, shall be 4 years, except that—

(i) of the initial members, two shall be appointed for terms of two years, one shall be appointed for a term of three years, and one shall be appointed for a term of four years;

(ii) any member appointed to fill a vacancy in the Board shall serve for the remainder of the term for which his predecessor was appointed; and

(iii) no individual who is appointed under paragraph (1)(A) of this subsection shall continue to serve after ceasing to be an officer or employee of the agency from which he or she was appointed.

(B) A vacancy on the Board shall be filled in the same manner in which the original appointment was made.

(C) The initial members of the Board shall be appointed within 120 days after November 17, 1988.

(b) Senior staff

The Administrator, after consultation with the Board, may appoint an executive secretary and two additional staff members without regard to the provisions of title 5 governing appointments in the competitive service, and may pay such employees without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, except that no individual so appointed may receive pay in excess of the annual rate of basic pay payable for GS-18 of the General Schedule.

(c) Other staff

The Administrator may appoint, fix the compensation, and remove additional employees of the Board under the applicable provisions of title 5.

(d) Detailed and temporary personnel

(1) The Board may use, without reimbursement, any personnel of a Federal agency (with the consent of the head of the agency concerned) to serve on advisory committees and task forces to assist the Board in carrying out the functions and responsibilities of the Board under this section.

(2) The Administrator, after consultation with the Board, may procure temporary and intermittent services under section 3109(b) of title 5 of personnel for the purpose of serving on advisory committees and task forces to assist the Board in carrying out the functions and responsibilities of the Board under this section.

(e) Compensation

Except as otherwise provided in subsection (a) of this section, the members of the Board who are officers or employees of the Federal Government, and officers and employees of other agencies of the Federal Government who are used under subsection (d)(1) of this section, shall receive no additional compensation for services, but shall continue to be compensated by the employing Department or agency of such officer or employee. Each member of the Board appointed from private life shall receive compensation at a rate not to exceed the daily equivalent of the rate prescribed for level IV of the Executive Schedule for each day (including travel time) in which the member is engaged in the actual performance of duties vested in the Board. Individuals hired under subsection (d)(2) of this section may receive compensation at rates fixed by the Administrator, but not to exceed the daily equivalent of the rate prescribed for level V of the Federal Executive Salary Schedule under section 5316 of title 5 for each day (including travel time) in which such appointees are prop-

erly engaged in the actual performance of duties under this section. While serving away from homes or the regular place of business, Board members and other appointees serving on an intermittent basis under this section shall be allowed travel expenses in accordance with section 5703 of title 5.

(f) Cost accounting standards authority

(1) The Board shall have the exclusive authority to make, promulgate, amend, and rescind cost accounting standards and interpretations thereof designed to achieve uniformity and consistency in the cost accounting standards governing measurement, assignment, and allocation of costs to contracts with the United States.

(2)(A) Cost accounting standards promulgated under this section shall be mandatory for use by all executive agencies and by contractors and subcontractors in estimating, accumulating, and reporting costs in connection with pricing and administration of, and settlement of disputes concerning, all negotiated prime contract and subcontract procurements with the United States in excess of the amount set forth in section 2306a(a)(1)(A)(i) of title 10, as such amount is adjusted in accordance with applicable requirements of law.

(B) Subparagraph (A) does not apply to the following contracts or subcontracts:

(i) Contracts or subcontracts for the acquisition of commercial items.

(ii) Contracts or subcontracts where the price negotiated is based on prices set by law or regulation.

(iii) Firm, fixed-price contracts or subcontracts awarded on the basis of adequate price competition without submission of certified cost or pricing data.

(iv) A contract or subcontract with a value of less than \$7,500,000 if, at the time the contract or subcontract is entered into, the segment of the contractor or subcontractor that will perform the work has not been awarded at least one contract or subcontract with a value of more than \$7,500,000 that is covered by the cost accounting standards.

(C) In this paragraph, the term “subcontract” includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractor or subcontractor.

(3) The Administrator, after consultation with the Board, shall prescribe rules and procedures governing actions of the Board under this section. Such rules and procedures shall require that any cost accounting standard promulgated, amended, or rescinded (and interpretations thereof) shall be adopted by majority vote of the Board members.

(4) The Board is authorized—

(A) to exempt classes or categories of contractors and subcontractors from the requirements of this section; and

(B) to establish procedures for the waiver of the requirements of this section with respect to individual contracts and subcontracts.

(5)(A) The head of an executive agency may waive the applicability of the cost accounting standards for a contract or subcontract with a value less than \$15,000,000 if that official deter-

mines in writing that the segment of the contractor or subcontractor that will perform the work—

(i) is primarily engaged in the sale of commercial items; and

(ii) would not otherwise be subject to the cost accounting standards under this section, as in effect on or after the effective date of this paragraph.

(B) The head of an executive agency may also waive the applicability of the cost accounting standards for a contract or subcontract under exceptional circumstances when necessary to meet the needs of the agency. A determination to waive the applicability of the cost accounting standards under this subparagraph shall be set forth in writing and shall include a statement of the circumstances justifying the waiver.

(C) The head of an executive agency may not delegate the authority under subparagraph (A) or (B) to any official in the executive agency below the senior policymaking level in the executive agency.

(D) The Federal Acquisition Regulation shall include the following:

(i) Criteria for selecting an official to be delegated authority to grant waivers under subparagraph (A) or (B).

(ii) The specific circumstances under which such a waiver may be granted.

(E) The head of each executive agency shall report the waivers granted under subparagraphs (A) and (B) for that agency to the Board on an annual basis.

(g) Requirements for standards

(1) Prior to the promulgation under this section of cost accounting standards and interpretations thereof, the Board shall—

(A) take into account, after consultation and discussions with the Comptroller General and professional accounting organizations, contractors, and other interested parties—

(i) the probable costs of implementation, including inflationary effects, if any, compared to the probable benefits;

(ii) the advantages, disadvantages, and improvements anticipated in the pricing and administration of, and settlement of disputes concerning, contracts; and

(iii) the scope of, and alternatives available to, the action proposed to be taken;

(B) prepare and publish a report in the Federal Register on the issues reviewed under paragraph (1)(A);

(C)(i) publish an advanced notice of proposed rulemaking in the Federal Register in order to solicit comments on the report prepared pursuant to subparagraph (B);

(ii) provide all parties affected a period of not less than 60 days after such publication to submit their views and comments; and

(iii) during this 60-day period, consult with the Comptroller General and consider any recommendation the Comptroller General may make; and

(D) publish a notice of such proposed rulemaking in the Federal Register and provide all parties affected a period of not less than 60 days after such publication to submit their views and comments.

(2) Rules, regulations, cost accounting standards, and modifications thereof promulgated or amended under this section shall have the full force and effect of law, and shall become effective within 120 days after publication in the Federal Register in final form, unless the Board determines a longer period is necessary. Implementation dates for contractors and subcontractors shall be determined by the Board, but in no event shall such dates be later than the beginning of the second fiscal year of the contractor or subcontractor after the standard becomes effective. Rules, regulations, cost accounting standards, and modifications thereof promulgated or amended under this section shall be accompanied by prefatory comments and by illustrations, if necessary.

(3) The functions exercised under this section are excluded from the operation of sections 551, 553 through 559, and 701 through 706 of title 5.

(h) Implementing regulations

(1) The Board shall promulgate rules and regulations for the implementation of cost accounting standards promulgated or interpreted under subsection (f) of this section. Such regulations shall be incorporated into the Federal Acquisition Regulation and shall require contractors and subcontractors as a condition of contracting with the United States to—

(A) disclose in writing their cost accounting practices, including methods of distinguishing direct costs from indirect costs and the basis used for allocating indirect costs; and

(B) agree to a contract price adjustment, with interest, for any increased costs paid to such contractor or subcontractor by the United States by reason of a change in the contractor's or subcontractor's cost accounting practices or by reason of a failure by the contractor or subcontractor to comply with applicable cost accounting standards.

(2) If the United States and a contractor or subcontractor fail to agree on a contract price adjustment, including whether the contractor or subcontractor has complied with the applicable cost accounting standards, the disagreement will constitute a dispute under the Contract Disputes Act [41 U.S.C. 601 et seq.].

(3) Any contract price adjustment undertaken pursuant to paragraph (1)(B) shall be made, where applicable, on relevant contracts between the United States and the contractor that are subject to the cost accounting standards so as to protect the United States from payment, in the aggregate, of increased costs (as defined by the Board). In no case shall the Government recover costs greater than the increased cost (as defined by the Board) to the Government, in the aggregate, on the relevant contracts subject to the price adjustment, unless the contractor made a change in its cost accounting practices of which it was aware or should have been aware at the time of the price negotiation and which it failed to disclose to the Government.

(4) The interest rate applicable to any contract price adjustment shall be the annual rate of interest established under section 6621 of title 26 for such period. Such interest shall accrue from the time payments of the increased costs were made to the contractor or subcontractor to

the time the United States receives full compensation for the price adjustment.

(i) Omitted

(j) Effect on other standards and regulations

(1) All cost accounting standards, waivers, exemptions, interpretations, modifications, rules, and regulations promulgated by the Cost Accounting Standards Board under section 2168¹ of title 50, Appendix, shall remain in effect unless and until amended, superseded, or rescinded by the Board pursuant to this section.

(2) Existing cost accounting standards referred to in paragraph (1) shall be subject to the provisions of this chapter in the same manner as if promulgated by the Board under this chapter.

(3) The Administrator, under the authority set forth in section 405 of this title, shall ensure that no regulation or proposed regulation of an executive agency is inconsistent with a cost accounting standard promulgated or amended under this section by rescinding or denying the promulgation of any such inconsistent regulation or proposed regulation and taking such other action authorized under section 405 of this title as may be appropriate.

(4) Costs which are the subject of cost accounting standards promulgated under this section shall not be subject to regulations that are established by another executive agency that differ from such standards with respect to the measurement, assignment, and allocation of such costs.

(k) Examinations

For the purpose of determining whether a contractor or subcontractor has complied with cost accounting standards promulgated under this section and has followed consistently the contractor's or subcontractor's disclosed cost accounting practices, any authorized representative of the head of the agency concerned, of the offices of inspector general established pursuant to the Inspector General Act of 1978, or of the Comptroller General of the United States shall have the right to examine and make copies of any documents, papers, or records of such contractor or subcontractor relating to compliance with such cost accounting standards.

(l) Authorization of appropriations

There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this section.

(Pub. L. 93-400, §26, as added Pub. L. 100-679, §5(a), Nov. 17, 1988, 102 Stat. 4058; amended Pub. L. 103-355, title II, §2453, title VIII, §8301(d), Oct. 13, 1994, 108 Stat. 3326, 3397; Pub. L. 104-106, div. D, title XLII, §4205, title XLIII, §4321(h)(4), Feb. 10, 1996, 110 Stat. 656, 675; Pub. L. 106-65, div. A, title VIII, §802(a), (b), Oct. 5, 1999, 113 Stat. 701; Pub. L. 109-163, div. A, title VIII, §822, Jan. 6, 2006, 119 Stat. 3386.)

REFERENCES IN TEXT

The provisions of title 5 governing appointments in the competitive service, referred to in subsec. (b), are classified generally to section 3301 et seq. of Title 5, Government Organization and Employees.

¹ See References in Text note below.

Level IV of the Executive Schedule, referred to in subsec. (e), is set out in section 5315 of Title 5.

For the effective date of this paragraph, referred to in subsec. (f)(5)(A)(ii), as 180 days after Oct. 5, 1999, see section 802(i) of Pub. L. 106-65, set out as an Effective Date of 1999 Amendment; Regulations; Implementation; Construction note below.

The Contract Disputes Act, referred to in subsec. (h)(2), probably means the Contract Disputes Act of 1978, Pub. L. 95-563, Nov. 1, 1978, 92 Stat. 2383, as amended, which is classified principally to chapter 9 (§601 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 601 of this title and Tables.

Section 2168 of title 50, Appendix, referred to in subsec. (j)(1), was repealed by Pub. L. 100-679, §5(b), Nov. 17, 1988, 102 Stat. 4063.

The Inspector General Act of 1978, referred to in subsec. (k), is Pub. L. 95-452, Oct. 12, 1978, 92 Stat. 1101, as amended, which is set out in the Appendix to Title 5, Government Organization and Employees.

CODIFICATION

Subsec. (i) of this section, which required the Board to submit an annual report to Congress on the activities and operations of the Board under this section, terminated, effective May 15, 2000, pursuant to section 3003 of Pub. L. 104-66, as amended, set out as a note under section 1113 of Title 31, Money and Finance. See, also, page 42 of House Document No. 103-7.

AMENDMENTS

2006—Subsec. (f)(2)(A). Pub. L. 109-163 substituted “the amount set forth in section 2306a(a)(1)(A)(i) of title 10, as such amount is adjusted in accordance with applicable requirements of law” for “\$500,000”.

1999—Subsec. (f)(2)(B)(iii), (iv). Pub. L. 106-65, §802(a), added cls. (iii) and (iv).

Subsec. (f)(5). Pub. L. 106-65, §802(b), added par. (5).

1996—Subsec. (f)(2)(B)(i). Pub. L. 104-106, §4205(1), added cl. (i) and struck out former cl. (i) which read as follows: “Contracts or subcontracts where the price negotiated is based on established catalog or market prices of commercial items sold in substantial quantities to the general public.”

Subsec. (f)(2)(B)(iii). Pub. L. 104-106, §4205(2), struck out cl. (iii) which read as follows: “Any other firm fixed-price contract or subcontract (without cost incentives) for commercial items.”

Subsec. (f)(3). Pub. L. 104-106, §4321(h)(4), substituted “The Administrator” for “Not later than 180 days after November 17, 1988, the Administrator”.

1994—Subsec. (f)(2). Pub. L. 103-355, §8301(d), designated existing provisions as subpar. (A), substituted a period for “, other than contracts or subcontracts where the price negotiated is based on (A) established catalog or market prices of commercial items sold in substantial quantities to the general public, or (B) prices set by law or regulation”, and added subpars. (B) and (C).

Subsec. (f)(3). Pub. L. 103-355, §2453, which directed substitution of “The Administrator” for “Not later than 180 days after the date of the enactment of this section, the Administrator”, could not be executed because those words did not appear in the original.

EFFECTIVE DATE OF 1999 AMENDMENT; REGULATIONS; IMPLEMENTATION; CONSTRUCTION

Pub. L. 106-65, div. A, title VIII, §802(c)-(e), (g)-(i), Oct. 5, 1999, 113 Stat. 701, 702, provided that:

“(C) REGULATION ON TYPES OF CAS COVERAGE.—(1) The Administrator for Federal Procurement Policy shall revise the rules and procedures prescribed pursuant to section 26(f) of the Office of Federal Procurement Policy Act (41 U.S.C. 422(f)) to the extent necessary to increase the thresholds established in section 9903.201-2 of title 48 of the Code of Federal Regulations from \$25,000,000 to \$50,000,000.

“(2) Paragraph (1) requires only a change of the statement of a threshold condition in the regulation referred

to by section number in that paragraph, and shall not be construed as—

“(A) a ratification or expression of approval of—

“(i) any aspect of the regulation; or

“(ii) the manner in which section 26 of the Office of Federal Procurement Policy Act is administered through the regulation; or

“(B) a requirement to apply the regulation.

“(d) IMPLEMENTATION.—The Administrator for Federal Procurement Policy shall ensure that this section and the amendments made by this section [amending this section] are implemented in a manner that ensures that the Federal Government can recover costs, as appropriate, in a case in which noncompliance with cost accounting standards, or a change in the cost accounting system of a contractor segment or subcontractor segment that is not determined to be desirable by the Federal Government, results in a shift of costs from contracts that are not covered by the cost accounting standards to contracts that are covered by the cost accounting standards.

“(e) IMPLEMENTATION OF REQUIREMENTS FOR REVISION OF REGULATIONS.—(1) Final regulations required by subsection (c) shall be issued not later than 180 days after the date of the enactment of this Act [Oct. 5, 1999].

“(2) Subsection (c) shall cease to be effective one year after the date on which final regulations issued in accordance with that subsection take effect.

“(g) INAPPLICABILITY OF STANDARDS TO CERTAIN CONTRACTS.—The cost accounting standards issued pursuant to section 26(f) of the Office of Federal Procurement Policy Act (41 U.S.C. 422(f)), as amended by this section, shall not apply during fiscal year 2000 with respect to a contract entered into under the authority provided in chapter 89 of title 5, United States Code (relating to health benefits for Federal employees).

“(h) CONSTRUCTION REGARDING CERTAIN NOT-FOR-PROFIT ENTITIES.—The amendments made by subsections (a) and (b) [amending this section] shall not be construed as modifying or superseding, nor as intended to impair or restrict, the applicability of the cost accounting standards described in section 26(f) of the Office of Federal Procurement Policy Act (41 U.S.C. 422(f)) to—

“(1) any educational institution or federally funded research and development center that is associated with an educational institution in accordance with Office of Management and Budget Circular A-21, as in effect on January 1, 1999; or

“(2) any contract with a nonprofit entity that provides research and development and related products or services to the Department of Defense.

“(i) EFFECTIVE DATE.—The amendments made by subsections (a) and (b) [amending this section] shall take effect 180 days after the date of enactment of this Act [Oct. 5, 1999], and shall apply with respect to—

“(1) contracts that are entered into on or after such effective date; and

“(2) determinations made on or after such effective date regarding whether a segment of a contractor or subcontractor is subject to the cost accounting standards under section 26(f) of the Office of Federal Procurement Policy Act (41 U.S.C. 422(f)), regardless of whether the contracts on which such determinations are made were entered into before, on, or after such date.”

EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104-106, see section 4401 of Pub. L. 104-106, set out as a note under section 251 of this title.

EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103-355, see section 10001 of Pub. L. 103-355, set out as a note under section 251 of this title.

REFERENCES IN OTHER LAWS TO GS-16, 17, OR 18 PAY RATES

References in laws to the rates of pay for GS-16, 17, or 18, or to maximum rates of pay under the General

Schedule, to be considered references to rates payable under specified sections of Title 5, Government Organization and Employees, see section 529 [title I, § 101(c)(1)] of Pub. L. 101-509, set out in a note under section 5376 of Title 5.

§ 423. Restrictions on disclosing and obtaining contractor bid or proposal information or source selection information

(a) Prohibition on disclosing procurement information

(1) A person described in paragraph (2) shall not, other than as provided by law, knowingly disclose contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates. In the case of an employee of a private sector organization assigned to an agency under chapter 37 of title 5, in addition to the restriction in the preceding sentence, such employee shall not, other than as provided by law, knowingly disclose contractor bid or proposal information or source selection information during the three-year period after the end of the assignment of such employee.

(2) Paragraph (1) applies to any person who—

(A) is a present or former official of the United States, or a person who is acting or has acted for or on behalf of, or who is advising or has advised the United States with respect to, a Federal agency procurement; and

(B) by virtue of that office, employment, or relationship has or had access to contractor bid or proposal information or source selection information.

(b) Prohibition on obtaining procurement information

A person shall not, other than as provided by law, knowingly obtain contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates.

(c) Actions required of procurement officers when contacted by offerors regarding non-Federal employment

(1) If an agency official who is participating personally and substantially in a Federal agency procurement for a contract in excess of the simplified acquisition threshold contacts or is contacted by a person who is a bidder or offeror in that Federal agency procurement regarding possible non-Federal employment for that official, the official shall—

(A) promptly report the contact in writing to the official's supervisor and to the designated agency ethics official (or designee) of the agency in which the official is employed; and

(B)(i) reject the possibility of non-Federal employment; or

(ii) disqualify himself or herself from further personal and substantial participation in that Federal agency procurement until such time as the agency has authorized the official to resume participation in such procurement, in accordance with the requirements of section 208 of title 18 and applicable agency regulations on the grounds that—

(I) the person is no longer a bidder or offeror in that Federal agency procurement; or

(II) all discussions with the bidder or offeror regarding possible non-Federal employment have terminated without an agreement or arrangement for employment.

(2) Each report required by this subsection shall be retained by the agency for not less than two years following the submission of the report. All such reports shall be made available to the public upon request, except that any part of a report that is exempt from the disclosure requirements of section 552 of title 5 under subsection (b)(1) of such section may be withheld from disclosure to the public.

(3) An official who knowingly fails to comply with the requirements of this subsection shall be subject to the penalties and administrative actions set forth in subsection (e) of this section.

(4) A bidder or offeror who engages in employment discussions with an official who is subject to the restrictions of this subsection, knowing that the official has not complied with subparagraph (A) or (B) of paragraph (1), shall be subject to the penalties and administrative actions set forth in subsection (e) of this section.

(d) Prohibition on former official's acceptance of compensation from contractor

(1) A former official of a Federal agency may not accept compensation from a contractor as an employee, officer, director, or consultant of the contractor within a period of one year after such former official—

(A) served, at the time of selection of the contractor or the award of a contract to that contractor, as the procuring contracting officer, the source selection authority, a member of the source selection evaluation board, or the chief of a financial or technical evaluation team in a procurement in which that contractor was selected for award of a contract in excess of \$10,000,000;

(B) served as the program manager, deputy program manager, or administrative contracting officer for a contract in excess of \$10,000,000 awarded to that contractor; or

(C) personally made for the Federal agency—

(i) a decision to award a contract, sub-contract, modification of a contract or sub-contract, or a task order or delivery order in excess of \$10,000,000 to that contractor;

(ii) a decision to establish overhead or other rates applicable to a contract or contracts for that contractor that are valued in excess of \$10,000,000;

(iii) a decision to approve issuance of a contract payment or payments in excess of \$10,000,000 to that contractor; or

(iv) a decision to pay or settle a claim in excess of \$10,000,000 with that contractor.

(2) Nothing in paragraph (1) may be construed to prohibit a former official of a Federal agency from accepting compensation from any division or affiliate of a contractor that does not produce the same or similar products or services as the entity of the contractor that is responsible for the contract referred to in subparagraph (A), (B), or (C) of such paragraph.

(3) A former official who knowingly accepts compensation in violation of this subsection

shall be subject to penalties and administrative actions as set forth in subsection (e) of this section.

(4) A contractor who provides compensation to a former official knowing that such compensation is accepted by the former official in violation of this subsection shall be subject to penalties and administrative actions as set forth in subsection (e) of this section.

(5) Regulations implementing this subsection shall include procedures for an official or former official of a Federal agency to request advice from the appropriate designated agency ethics official regarding whether the official or former official is or would be precluded by this subsection from accepting compensation from a particular contractor.

(e) Penalties and administrative actions

(1) Criminal penalties

Whoever engages in conduct constituting a violation of subsection (a) or (b) of this section for the purpose of either—

(A) exchanging the information covered by such subsection for anything of value, or

(B) obtaining or giving anyone a competitive advantage in the award of a Federal agency procurement contract,

shall be imprisoned for not more than 5 years or fined as provided under title 18, or both.

(2) Civil penalties

The Attorney General may bring a civil action in an appropriate United States district court against any person who engages in conduct constituting a violation of subsection (a), (b), (c), or (d) of this section. Upon proof of such conduct by a preponderance of the evidence, the person is subject to a civil penalty. An individual who engages in such conduct is subject to a civil penalty of not more than \$50,000 for each violation plus twice the amount of compensation which the individual received or offered for the prohibited conduct. An organization that engages in such conduct is subject to a civil penalty of not more than \$500,000 for each violation plus twice the amount of compensation which the organization received or offered for the prohibited conduct.

(3) Administrative actions

(A) If a Federal agency receives information that a contractor or a person has engaged in conduct constituting a violation of subsection (a), (b), (c), or (d) of this section, the Federal agency shall consider taking one or more of the following actions, as appropriate:

(i) Cancellation of the Federal agency procurement, if a contract has not yet been awarded.

(ii) Rescission of a contract with respect to which—

(I) the contractor or someone acting for the contractor has been convicted for an offense punishable under paragraph (1), or

(II) the head of the agency that awarded the contract has determined, based upon a preponderance of the evidence, that the contractor or someone acting for the contractor has engaged in conduct constituting such an offense.

(iii) Initiation of suspension or debarment proceedings for the protection of the Government in accordance with procedures in the Federal Acquisition Regulation.

(iv) Initiation of adverse personnel action, pursuant to the procedures in chapter 75 of title 5 or other applicable law or regulation.

(B) If a Federal agency rescinds a contract pursuant to subparagraph (A)(ii), the United States is entitled to recover, in addition to any penalty prescribed by law, the amount expended under the contract.

(C) For purposes of any suspension or debarment proceedings initiated pursuant to subparagraph (A)(iii), engaging in conduct constituting an offense under subsection (a), (b), (c), or (d) of this section affects the present responsibility of a Government contractor or subcontractor.

(f) Definitions

As used in this section:

(1) The term “contractor bid or proposal information” means any of the following information submitted to a Federal agency as part of or in connection with a bid or proposal to enter into a Federal agency procurement contract, if that information has not been previously made available to the public or disclosed publicly:

(A) Cost or pricing data (as defined by section 2306a(h) of title 10, with respect to procurements subject to that section, and section 254b(h) of this title, with respect to procurements subject to that section).

(B) Indirect costs and direct labor rates.

(C) Proprietary information about manufacturing processes, operations, or techniques marked by the contractor in accordance with applicable law or regulation.

(D) Information marked by the contractor as “contractor bid or proposal information”, in accordance with applicable law or regulation.

(2) The term “source selection information” means any of the following information prepared for use by a Federal agency for the purpose of evaluating a bid or proposal to enter into a Federal agency procurement contract, if that information has not been previously made available to the public or disclosed publicly:

(A) Bid prices submitted in response to a Federal agency solicitation for sealed bids, or lists of those bid prices before public bid opening.

(B) Proposed costs or prices submitted in response to a Federal agency solicitation, or lists of those proposed costs or prices.

(C) Source selection plans.

(D) Technical evaluation plans.

(E) Technical evaluations of proposals.

(F) Cost or price evaluations of proposals.

(G) Competitive range determinations that identify proposals that have a reasonable chance of being selected for award of a contract.

(H) Rankings of bids, proposals, or competitors.

(I) The reports and evaluations of source selection panels, boards, or advisory councils.

(J) Other information marked as “source selection information” based on a case-by-case determination by the head of the agency, his designee, or the contracting officer that its disclosure would jeopardize the integrity or successful completion of the Federal agency procurement to which the information relates.

(3) The term “Federal agency” has the meaning provided such term in section 102 of title 40.

(4) The term “Federal agency procurement” means the acquisition (by using competitive procedures and awarding a contract) of goods or services (including construction) from non-Federal sources by a Federal agency using appropriated funds.

(5) The term “contracting officer” means a person who, by appointment in accordance with applicable regulations, has the authority to enter into a Federal agency procurement contract on behalf of the Government and to make determinations and findings with respect to such a contract.

(6) The term “protest” means a written objection by an interested party to the award or proposed award of a Federal agency procurement contract, pursuant to subchapter V of chapter 35 of title 31.

(7) The term “official” means the following:

(A) An officer, as defined in section 2104 of title 5.

(B) An employee, as defined in section 2105 of title 5.

(C) A member of the uniformed services, as defined in section 2101(3) of title 5.

(g) Limitation on protests

No person may file a protest against the award or proposed award of a Federal agency procurement contract alleging a violation of subsection (a), (b), (c), or (d) of this section, nor may the Comptroller General of the United States consider such an allegation in deciding a protest, unless that person reported to the Federal agency responsible for the procurement, no later than 14 days after the person first discovered the possible violation, the information that the person believed constitutes evidence of the offense.

(h) Savings provisions

This section does not—

(1) restrict the disclosure of information to, or its receipt by, any person or class of persons authorized, in accordance with applicable agency regulations or procedures, to receive that information;

(2) restrict a contractor from disclosing its own bid or proposal information or the recipient from receiving that information;

(3) restrict the disclosure or receipt of information relating to a Federal agency procurement after it has been canceled by the Federal agency before contract award unless the Federal agency plans to resume the procurement;

(4) prohibit individual meetings between a Federal agency official and an offeror or potential offeror for, or a recipient of, a contract or subcontract under a Federal agency procurement, provided that unauthorized disclosure or receipt of contractor bid or proposal

information or source selection information does not occur;

(5) authorize the withholding of information from, nor restrict its receipt by, Congress, a committee or subcommittee of Congress, the Comptroller General, a Federal agency, or an inspector general of a Federal agency;

(6) authorize the withholding of information from, nor restrict its receipt by, the Comptroller General of the United States in the course of a protest against the award or proposed award of a Federal agency procurement contract; or

(7) limit the applicability of any requirements, sanctions, contract penalties, and remedies established under any other law or regulation.

(Pub. L. 93-400, §27, as added Pub. L. 100-679, §6(a), Nov. 17, 1988, 102 Stat. 4063; amended Pub. L. 101-189, div. A, title VIII, §814(a)-(d)(1), Nov. 29, 1989, 103 Stat. 1495-1498; Pub. L. 101-510, div. A, title XIV, §1484(l)(6), Nov. 5, 1990, 104 Stat. 1720; Pub. L. 102-25, title VII, §705(i), Apr. 6, 1991, 105 Stat. 121; Pub. L. 103-355, title VIII, §8301(e), Oct. 13, 1994, 108 Stat. 3397; Pub. L. 104-106, div. D, title XLIII, §4304(a), Feb. 10, 1996, 110 Stat. 659; Pub. L. 107-347, title II, §209(d)(4), Dec. 17, 2002, 116 Stat. 2930.)

CODIFICATION

“Section 102 of title 40” substituted in subsec. (f)(3) for “section 3 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 472)” on authority of Pub. L. 107-217, §5(c), Aug. 21, 2002, 116 Stat. 1303, the first section of which enacted Title 40, Public Buildings, Property, and Works.

AMENDMENTS

2002—Subsec. (a)(1). Pub. L. 107-347 inserted at end “In the case of an employee of a private sector organization assigned to an agency under chapter 37 of title 5, in addition to the restriction in the preceding sentence, such employee shall not, other than as provided by law, knowingly disclose contractor bid or proposal information or source selection information during the three-year period after the end of the assignment of such employee.”

1996—Pub. L. 104-106 amended section generally, substituting subssecs. (a) to (h) relating to restrictions on disclosing and obtaining contractor bid or proposal information and source selection information for former subssecs. (a) to (p) relating to procurement integrity.

1994—Subsec. (e)(1)(B). Pub. L. 103-355 inserted “, except in the case of a contract for the procurement of commercial items,” after “certifies in writing to such contracting officer” in introductory provisions.

1991—Subsec. (p)(8). Pub. L. 102-25 substituted “has the meaning given such term by section 109(3) of the Ethics in Government Act of 1978 (5 U.S.C. App.)” for “has the same meaning as the term ‘designated agency official’ in section 209(10) of the Ethics in Government Act of 1978 (92 Stat. 1850; 5 U.S.C. App.)”

1990—Subsec. (f)(3)(D), (F). Pub. L. 101-510 redesignated subpar. (D), defining term “civil service”, as (F).

1989—Subsecs. (a)(1), (b)(1). Pub. L. 101-189, §814(a)(1)(A), inserted “, except as provided in subsection (c) of this section” before semicolon at end.

Subsec. (c). Pub. L. 101-189, §814(a)(1)(C), added subsec. (c). Former subsec. (c) redesignated (d).

Subsec. (d). Pub. L. 101-189, §814(a)(1)(B)(ii), redesignated subsec. (c) as (d). Former subsec. (d) redesignated (e).

Subsec. (e). Pub. L. 101-189, §814(a)(1)(B)(ii), redesignated subsec. (d) as (e). Former subsec. (e) redesignated (f).

Subsec. (e)(1)(A)(i), (B)(ii), (2)(A), (3)(A). Pub. L. 101-189, § 814(c)(1)(A)-(D), substituted “(d), or (f)” for “(c), or (e)”.

Subsec. (e)(7)(B)(ii). Pub. L. 101-189, § 814(c)(1)(E), substituted “subsection (o)” for “subsection (m)”.

Subsec. (f). Pub. L. 101-189, § 814(a)(2)(B), substituted “Restrictions resulting from procurement activities of procurement officials” for “Restrictions on Government officials and employees” as heading, and “(1) No individual who, while serving as an officer or employee of the Government or member of the Armed Forces, was a procurement official with respect to a particular procurement may knowingly—” for “No Government official or employee, civilian, or military, who has participated personally and substantially in the conduct of any Federal agency procurement or who has personally reviewed and approved the award, modification, or extension of any contract for such procurement shall—”.

Pub. L. 101-189, § 814(a)(2)(A), redesignated pars. (1) and (2) as subpars. (A) and (B), respectively.

Pub. L. 101-189, § 814(a)(1)(B)(ii), redesignated subsec. (e) as (f). Former subsec. (f) redesignated (g).

Subsec. (f)(2). Pub. L. 101-189, § 814(a)(2)(C), added par. (2).

Subsec. (f)(3). Pub. L. 101-189, § 814(d)(1), added par. (3).

Subsec. (g). Pub. L. 101-189, § 814(a)(1)(B)(ii), redesignated subsec. (f) as (g). Former subsec. (g) redesignated (h).

Subsec. (g)(1). Pub. L. 101-189, § 814(c)(2), substituted “subsection (o)” for “subsection (m)”.

Subsec. (h). Pub. L. 101-189, § 814(a)(1)(B)(ii), redesignated subsec. (g) as (h). Former subsec. (h) redesignated (i).

Subsec. (h)(1). Pub. L. 101-189, § 814(c)(3)(A), substituted “subsection (e)” for “subsection (d)”.

Subsec. (h)(2). Pub. L. 101-189, § 814(c)(3)(B), substituted “(b) or (d)” for “(b) or (c)”.

Subsec. (h)(3). Pub. L. 101-189, § 814(c)(3)(C), substituted “(i) and (j)” for “(h) and (i)”.

Subsec. (i). Pub. L. 101-189, § 814(c)(4), substituted “(d), or (f)” for “(c), or (e)”.

Pub. L. 101-189, § 814(a)(1)(B)(ii), redesignated subsec. (h) as (i). Former subsec. (i) redesignated (j).

Subsec. (j). Pub. L. 101-189, § 814(a)(1)(B)(ii), redesignated subsec. (i) as (j). Former subsec. (j) redesignated (l).

Subsec. (j)(1). Pub. L. 101-189, § 814(c)(5), substituted “subsection (p)” for “subsection (n)” and “subsection (o)” for “subsection (m)”.

Subsec. (k). Pub. L. 101-189, § 814(a)(3), added subsec. (k). Former subsec. (k) redesignated (m).

Subsec. (l). Pub. L. 101-189, § 814(a)(1)(B)(i), redesignated subsec. (j) as (l). Former subsec. (l) redesignated (n).

Subsec. (l)(1). Pub. L. 101-189, § 814(c)(6)(A), substituted “subsections (b), (c), and (e)” for “subsection (b)”.

Subsec. (l)(2). Pub. L. 101-189, § 814(c)(6)(B), substituted “subsections (b), (c), and (e)” for “subsection (b)” and “(d), or (f)” for “(c), or (e)”.

Subsecs. (m), (n). Pub. L. 101-189, § 814(a)(1)(B)(i), redesignated subsecs. (k) and (l) as (m) and (n), respectively. Former subsecs. (m) and (n) redesignated (o) and (p), respectively.

Subsec. (o). Pub. L. 101-189, § 814(a)(4), amended subsec. (o) generally. Prior to amendment, subsec. (o) read as follows: “Government-wide regulations and guidelines deemed appropriate to carry out this section shall be issued in the Federal Acquisition Regulation within 180 days after November 17, 1988.”

Pub. L. 101-189, § 814(a)(1)(B)(i), redesignated subsec. (m) as (o).

Subsec. (p). Pub. L. 101-189, § 814(a)(1)(B)(i), redesignated subsec. (n) as (p).

Subsec. (p)(1). Pub. L. 101-189, § 814(b)(1), substituted “on the earliest specific date, as determined under implementing regulations, on which an authorized official orders or requests an action described in clauses (i)-(viii) of paragraph (3)(A),” for “with the develop-

ment, preparation, and issuance of a procurement solicitation.”.

Subsec. (p)(3)(A). Pub. L. 101-189, § 814(b)(2), added subpar. (A) and struck out former subpar. (A) which read as follows: “The term ‘procurement official’ means any civilian or military official or employee of an agency who has participated personally and substantially in the conduct of the agency procurement concerned, including all officials and employees who are responsible for reviewing or approving the procurement, as further defined by applicable implementing regulations.”

Subsec. (p)(8). Pub. L. 101-189, § 814(b)(3), added par. (8).

EFFECTIVE DATE OF 2002 AMENDMENT

Amendment by Pub. L. 107-347 effective 120 days after Dec. 17, 2002, see section 402(a) of Pub. L. 107-347, set out as an Effective Date note under section 3601 of Title 44, Public Printing and Documents.

EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104-106, see section 4401 of Pub. L. 104-106, set out as a note under section 251 of this title.

EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103-355, see section 10001 of Pub. L. 103-355, set out as a note under section 251 of this title.

EFFECTIVE DATE

Section 6(b) of Pub. L. 100-679, as amended by Pub. L. 101-28, § 1, May 15, 1989, 103 Stat. 57, provided that: “The amendment made by subsection (a) [enacting this section] shall take effect July 16, 1989.”

REGULATIONS

Section 814(e) of Pub. L. 101-189 provided that: “Not later than 90 days after the date of the enactment of this section [Nov. 29, 1989], regulations implementing the amendments made by this section to the provisions of section 27 of the Office of Federal Procurement Policy Act (41 U.S.C. 423) shall be issued in accordance with sections 6 and 25 of such Act (41 U.S.C. 405, 421), after coordination with the Director of the Office of Government Ethics.”

CLARIFICATION OF FREQUENCY OF CERTIFICATION BY EMPLOYEES AND CONTRACTORS

Section 815(b) of Pub. L. 101-510 provided that: “Not later than 30 days after the date of the enactment of this Act [Nov. 5, 1990], the regulations implementing section 27(e)(1)(B) of the Office of Federal Procurement Policy Act (41 U.S.C. 423(e)(1)(B)) shall be revised to ensure that a contractor is required to obtain from each officer, employee, agent, representative, and consultant of the contractor only one certification (as described in clauses (i) and (ii) of that section) during the person’s employment or association with the contractor and that such certification shall be made at the earliest possible date after the person begins his or her employment or association with the contractor.”

SUSPENSION OF EFFECT OF SECTION

Section 815(a)(1) of Pub. L. 101-510 provided that subsection (f) of this section shall have no force or effect during the period beginning on Dec. 1, 1990, and ending on May 31, 1991.

Pub. L. 101-194, title V, § 507(1), Nov. 30, 1989, 103 Stat. 1759, provided that the provisions of this section shall have no force or effect during the period beginning Dec. 1, 1989, and ending one year after such date.

§ 424. Repealed. Pub. L. 103-355, title VIII, § 8303(b), Oct. 13, 1994, 108 Stat. 3398

Section, Pub. L. 93-400, § 28, as added Pub. L. 100-679, § 9, Nov. 17, 1988, 102 Stat. 4069, related to establishment

and duties of Advocate for the Acquisition of Commercial Products.

EFFECTIVE DATE OF REPEAL

For effective date and applicability of repeal, see section 10001 of Pub. L. 103-355, set out as an Effective Date of 1994 Amendment note under section 251 of this title.

§ 425. Contract clauses and certifications

(a) Nonstandard contract clauses

The Federal Acquisition Regulatory Council shall promulgate regulations to discourage the use of a nonstandard contract clause on a repetitive basis. The regulations shall include provisions that—

(1) clearly define what types of contract clauses are to be treated as nonstandard clauses; and

(2) require prior approval for the use of a nonstandard clause on a repetitive basis by an official at a level of responsibility above the contracting officer.

(b) Construction of certification requirements

A provision of law may not be construed as requiring a certification by a contractor or offeror in a procurement made or to be made by the Federal Government unless that provision of law specifically provides that such a certification shall be required.

(c) Prohibition on certification requirements

(1) A requirement for a certification by a contractor or offeror may not be included in the Federal Acquisition Regulation unless—

(A) the certification requirement is specifically imposed by statute; or

(B) written justification for such certification requirement is provided to the Administrator for Federal Procurement Policy by the Federal Acquisition Regulatory Council, and the Administrator approves in writing the inclusion of such certification requirement.

(2)(A) A requirement for a certification by a contractor or offeror may not be included in a procurement regulation of an executive agency unless—

(i) the certification requirement is specifically imposed by statute; or

(ii) written justification for such certification requirement is provided to the head of the executive agency by the senior procurement executive of the agency, and the head of the executive agency approves in writing the inclusion of such certification requirement.

(B) For purposes of subparagraph (A), the term “head of the executive agency” with respect to a military department means the Secretary of Defense.

(Pub. L. 93-400, § 29, as added Pub. L. 103-355, title I, § 1093, Oct. 13, 1994, 108 Stat. 3273; amended Pub. L. 104-106, div. D, title XLIII, § 4301(b)(2)(A), (c), Feb. 10, 1996, 110 Stat. 657, 658.)

AMENDMENTS

1996—Pub. L. 104-106 substituted “Contract clauses and certifications” for “Nonstandard contract clauses” in section catchline, designated existing provisions as subsec. (a) and inserted heading, and added subsecs. (b) and (c).

EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104-106, see section 4401 of Pub. L. 104-106, set out as a note under section 251 of this title.

EFFECTIVE DATE

For effective date and applicability of section, see section 10001 of Pub. L. 103-355, set out as an Effective Date of 1994 Amendment note under section 251 of this title.

CURRENT CERTIFICATION REQUIREMENTS

Section 4301(b)(1) of Pub. L. 104-106 provided that:

“(A) Not later than 210 days after the date of the enactment of this Act [Feb. 10, 1996], the Administrator for Federal Procurement Policy shall issue for public comment a proposal to amend the Federal Acquisition Regulation to remove from the Federal Acquisition Regulation certification requirements for contractors and offerors that are not specifically imposed by statute. The Administrator may omit such a certification requirement from the proposal only if—

“(i) the Federal Acquisition Regulatory Council provides the Administrator with a written justification for the requirement and a determination that there is no less burdensome means for administering and enforcing the particular regulation that contains the certification requirement; and

“(ii) the Administrator approves in writing the retention of the certification requirement.

“(B)(i) Not later than 210 days after the date of the enactment of this Act, the head of each executive agency that has agency procurement regulations containing one or more certification requirements for contractors and offerors that are not specifically imposed by statute shall issue for public comment a proposal to amend the regulations to remove the certification requirements. The head of the executive agency may omit such a certification requirement from the proposal only if—

“(I) the senior procurement executive for the executive agency provides the head of the executive agency with a written justification for the requirement and a determination that there is no less burdensome means for administering and enforcing the particular regulation that contains the certification requirement; and

“(II) the head of the executive agency approves in writing the retention of such certification requirement.

“(ii) For purposes of clause (i), the term ‘head of the executive agency’ with respect to a military department means the Secretary of Defense.”

§ 426. Use of electronic commerce in Federal procurement

(a) In general

The head of each executive agency, after consulting with the Administrator, shall establish, maintain, and use, to the maximum extent that is practicable and cost-effective, procedures and processes that employ electronic commerce in the conduct and administration of its procurement system.

(b) Applicable standards

In conducting electronic commerce, the head of an agency shall apply nationally and internationally recognized standards that broaden interoperability and ease the electronic interchange of information.

(c) Agency procedures

The head of each executive agency shall ensure that systems, technologies, procedures, and processes established pursuant to this section—

(1) are implemented with uniformity throughout the agency, to the extent practicable;

(2) are implemented only after granting due consideration to the use or partial use, as appropriate, of existing electronic commerce and electronic data interchange systems and infrastructures such¹ the Federal acquisition computer network architecture known as FACNET;

(3) facilitate access to Federal Government procurement opportunities, including opportunities for small business concerns, socially and economically disadvantaged small business concerns, and business concerns owned predominantly by women; and

(4) ensure that any notice of agency requirements or agency solicitation for contract opportunities is provided in a form that allows convenient and universal user access through a single, Government-wide point of entry.

(d) Implementation

The Administrator shall, in carrying out the requirements of this section—

(1) issue policies to promote, to the maximum extent practicable, uniform implementation of this section by executive agencies, with due regard for differences in program requirements among agencies that may require departures from uniform procedures and processes in appropriate cases, when warranted because of the agency mission;

(2) ensure that the head of each executive agency complies with the requirements of subsection (c) of this section with respect to the agency systems, technologies, procedures, and processes established pursuant to this section; and

(3) consult with the heads of appropriate Federal agencies with applicable technical and functional expertise, including the Office of Information and Regulatory Affairs, the National Institute of Standards and Technology, the General Services Administration, and the Department of Defense.

(e) Report

Not later than March 1 of each even-numbered year through 2004, the Administrator shall submit to Congress a report setting forth in detail the progress made in implementing the requirements of this section. The report shall include the following:

(1) A strategic plan for the implementation of a Government-wide electronic commerce capability.

(2) An agency-by-agency summary of implementation of the requirements of subsection (c) of this section, including timetables, as appropriate, addressing when individual agencies will come into full compliance.

(3) A specific assessment of compliance with the requirement in subsection (c) of this section to provide universal public access through a single, Government-wide point of entry.

(4) An agency-by-agency summary of the volume and dollar value of transactions that were conducted using electronic commerce methods during the previous two fiscal years.

(5) A discussion of possible incremental changes to the electronic commerce capability referred to in subsection (c)(4) of this section to increase the level of government contract information available to the private sector, including an assessment of the advisability of including contract award information in the electronic commerce functional standard.

(f) “Electronic commerce” defined

For the purposes of this section, the term “electronic commerce” means electronic techniques for accomplishing business transactions, including electronic mail or messaging, World Wide Web technology, electronic bulletin boards, purchase cards, electronic funds transfers, and electronic data interchange.

(Pub. L. 93-400, §30, as added Pub. L. 103-355, title IX, §9001(a), Oct. 13, 1994, 108 Stat. 3399; Pub. L. 105-85, div. A, title VIII, §850(a), Nov. 18, 1997, 111 Stat. 1847; Pub. L. 106-398, §1 [[div. A], title VIII, §810(d)], Oct. 30, 2000, 114 Stat. 1654, 1654A-210.)

AMENDMENTS

2000—Subsec. (e). Pub. L. 106-398, §1 [[div. A], title VIII, §810(d)(1)], substituted “Not later than March 1 of each even-numbered year through 2004” for “Not later than March 1, 1998, and every year afterward through 2003” in introductory provisions.

Subsec. (e)(4). Pub. L. 106-398, §1 [[div. A], title VIII, §810(d)(2)], substituted “An” for “Beginning with the report submitted on March 1, 1999, an” and “two fiscal years” for “calendar year”.

1997—Pub. L. 105-85 amended section catchline and text generally. Prior to amendment, section consisted of subssecs. (a) to (d) requiring the Administrator to establish a program for development and implementation of a Federal acquisition computer network architecture to be known as FACNET.

EFFECTIVE DATE OF 2000 AMENDMENT

Amendment by Pub. L. 106-398 effective Oct. 1, 2000, see section 1 [[div. A], title VIII, §810(e)] of Pub. L. 106-398, set out as a note under section 637 of Title 15, Commerce and Trade.

EFFECTIVE DATE OF 1997 AMENDMENT

Amendment by Pub. L. 105-85 effective 180 days after Nov. 18, 1997, see section 850(g) of Pub. L. 105-85, set out as a note under section 2302c of Title 10, Armed Forces.

EFFECTIVE DATE

For effective date and applicability of section, see section 10001 of Pub. L. 103-355, set out as an Effective Date of 1994 Amendment note under section 251 of this title.

§ 426a. Repealed. Pub. L. 105-85, div. A, title VIII, § 850(b), Nov. 18, 1997, 111 Stat. 1848

Section, Pub. L. 93-400, §30A, as added Pub. L. 103-355, title IX, §9001(a), Oct. 13, 1994, 108 Stat. 3400, related to Federal acquisition computer network implementation.

EFFECTIVE DATE OF REPEAL

Repeal effective 180 days after Nov. 18, 1997, see section 850(g) of Pub. L. 105-85, set out as an Effective Date of 1997 Amendment note under section 2302c of Title 10, Armed Forces.

GAO DETERMINATION OF ELIGIBLE AGENCY CONTRACTS

Section 9004 of Pub. L. 103-355 required Comptroller General to submit to Administrator for Federal Procurement Policy and congressional committees, not

¹ So in original. Probably should be followed by “as”.

later than 3 years after Oct. 13, 1994, a report on classes of contracts in amounts greater than micro-purchase threshold and not greater than simplified acquisition threshold that are not suitable for acquisition through a system with full FACNET capability, and authorized Federal Acquisition Regulatory Council, not earlier than 3 years after Oct. 13, 1994, to make determination that such class or classes of contracts were not suitable for acquisition through such a system, prior to repeal by Pub. L. 105-85, div. A, title VIII, §850(c), Nov. 18, 1997, 111 Stat. 1848.

§ 427. Simplified acquisition procedures

(a) Requirement

In order to promote efficiency and economy in contracting and to avoid unnecessary burdens for agencies and contractors, the Federal Acquisition Regulation shall provide for—

(1) special simplified procedures for purchases of property and services for amounts not greater than the simplified acquisition threshold; and

(2) special simplified procedures for purchases of property and services for amounts greater than the simplified acquisition threshold but not greater than \$5,000,000 with respect to which the contracting officer reasonably expects, based on the nature of the property or services sought and on market research, that offers will include only commercial items.

(b) Prohibition on dividing purchases

A proposed purchase or contract for an amount above the simplified acquisition threshold may not be divided into several purchases or contracts for lesser amounts in order to use the simplified acquisition procedures required by subsection (a) of this section.

(c) Promotion of competition required

In using simplified acquisition procedures, the head of an executive agency shall promote competition to the maximum extent practicable.

(d) Consideration of offers timely received

The simplified acquisition procedures contained in the Federal Acquisition Regulation shall include a requirement that a contracting officer consider each responsive offer timely received from an eligible offeror.

(e) Interim reporting rule

Until October 1, 2004, procuring activities shall continue to report under section 417(d) of this title procurement awards with a dollar value of at least \$25,000, but less than \$100,000, in conformity with the procedures for the reporting of a contract award greater than \$25,000 that were in effect on October 1, 1992.

(f) Special rules for commercial items

The Federal Acquisition Regulation shall provide that, in the case of a purchase of commercial items using special simplified procedures, an executive agency—

(1) shall publish a notice in accordance with section 416 of this title and, as provided in subsection (b)(4) of such section, permit all responsible sources to submit a bid, proposal, or quotation (as appropriate) which shall be considered by the agency;

(2) may not conduct the purchase on a sole source basis unless the need to do so is justifi-

fied in writing and approved in accordance with section 2304 of title 10 or section 253 of this title, as applicable; and

(3) shall include in the contract file a written description of the procedures used in awarding the contract and the number of offers received.

(Pub. L. 93-400, §31, as added Pub. L. 103-355, title IV, §4201(a), Oct. 13, 1994, 108 Stat. 3342; amended Pub. L. 104-106, div. D, title XLII, §4202(c), title XLIII, §4302(b), Feb. 10, 1996, 110 Stat. 653, 658; Pub. L. 104-201, div. A, title X, §1074(b)(6), Sept. 23, 1996, 110 Stat. 2660; Pub. L. 105-85, div. A, title VIII, §850(d), Nov. 18, 1997, 111 Stat. 1848; Pub. L. 106-65, div. A, title VIII, §818, Oct. 5, 1999, 113 Stat. 712.)

AMENDMENTS

1999—Subsec. (e). Pub. L. 106-65 substituted “October 1, 2004” for “October 1, 1999”.

1997—Subsecs. (e) to (g). Pub. L. 105-85 redesignated subsecs. (f) and (g) as (e) and (f), respectively, and struck out heading and text of subsec. (e). Text read as follows: “The simplified acquisition procedures provided in the Federal Acquisition Regulation pursuant to section 2304(g)(1)(A) of title 10, section 253(g)(1)(A) of this title, and subsection (a)(1) of this section may not be used by an agency after December 31, 1999, for contracts in amounts greater than \$50,000 and not greater than the simplified acquisition threshold until a certification has been made pursuant to section 426a(a)(2) of this title that the agency has implemented a full FACNET capability.”

1996—Subsec. (a). Pub. L. 104-106, §4202(c)(1), as amended by Pub. L. 104-201, substituted “shall provide for—” and pars. (1) and (2) for “shall provide for special simplified procedures for contracts for acquisition of property and services that are not greater than the simplified acquisition threshold.”

Subsec. (e). Pub. L. 104-106, §4302(b)(2), substituted “pursuant to section 2304(g)(1)(A) of title 10, section 253(g)(1)(A) of this title, and subsection (a)(1) of this section” for “pursuant to this section”.

Pub. L. 104-106, §4302(b)(1), designated subsec. (e)(2)(B) as entire subsec. and struck out former pars. (1) and (2)(A) which read as follows:

“(1) EFFECT OF INTERIM FACNET CAPABILITY.—The simplified acquisition procedures provided in the Federal Acquisition Regulation pursuant to this section may not be used by a procuring activity of an agency for contracts in amounts greater than \$50,000 and not greater than the simplified acquisition threshold until a certification has been made pursuant to section 426a(a)(1) of this title that the procuring activity has implemented an interim FACNET capability.

“(2) EFFECT OF FULL FACNET CAPABILITY.—(A)(i) In the case of a procuring activity described in clause (ii), the simplified acquisition procedures provided in the Federal Acquisition Regulation pursuant to this section may be used by the activity for contracts in amounts greater than \$50,000 and not greater than the simplified acquisition threshold.

“(ii) Clause (i) applies to any procuring activity—

“(I) that has not certified, pursuant to section 426a(a)(1) of this title, that it has implemented interim FACNET capability; and

“(II) that is in an agency that has excluded the procuring activity from the agency’s full FACNET certification under section 426a(a)(2) of this title on the basis that implementation of full FACNET capability would not be cost effective or practicable in that activity.”

Subsec. (g). Pub. L. 104-106, §4202(c)(2), added subsec. (g).

EFFECTIVE DATE OF 1997 AMENDMENT

Amendment by Pub. L. 105-85 effective 180 days after Nov. 18, 1997, see section 850(g) of Pub. L. 105-85, set out as a note under section 2302c of Title 10, Armed Forces.

EFFECTIVE DATE OF 1996 AMENDMENTS

Section 1074(b)(6) of Pub. L. 104-201 provided that the amendment made by that section is effective Feb. 10, 1996.

For effective date and applicability of amendment by Pub. L. 104-106, see section 4401 of Pub. L. 104-106, set out as a note under section 251 of this title.

EFFECTIVE DATE

For effective date and applicability of section, see section 10001 of Pub. L. 103-355, set out as an Effective Date of 1994 Amendment note under section 251 of this title.

TERMINATION OF AUTHORITY TO ISSUE SOLICITATIONS FOR PURCHASES OF COMMERCIAL ITEMS IN EXCESS OF SIMPLIFIED ACQUISITION THRESHOLD

Authority to issue solicitations for purchases of commercial items in excess of simplified acquisition threshold pursuant to special simplified procedures authorized by subsec. (a) of this section to expire three years after date certain amendments by section 4202 of Pub. L. 104-106 take effect pursuant to section 4401(b) of Pub. L. 104-106, set out as a note under section 251 of this title, see section 4202(e) of Pub. L. 104-106, set out as a note under section 2304 of Title 10, Armed Forces.

§ 428. Procedures applicable to purchases below micro-purchase threshold**(a) Requirements**

(1) The head of each executive agency shall ensure that procuring activities of that agency, in awarding a contract with a price exceeding the micro-purchase threshold, comply with the requirements of section 637(a) of title 15, section 2323 of title 10, and section 7102 of the Federal Acquisition Streamlining Act of 1994.

(2) The authority under part 13.106(a)(1) of the Federal Acquisition Regulation (48 C.F.R. 13.106(a)(1)), as in effect on November 18, 1993, to make purchases without securing competitive quotations does not apply to any purchases with a price exceeding the micro-purchase threshold.

(b) Exclusion for micro-purchases

A purchase by an executive agency with an anticipated value of the micro-purchase threshold or less is not subject to section 644(j) of title 15 and the Buy American Act (41 U.S.C. 10a-10c).

(c) Purchases without competitive quotations

A purchase not greater than \$2,500 may be made without obtaining competitive quotations if an employee of an executive agency or a member of the Armed Forces of the United States authorized to do so determines that the price for the purchase is reasonable.

(d) Equitable distribution

Purchases not greater than \$2,500 shall be distributed equitably among qualified suppliers.

(e) Implementation through FAR

This section shall be implemented through the Federal Acquisition Regulation.

(f) Micro-purchase threshold defined

For purposes of this section, the micro-purchase threshold is the amount of \$2,500.

(Pub. L. 93-400, §32, as added Pub. L. 103-355, title IV, §4301(a), Oct. 13, 1994, 108 Stat. 3346; amended Pub. L. 104-106, div. D, title XLIII, §§4304(b)(4), (c)(3), 4311, Feb. 10, 1996, 110 Stat. 664, 671.)

REFERENCES IN TEXT

Section 7102 of the Federal Acquisition Streamlining Act of 1994, referred to in subsec. (a)(1), is section 7102 of Pub. L. 103-355, which is set out as a note under section 644 of Title 15, Commerce and Trade.

The Buy American Act, referred to in subsec. (b), is title III of act Mar. 3, 1933, ch. 212, 47 Stat. 1520, as amended, which is classified generally to sections 10a, 10b, and 10c of this title. For complete classification of this Act to the Code, see Short Title note set out under section 10a of this title and Tables.

AMENDMENTS

1996—Subsec. (c). Pub. L. 104-106, §4311, substituted “an employee of an executive agency or a member of the Armed Forces of the United States authorized to do so” for “the contracting officer”.

Pub. L. 104-106, §4304(b)(4), (c)(3), redesignated subsec. (d) as (c) and struck out heading and text of former subsec. (c). Text read as follows: “For purposes of section 423 of this title, an officer or employee of an executive agency, or a member of the Armed Forces of the United States, shall not be considered a procurement official if—

“(1) the contracting authority of the officer, employee, or member does not exceed \$2,500; and

“(2) the head of the contracting activity concerned (or a designee of the head of the contracting activity concerned) determines that the duties of the position of that officer, employee, or member are such that it is unlikely that the officer, employee, or member will be required to conduct procurements in a total amount greater than \$20,000 in any 12-month period.”

Subsecs. (d) to (g). Pub. L. 104-106, §4304(c)(3), redesignated subsecs. (e) to (g) as (d) to (f), respectively. Former subsec. (d) redesignated (c).

EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104-106, see section 4401 of Pub. L. 104-106, set out as a note under section 251 of this title.

EFFECTIVE DATE

Section effective Oct. 13, 1994, and to be implemented in Federal Acquisition Regulation not later than 60 days after Oct. 13, 1994, see section 4301(c) of Pub. L. 103-355, set out as an Effective Date of 1994 Amendment note under section 10a of this title.

§ 428a. Special emergency procurement authority**(a) Applicability**

The authorities provided in this section apply with respect to any procurement of property or services by or for an executive agency that, as determined by the head of such executive agency, are to be used—

(1) in support of a contingency operation; or

(2) to facilitate the defense against or recovery from nuclear, biological, chemical, or radiological attack against the United States.

(b) Increased thresholds

For a procurement to which this section applies under subsection (a) of this section—

(1) the amount specified in subsections (c), (d), and (f) of section 428 of this title shall be deemed to be—

(A) \$15,000 in the case of any contract to be awarded and performed, or purchase to be made, inside the United States; and

(B) \$25,000 in the case of any contract to be awarded and performed, or purchase to be made, outside the United States; and

(2) the term “simplified acquisition threshold” means—

(A) \$250,000 in the case of any contract to be awarded and performed, or purchase to be made, inside the United States; and

(B) \$1,000,000 in the case of any contract to be awarded and performed, or purchase to be made, outside the United States.

(c) Increased limitation on use of simplified acquisition procedures

For a procurement to which this section applies under subsection (a) of this section, the \$5,000,000 limitation in the following provisions of law shall be deemed to be \$10,000,000:

- (1) Section 427(a)(2) of this title.
- (2) Section 2304(g)(1)(B) of title 10.
- (3) Section 253(g)(1)(B) of this title.

(d) Commercial items authority

(1) The head of an executive agency carrying out a procurement of property or a service to which this section applies under subsection (a)(2) of this section may treat such property or service as a commercial item for the purpose of carrying out such procurement.

(2) A contract in an amount greater than \$15,000,000 that is awarded on a sole source basis for an item or service treated as a commercial item under paragraph (1) shall not be exempt from—

(A) cost accounting standards promulgated pursuant to section 422 of this title; or

(B) cost or pricing data requirements (commonly referred to as truth in negotiating) under section 2306a of title 10 and section 254b of this title.

(e) Contingency operation defined

In this section, the term “contingency operation” has the meaning given such term in section 101(a)(13) of title 10.

(Pub. L. 93–400, §32A, as added Pub. L. 108–136, div. A, title XIV, §1443(a)(1), Nov. 24, 2003, 117 Stat. 1675; amended Pub. L. 108–375, div. A, title VIII, §822, Oct. 28, 2004, 118 Stat. 2016.)

AMENDMENTS

2004—Subsec. (b)(1). Pub. L. 108–375, §822(1), added par. (1) and struck out former par. (1) which read as follows: “the amount specified in subsections (c), (d), and (f) of section 428 of this title shall be deemed to be \$15,000; and”.

Subsec. (b)(2)(B). Pub. L. 108–375, §822(2), substituted “\$1,000,000” for “\$500,000”.

AUTHORITY TO ENTER INTO CERTAIN TRANSACTIONS FOR DEFENSE AGAINST OR RECOVERY FROM TERRORISM OR NUCLEAR, BIOLOGICAL, CHEMICAL, OR RADIOLOGICAL ATTACK

Pub. L. 108–136, div. A, title XIV, §1441, Nov. 24, 2003, 117 Stat. 1673, provided that:

“(a) AUTHORITY.—

“(1) IN GENERAL.—The head of an executive agency who engages in basic research, applied research, advanced research, and development projects that—

“(A) are necessary to the responsibilities of such official’s executive agency in the field of research and development, and

“(B) have the potential to facilitate defense against or recovery from terrorism or nuclear, biological, chemical, or radiological attack,

may exercise the same authority (subject to the same restrictions and conditions) with respect to such research and projects as the Secretary of Defense may exercise under section 2371 of title 10, United States

Code, except for subsections (b) and (f) of such section 2371.

“(2) PROTOTYPE PROJECTS.—The head of an executive agency may, under the authority of paragraph (1), carry out prototype projects that meet the requirements of subparagraphs (A) and (B) of paragraph (1) in accordance with the requirements and conditions provided for carrying out prototype projects under section 845 of the National Defense Authorization Act for Fiscal Year 1994 (Public Law 103–160; 10 U.S.C. 2371 note), including that, to the maximum extent practicable, competitive procedures shall be used when entering into agreements to carry out projects under subsection (a) of that section and that the period of authority to carry out projects under such subsection (a) terminates as provided in subsection (g) [now (i)] of that section.

“(3) APPLICATION OF REQUIREMENTS AND CONDITIONS.—In applying the requirements and conditions of section 845 of the National Defense Authorization Act for Fiscal Year 1994 under this subsection—

“(A) subsection (c) of that section shall apply with respect to prototype projects carried out under this paragraph; and

“(B) the Director of the Office of Management and Budget shall perform the functions of the Secretary of Defense under subsection (d) of that section.

“(4) APPLICABILITY TO SELECTED EXECUTIVE AGENCIES.—

“(A) OMB AUTHORIZATION REQUIRED.—The head of an executive agency may exercise authority under this subsection for a project only if authorized by the Director of the Office of Management and Budget to use the authority for such project.

“(B) RELATIONSHIP TO AUTHORITY OF DEPARTMENT OF HOMELAND SECURITY.—The authority under this subsection shall not apply to the Secretary of Homeland Security while section 831 of the Homeland Security Act of 2002 (Public Law 107–296; 116 Stat. 2224) [6 U.S.C. 391] is in effect.

“(b) ANNUAL REPORT.—The annual report of the head of an executive agency that is required under subsection (h) of section 2371 of title 10, United States Code, as applied to the head of the executive agency by subsection (a), shall be submitted to the Committee on Governmental Affairs of the Senate and the Committee on Government Reform [now Committee on Oversight and Government Reform] of the House of Representatives.

“(c) REGULATIONS.—The Director of the Office of Management and Budget shall prescribe regulations to carry out this section. No transaction may be conducted under the authority of this section before the date on which such regulations take effect.

“(d) TERMINATION OF AUTHORITY.—The authority to carry out transactions under subsection (a) shall terminate on September 30, 2008.”

§ 429. List of laws inapplicable to contracts not greater than simplified acquisition threshold in Federal Acquisition Regulation

(a) List of inapplicable provisions of law

(1) The Federal Acquisition Regulation shall include a list of provisions of law that are inapplicable to contracts or subcontracts in amounts not greater than the simplified acquisition threshold. A provision of law that is properly included on the list pursuant to paragraph (2) may not be construed as applicable to such contracts or subcontracts (as the case may be) by an executive agency. Nothing in this section shall be construed to render inapplicable to contracts and subcontracts in amounts not greater than the simplified acquisition threshold any provision of law that is not included on such list.

(2) A provision of law described in subsection (b) of this section that is enacted after October

13, 1994, shall be included on the list of inapplicable provisions of law required by paragraph (1), unless the Federal Acquisition Regulatory Council makes a written determination that it would not be in the best interest of the Federal Government to exempt contracts or subcontracts in amounts not greater than the simplified acquisition threshold from the applicability of the provision.

(b) Covered law

A provision of law referred to in subsection (a)(2) of this section is any provision of law that, as determined by the Federal Acquisition Regulatory Council, sets forth policies, procedures, requirements, or restrictions for the procurement of property or services by the Federal Government, except for a provision of law that—

(1) provides for criminal or civil penalties; or

(2) specifically refers to this section and provides that, notwithstanding this section, it shall be applicable to contracts or subcontracts in amounts not greater than the simplified acquisition threshold.

(c) Petition

In the event that a provision of law described in subsection (b) of this section is not included on the list of inapplicable provisions of law as required by subsection (a) of this section, and no written determination has been made by the Federal Acquisition Regulatory Council pursuant to subsection (a)(2) of this section, a person may petition the Administrator for Federal Procurement Policy to take appropriate action. The Administrator shall revise the Federal Acquisition Regulation to include the provision on the list of inapplicable provisions of law unless the Federal Acquisition Regulatory Council makes a determination pursuant to subsection (a)(2) of this section within 60 days after the date on which the petition is received.

(Pub. L. 93-400, §33, as added Pub. L. 103-355, title IV, §4101, Oct. 13, 1994, 108 Stat. 3339.)

EFFECTIVE DATE

For effective date and applicability of section, see section 10001 of Pub. L. 103-355, set out as an Effective Date of 1994 Amendment note under section 251 of this title.

§ 430. List of laws inapplicable to procurements of commercial items in Federal Acquisition Regulation

(a) List of inapplicable provisions of law

(1) The Federal Acquisition Regulation shall include a list of provisions of law that are inapplicable to contracts for the procurement of commercial items. A provision of law that is properly included on the list pursuant to paragraph (2) may not be construed as applicable to purchases of commercial items by an executive agency. Nothing in this section shall be construed to render inapplicable to contracts for the procurement of commercial items any provision of law that is not included on such list.

(2) A provision of law described in subsection (c) of this section that is enacted after October 13, 1994, shall be included on the list of inapplicable provisions of law required by paragraph (1), unless the Federal Acquisition Regulatory

Council makes a written determination that it would not be in the best interest of the Federal Government to exempt contracts for the procurement of commercial items from the applicability of the provision.

(b) Subcontracts

(1) The Federal Acquisition Regulation shall include a list of provisions of law that are inapplicable to subcontracts under either a contract for the procurement of commercial items or a subcontract for the procurement of commercial items. A provision of law that is properly included on the list pursuant to paragraph (2) may not be construed as applicable to such subcontracts. Nothing in this section shall be construed to render inapplicable to subcontracts under a contract for the procurement of commercial items any provision of law that is not included on such list.

(2) A provision of law described in subsection (c) of this section shall be included on the list of inapplicable provisions of law required by paragraph (1) unless the Federal Acquisition Regulatory Council makes a written determination that it would not be in the best interest of the Federal Government to exempt subcontracts under a contract for the procurement of commercial items from the applicability of the provision.

(3) Nothing in this subsection shall be construed to authorize the waiver of the applicability of any provision of law with respect to any subcontract under a contract with a prime contractor reselling or distributing commercial items of another contractor without adding value.

(4) In this subsection, the term “subcontract” includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractor or subcontractor.

(c) Covered law

A provision of law referred to in subsections (a)(2) and (b) of this section is any provision of law that, as determined by the Federal Acquisition Regulatory Council, sets forth policies, procedures, requirements, or restrictions for the procurement of property or services by the Federal Government, except for a provision of law that—

(1) provides for criminal or civil penalties; or

(2) specifically refers to this section and provides that, notwithstanding this section, it shall be applicable to contracts for the procurement of commercial items.

(d) Petition

In the event that a provision of law described in subsection (c) of this section is not included on the list of inapplicable provisions of law as required by subsection (a) or (b) of this section, and no written determination has been made by the Federal Acquisition Regulatory Council pursuant to subsection (a)(2) or (b)(2) of this section, a person may petition the Administrator for Federal Procurement Policy to take appropriate action. The Administrator shall revise the Federal Acquisition Regulation to include the provision on the list of inapplicable provisions of law unless the Federal Acquisition Regulatory Council makes a determination pursu-

ant to subsection (a)(2) or (b)(2) of this section within 60 days after the date on which the petition is received.

(Pub. L. 93-400, §34, as added Pub. L. 103-355, title VIII, §8003(a), Oct. 13, 1994, 108 Stat. 3388.)

EFFECTIVE DATE

For effective date and applicability of section, see section 10001 of Pub. L. 103-355, set out as an Effective Date of 1994 Amendment note under section 251 of this title.

Section 8003(b) of Pub. L. 103-355 provided that: "No petition may be filed under section 34(d) of the Office of Federal Procurement Policy Act [41 U.S.C. 430(d)], as added by subsection (a), until after the date occurring 6 months after the date of the enactment of this Act [Oct. 13, 1994]."

§ 431. Commercially available off-the-shelf item acquisitions: lists of inapplicable laws in Federal Acquisition Regulation

(a) Lists of inapplicable provisions of law

(1) The Federal Acquisition Regulation shall include a list of provisions of law that are inapplicable to contracts for the procurement of commercially available off-the-shelf items.

(2) A provision of law that, pursuant to paragraph (3), is properly included on a list referred to in paragraph (1) may not be construed as being applicable to contracts referred to in paragraph (1). Nothing in this section shall be construed to render inapplicable to such contracts any provision of law that is not included on such list.

(3) A provision of law described in subsection (b) of this section shall be included on the list of inapplicable provisions of law required by paragraph (1) unless the Administrator for Federal Procurement Policy makes a written determination that it would not be in the best interest of the United States to exempt such contracts from the applicability of that provision of law. Nothing in this section shall be construed as modifying or superseding, or as being intended to impair or restrict authorities or responsibilities under—

(A) section 644 of title 15; or

(B) bid protest procedures developed under the authority of subchapter V of chapter 35 of title 31; subsections (e) and (f) of section 2305 of title 10; or subsections (h) and (i) of section 253b of this title.

(b) Covered law

Except as provided in subsection (a)(3) of this section, the list referred to in subsection (a)(1) of this section shall include each provision of law that, as determined by the Administrator, imposes on persons who have been awarded contracts by the Federal Government for the procurement of commercially available off-the-shelf items Government-unique policies, procedures, requirements, or restrictions for the procurement of property or services, except the following:

(1) A provision of law that provides for criminal or civil penalties.

(2) A provision of law that specifically refers to this section and provides that, notwithstanding this section, such provision of law shall be applicable to contracts for the pro-

urement of commercially available off-the-shelf items.

(c) "Commercially available off-the-shelf item" defined

(1) As used in this section, the term "commercially available off-the-shelf item" means, except as provided in paragraph (2), an item that—

(A) is a commercial item (as described in section 403(12)(A) of this title);

(B) is sold in substantial quantities in the commercial marketplace; and

(C) is offered to the Government, without modification, in the same form in which it is sold in the commercial marketplace.

(2) The term "commercially available off-the-shelf item" does not include bulk cargo, as defined in section 40102(4) of title 46, such as agricultural products and petroleum products.

(Pub. L. 93-400, §35, as added Pub. L. 104-106, div. D, title XLII, §4203(a), Feb. 10, 1996, 110 Stat. 654; amended Pub. L. 105-85, div. A, title X, §1073(g)(2)(C), Nov. 18, 1997, 111 Stat. 1906.)

CODIFICATION

In subsec. (c)(2), "section 40102(4) of title 46" substituted for "section 3 of the Shipping Act of 1984 (46 U.S.C. App. 1702)" on authority of Pub. L. 109-304, §18(c), Oct. 6, 2006, 120 Stat. 1709, which Act enacted section 40102 of Title 46, Shipping.

Another section 35 of Pub. L. 93-400 was renumbered §38 and is classified to section 434 of this title.

AMENDMENTS

1997—Subsec. (b)(2). Pub. L. 105-85 substituted "commercially available" for "commercial".

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 251 of this title.

§ 431a. Inflation adjustment of acquisition-related dollar thresholds

(a) Requirement for periodic adjustment

(1) On October 1 of each year that is evenly divisible by five, the Federal Acquisition Regulatory Council shall adjust each acquisition-related dollar threshold provided by law, as described in subsection (c) of this section, to the baseline constant dollar value of that threshold.

(2) For the purposes of paragraph (1), the baseline constant dollar value—

(A) for a dollar threshold in effect on October 1, 2000, that was first specified in a law that took effect on or before such date shall be the October 1, 2000, constant dollar value of that dollar threshold; and

(B) for a dollar threshold specified in a law that takes effect after October 1, 2000, shall be the constant dollar value of that threshold as of the effective date of that dollar threshold pursuant to such law.

(b) Adjustments effective upon publication

The Federal Acquisition Regulatory Council shall publish a notice of the adjusted dollar thresholds under this section in the Federal Register. The adjusted dollar thresholds shall take effect on the date of publication.

(c) Acquisition-related dollar thresholds

Except as provided in subsection (d) of this section, the requirement for adjustment under

subsection (a) of this section applies to a dollar threshold that is specified in law as a factor in defining the scope of the applicability of a policy, procedure, requirement, or restriction provided in that law to the procurement of property or services by an executive agency, as determined by the Federal Acquisition Regulatory Council.

(d) Excluded thresholds

Subsection (a) of this section does not apply to—

- (1) dollar thresholds in sections 3141 through 3144, 3146, and 3147 of title 40;
- (2) dollar thresholds in the Service Contract Act of 1965 (41 U.S.C. 351, et seq.); or
- (3) dollar thresholds established by the United States Trade Representative pursuant to title III of the Trade Agreements Act of 1979 (19 U.S.C. 2511 et seq.).

(e) Calculation of adjustments

An adjustment under this section shall—

- (1) be calculated on the basis of changes in the Consumer Price Index for all-urban consumers published monthly by the Department of Labor; and
- (2) be rounded—
 - (A) in the case of a dollar threshold that (as in effect on the day before the adjustment) is less than \$10,000, to the nearest \$500;
 - (B) in the case of a dollar threshold that (as in effect on the day before the adjustment) is not less than \$10,000, but is less than \$100,000, to the nearest \$5,000;
 - (C) in the case of a dollar threshold that (as in effect on the day before the adjustment) is not less than \$100,000, but is less than \$1,000,000, to the nearest \$50,000; and
 - (D) in the case of a dollar threshold that (as in effect on the day before the adjustment) is \$1,000,000 or more, to the nearest \$500,000.

(f) Petition for inclusion of omitted threshold

- (1) If a dollar threshold adjustable under this section is not included in a notice of adjustment published under subsection (b) of this section, any person may request adjustment of that dollar threshold by submitting a petition for adjustment to the Administrator for Federal Procurement Policy.
- (2) Upon receipt of a petition for adjustment of a dollar threshold under paragraph (1), the Administrator shall—
 - (A) determine, in writing, whether that dollar threshold is required to be adjusted under this section; and
 - (B) if so, shall publish in the Federal Register a revised notice of the adjusted dollar thresholds under this section that includes the adjustment of the dollar threshold covered by the petition.
- (3) The adjustment of a dollar threshold pursuant to a petition under this subsection shall take effect on the date of the publication of the revised notice adding the adjustment of that dollar threshold under paragraph (2)(B).

(Pub. L. 93-400, §35A, as added Pub. L. 108-375, div. A, title VIII, §807(a)(1), Oct. 28, 2004, 118 Stat. 2010.)

REFERENCES IN TEXT

The Service Contract Act of 1965, referred to in subsection (d)(2), is Pub. L. 89-286, Oct. 22, 1965, 79 Stat. 1034, as amended, which is classified generally to chapter 6 (§351 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 351 of this title and Tables.

The Trade Agreements Act of 1979, referred to in subsection (d)(3), is Pub. L. 96-39, July 26, 1979, 93 Stat. 144, as amended. Title III of the Act is classified generally to subchapter I (§2511 et seq.) of chapter 13 of Title 19, Customs Duties. For complete classification of this Act to the Code, see References in Text note set out under section 2501 of Title 19 and Tables.

RELATIONSHIP TO OTHER INFLATION ADJUSTMENT AUTHORITIES

Pub. L. 108-375, div. A, title VIII, §807(c), Oct. 28, 2004, 118 Stat. 2011, provided that:

- “(1) Section 35A of the Office of Federal Procurement Policy Act [41 U.S.C. 431a], as added by subsection (a), supersedes the applicability of any other provision of law that provides for the adjustment of a dollar threshold that is adjustable under such section.
- “(2) After the date of the enactment of this Act [Oct. 28, 2004], a dollar threshold adjustable under section 35A of the Office of Federal Procurement Policy Act, as added by subsection (a), shall be adjusted only as provided under that section.”

§ 432. Value engineering

(a) In general

Each executive agency shall establish and maintain cost-effective value engineering procedures and processes.

(b) “Value engineering” defined

As used in this section, the term “value engineering” means an analysis of the functions of a program, project, system, product, item of equipment, building, facility, service, or supply of an executive agency, performed by qualified agency or contractor personnel, directed at improving performance, reliability, quality, safety, and life cycle costs.

(Pub. L. 93-400, §36, as added Pub. L. 104-106, div. D, title XLIII, §4306(a), Feb. 10, 1996, 110 Stat. 665.)

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 251 of this title.

§ 433. Acquisition workforce

(a) Applicability

Except as provided in subsection (h)(3) of this section, this section does not apply to an executive agency that is subject to chapter 87 of title 10.

(b) Management policies

(1) Policies and procedures

The head of each executive agency, after consultation with the Administrator for Federal Procurement Policy, shall establish policies and procedures for the effective management (including accession, education, training, career development, and performance incentives) of the acquisition workforce of the agency. The development of acquisition workforce policies under this section shall be car-

ried out consistent with the merit system principles set forth in section 2301(b) of title 5.

(2) Uniform implementation

The head of each executive agency shall ensure that, to the maximum extent practicable, acquisition workforce policies and procedures established are uniform in their implementation throughout the agency.

(3) Government-wide policies and evaluation

The Administrator shall issue policies to promote uniform implementation of this section by executive agencies, with due regard for differences in program requirements among agencies that may be appropriate and warranted in view of the agency mission. The Administrator shall coordinate with the Deputy Director for Management of the Office of Management and Budget to ensure that such policies are consistent with the policies and procedures established and enhanced system of incentives provided pursuant to section 5051(c) of the Federal Acquisition Streamlining Act of 1994 (41 U.S.C. 263 note). The Administrator shall evaluate the implementation of the provisions of this section by executive agencies.

(c) Senior procurement executive authorities and responsibilities

Subject to the authority, direction, and control of the head of an executive agency, the senior procurement executive of the agency shall carry out all powers, functions, and duties of the head of the agency with respect to implementation of this section. The senior procurement executive shall ensure that the policies of the head of the executive agency established in accordance with this section are implemented throughout the agency.

(d) Management information systems

The Administrator shall ensure that the heads of executive agencies collect and maintain standardized information on the acquisition workforce related to implementation of this section. To the maximum extent practicable, such data requirements shall conform to standards established by the Office of Personnel Management for the Central Personnel Data File.

(e) Applicability to acquisition workforce

The programs established by this section shall apply to the acquisition workforce of each executive agency. For purposes of this section, the acquisition workforce of an agency consists of all employees serving in acquisition positions listed in subsection (g)(1)(A) of this section.

(f) Career development

(1) Career paths

The head of each executive agency shall ensure that appropriate career paths for personnel who desire to pursue careers in acquisition are identified in terms of the education, training, experience, and assignments necessary for career progression to the most senior acquisition positions. The head of each executive agency shall make information available on such career paths.

(2) Critical duties and tasks

For each career path, the head of each executive agency shall identify the critical acqui-

sition-related duties and tasks in which, at minimum, employees of the agency in the career path shall be competent to perform at full performance grade levels. For this purpose, the head of the executive agency shall provide appropriate coverage of the critical duties and tasks identified by the Director of the Federal Acquisition Institute.

(3) Mandatory training and education

For each career path, the head of each executive agency shall establish requirements for the completion of course work and related on-the-job training in the critical acquisition-related duties and tasks of the career path. The head of each executive agency shall also encourage employees to maintain the currency of their acquisition knowledge and generally enhance their knowledge of related acquisition management disciplines through academic programs and other self-developmental activities.

(4) Performance incentives

The head of each executive agency shall provide for an enhanced system of incentives for the encouragement of excellence in the acquisition workforce which rewards performance of employees that contribute to achieving the agency's performance goals. The system of incentives shall include provisions that—

(A) relate pay to performance (including the extent to which the performance of personnel in such workforce contributes to achieving the cost goals, schedule goals, and performance goals established for acquisition programs pursuant to section 263(b) of this title); and

(B) provide for consideration, in personnel evaluations and promotion decisions, of the extent to which the performance of personnel in such workforce contributes to achieving such cost goals, schedule goals, and performance goals.

(g) Qualification requirements

(1) In general

(A) Subject to paragraph (2), the Administrator shall establish qualification requirements, including education requirements, for the following positions:

(i) Entry-level positions in the General Schedule Contracting series (GS-1102).

(ii) Senior positions in the General Schedule Contracting series (GS-1102).

(iii) All positions in the General Schedule Purchasing series (GS-1105).

(iv) Positions in other General Schedule series in which significant acquisition-related functions are performed.

(B) Subject to paragraph (2), the Administrator shall prescribe the manner and extent to which such qualification requirements shall apply to any person serving in a position described in subparagraph (A) at the time such requirements are established.

(2) Relationship to requirements applicable to defense acquisition workforce

The Administrator shall establish qualification requirements and make prescriptions under paragraph (1) that are comparable to

those established for the same or equivalent positions pursuant to chapter 87 of title 10 with appropriate modifications.

(3) Approval of requirements

The Administrator shall submit any requirement established or prescription made under paragraph (1) to the Director of the Office of Personnel Management for approval. If the Director does not disapprove a requirement or prescription within 30 days after the date on which the Director receives it, the requirement or prescription is deemed to be approved by the Director.

(h) Education and training

(1) Funding levels

(A) The head of an executive agency shall set forth separately the funding levels requested for education and training of the acquisition workforce in the budget justification documents submitted in support of the President's budget submitted to Congress under section 1105 of title 31.

(B) Funds appropriated for education and training under this section may not be obligated for any other purpose.

(2) Tuition assistance

The head of an executive agency may provide tuition reimbursement in education (including a full-time course of study leading to a degree) in accordance with section 4107 of title 5 for personnel serving in acquisition positions in the agency.

(3) Acquisition workforce training fund

(A) The Administrator of General Services shall establish an acquisition workforce training fund. The Administrator shall manage the fund through the Federal Acquisition Institute to support the training of the acquisition workforce of the executive agencies, except as provided in subparagraph (D). The Administrator shall consult with the Administrator for Federal Procurement Policy in managing the fund.

(B) There shall be credited to the acquisition workforce training fund 5 percent of the fees collected by executive agencies (other than the Department of Defense) under the following contracts:

(i) Governmentwide task and delivery-order contracts entered into under sections 253h and 253i of this title.

(ii) Governmentwide contracts for the acquisition of information technology as defined in section 11101 of title 40 and multi-agency acquisition contracts for such technology authorized by section 11314 of such title.

(iii) Multiple-award schedule contracts entered into by the Administrator of General Services.

(C) The head of an executive agency that administers a contract described in subparagraph (B) shall remit to the General Services Administration the amount required to be credited to the fund with respect to such contract at the end of each quarter of the fiscal year.

(D) The Administrator of General Services shall transfer to the Secretary of Defense fees

collected from the Department of Defense pursuant to subparagraph (B), to be used by the Defense Acquisition University for purposes of acquisition workforce training.

(E) The Administrator of General Services, through the Office of Federal Acquisition Policy, shall ensure that funds collected for training under this section are not used for any purpose other than the purpose specified in subparagraph (A).

(F) Amounts credited to the fund shall be in addition to funds requested and appropriated for education and training referred to in paragraph (1).

(G) Amounts credited to the fund shall remain available to be expended only in the fiscal year for which credited and the two succeeding fiscal years.

(i) Provisions relating to reemployment

(1) Policies and procedures

The head of each executive agency, after consultation with the Administrator and the Director of the Office of Personnel Management, shall establish policies and procedures under which the agency head may reemploy in an acquisition-related position (as described in subsection (g)(1)(A)) an individual receiving an annuity from the Civil Service Retirement and Disability Fund, on the basis of such individual's service, without discontinuing such annuity. The head of each executive agency shall keep the Administrator informed of the agency's use of this authority.

(2) Service not subject to CSRS or FERS

An individual so reemployed shall not be considered an employee for the purposes of chapter 83 or 84 of title 5.

(3) Criteria for exercise of authority

Policies¹ and procedures established pursuant to this subsection shall authorize the head of the executive agency, on a case-by-case basis, to continue an annuity if—

(A) the unusually high or unique qualifications of an individual receiving an annuity from the Civil Service Retirement and Disability Fund on the basis of such individual's service,

(B) the exceptional difficulty in recruiting or retaining a qualified employee, or

(C) a temporary emergency hiring need,

makes the reemployment of an individual essential.

(4) Reporting requirement

The Administrator shall submit annually to the Committee on Government Reform of the House of Representatives and the Committee on Homeland Security and Governmental Affairs of the Senate a report on the use of the authority under this subsection, including the number of employees reemployed under authority of this subsection.

(5) Sunset provision

The authority under this subsection shall expire on December 31, 2011.

(Pub. L. 93-400, §37, as added Pub. L. 104-106, div. D, title XLIII, § 4307(a)(1), Feb. 10, 1996, 110 Stat.

¹ So in original. Probably should be "Policies".

666; amended Pub. L. 108-136, div. A, title XIV, § 1412(b), Nov. 24, 2003, 117 Stat. 1664; Pub. L. 109-163, div. A, title VIII, § 821(a), (b)(1), Jan. 6, 2006, 119 Stat. 3386; Pub. L. 109-313, § 4, Oct. 6, 2006, 120 Stat. 1737; Pub. L. 110-181, div. A, title VIII, § 854, Jan. 28, 2008, 122 Stat. 251.)

REFERENCES IN TEXT

Section 5051(c) of the Federal Acquisition Streamlining Act of 1994, referred to in subsec. (b)(3), is section 5051(c) of Pub. L. 103-355, which is set out as a note under section 263 of this title.

AMENDMENTS

2008—Subsec. (h)(3)(H). Pub. L. 110-181 struck out subpar. (H) which read as follows: “This paragraph shall cease to be effective five years after November 24, 2003.”

2006—Subsec. (a). Pub. L. 109-163, § 821(b)(1), substituted “Except as provided in subsection (h)(3) of this section, this section” for “This section”.

Subsec. (h)(3)(A). Pub. L. 109-163, § 821(a)(1), substituted “, except as provided in subparagraph (D)” for “other than the Department of Defense”.

Subsec. (h)(3)(D) to (H). Pub. L. 109-163, § 821(a)(2), added subpar. (D) and redesignated former subpars. (D) to (G) as (E) to (H), respectively.

Subsec. (i). Pub. L. 109-313 added subsec. (i).

2003—Subsec. (h)(3). Pub. L. 108-136 added par. (3).

EFFECTIVE DATE OF 2006 AMENDMENT

Amendment by Pub. L. 109-313 effective 60 days after Oct. 6, 2006, see section 6 of Pub. L. 109-313, set out as a note under section 5316 of Title 5, Government Organization and Employees.

Pub. L. 109-163, div. A, title VIII, § 821(d), Jan. 6, 2006, 119 Stat. 3386, provided that: “The amendments made by this section [amending this section and repealing provisions set out as a note under this section] shall apply with respect to fees collected under contracts described in section 37(h)(3)(B) of the Office of Federal Procurement Policy Act (41 U.S.C. 433(h)(3)(B)) after the date of the enactment of this Act [Jan. 6, 2006].”

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 251 of this title.

DEFENSE ACQUISITION UNIVERSITY FUNDING

Pub. L. 109-163, div. A, title VIII, § 821(c), Jan. 6, 2006, 119 Stat. 3386, provided that: “Amounts transferred under section 37(h)(3)(D) of the Office of Federal Procurement Policy Act [41 U.S.C. 433(h)(3)(D)] (as amended by subsection (a)) for use by the Defense Acquisition University shall be in addition to other amounts authorized for the University.”

PURPOSES OF 2003 AMENDMENT

Pub. L. 108-136, div. A, title XIV, § 1412(a), Nov. 24, 2003, 117 Stat. 1664, provided that: “The purposes of this section [amending this section and enacting provisions set out as notes under this section] are to ensure that the Federal acquisition workforce—

“(1) adapts to fundamental changes in the nature of Federal Government acquisition of property and services associated with the changing roles of the Federal Government; and

“(2) acquires new skills and a new perspective to enable it to contribute effectively in the changing environment of the 21st century.”

INAPPLICABILITY OF SUBSECTION (h)(3) TO DEPARTMENT OF DEFENSE ACQUISITION WORKFORCE

Pub. L. 108-136, div. A, title XIV, § 1412(c), Nov. 24, 2003, 117 Stat. 1665, which provided that section 1412 of

Pub. L. 108-136 was inapplicable to the acquisition workforce of the Department of Defense and that fees covered by subsec. (h)(3) of this section were to be reduced by 5 percent to reflect the Department’s nonparticipation in the acquisition workforce training fund, was repealed by Pub. L. 109-163, div. A, title VIII, § 821(b)(2), Jan. 6, 2006, 119 Stat. 3386.

ACQUISITION WORKFORCE RECRUITMENT PROGRAM

Pub. L. 108-136, div. A, title XIV, § 1413, Nov. 24, 2003, 117 Stat. 1665, as amended by Pub. L. 110-181, div. A, title VIII, § 853, title X, § 1063(g)(2), Jan. 28, 2008, 122 Stat. 250, 323, provided that:

“(a) DETERMINATION OF SHORTAGE CATEGORY POSITIONS.—For purposes of sections 3304, 5333, and 5753 of title 5, United States Code, the head of a department or agency of the United States (other than the Secretary of Defense) may determine, under regulations prescribed by the Office of Personnel Management, that certain Federal acquisition positions (as described in section 37(g)(1)(A) of the Office of Federal Procurement Policy Act (41 U.S.C. 433(g)(1)(A))) are shortage category positions in order to use the authorities in those sections to recruit and appoint highly qualified persons directly to such positions in the department or agency.

“(b) TERMINATION OF AUTHORITY.—The head of a department or agency may not appoint a person to a position of employment under this section after September 30, 2012.

“(c) REPORT.—Not later than March 31, 2007, the Director of the Office of Personnel Management, in consultation with the Administrator for Federal Procurement Policy, shall submit to Congress a report on the implementation of this section. The report shall include—

“(1) a list of the departments and agencies that exercised the authority provided in this section, and whether the exercise of the authority was carried out in accordance with the regulations prescribed by the Office of Personnel Management;

“(2) the Director’s assessment of the efficacy of the exercise of the authority provided in this section in attracting employees with unusually high qualifications to the acquisition workforce; and

“(3) any recommendations considered appropriate by the Director on whether the authority to carry out the program should be extended.”

ARCHITECTURAL AND ENGINEERING ACQUISITION WORKFORCE

Pub. L. 108-136, div. A, title XIV, § 1414, Nov. 24, 2003, 117 Stat. 1666, provided that: “The Administrator for Federal Procurement Policy, in consultation with the Secretary of Defense, the Administrator of General Services, and the Director of the Office of Personnel Management, shall develop and implement a plan to ensure that the Federal Government maintains the necessary capability with respect to the acquisition of architectural and engineering services to—

“(1) ensure that Federal Government employees have the expertise to determine agency requirements for such services;

“(2) establish priorities and programs (including acquisition plans);

“(3) establish professional standards;

“(4) develop scopes of work; and

“(5) award and administer contracts for such services.”

§ 433a. Federal acquisition workforce improvements

(a) Associate Administrator for Acquisition Workforce Programs

The Administrator for Federal Procurement Policy shall designate a member of the Senior Executive Service as the Associate Administrator for Acquisition Workforce Programs. The

Associate Administrator for Acquisition Workforce Programs shall be located in the Federal Acquisition Institute (or its successor). The Associate Administrator shall be responsible for—

- (1) supervising the acquisition workforce training fund established under section 433(h)(3) of this title;
- (2) developing, in coordination with Chief Acquisition Officers and Chief Human Capital Officers, a strategic human capital plan for the acquisition workforce of the Federal Government;
- (3) reviewing and providing input to individual agency acquisition workforce succession plans;
- (4) recommending to the Administrator and other senior government officials appropriate programs, policies, and practices to increase the quantity and quality of the Federal acquisition workforce; and
- (5) carrying out such other functions as the Administrator may assign.

(b) Acquisition and contracting training programs within executive agencies

(1) Requirement

The head of each executive agency, after consultation with the Associate Administrator for Acquisition Workforce Programs, shall establish and operate acquisition and contracting training programs. Such programs shall—

- (A) have curricula covering a broad range of acquisition and contracting disciplines corresponding to the specific acquisition and contracting needs of the agency involved;
- (B) be developed and applied according to rigorous standards; and
- (C) be designed to maximize efficiency, through the use of self-paced courses, online courses, on-the-job training, and the use of remote instructors, wherever such features can be applied without reducing the effectiveness of the training or negatively affecting academic standards.

(2) Chief Acquisition Officer authorities and responsibilities

Subject to the authority, direction, and control of the head of an executive agency, the Chief Acquisition Officer for such agency shall carry out all powers, functions, and duties of the head of the agency with respect to implementation of this subsection. The Chief Acquisition Officer shall ensure that the policies established by the head of the agency in accordance with this subsection are implemented throughout the agency.

(c) Government-wide policies and evaluation

The Administrator for Federal Procurement Policy shall issue policies to promote the development of performance standards for training and uniform implementation of this section by executive agencies, with due regard for differences in program requirements among agencies that may be appropriate and warranted in view of the agency mission. The Administrator shall evaluate the implementation of the provisions of subsection (b) by executive agencies.

(d) Acquisition and contracting training reporting

The Administrator for Federal Procurement Policy shall ensure that the heads of executive

agencies collect and maintain standardized information on the acquisition and contracting workforce related to the implementation of subsection (b).

(e) Acquisition workforce human capital succession plan

(1) In general

Not later than 1 year after January 28, 2008, each Chief Acquisition Officer for an executive agency shall develop, in consultation with the Chief Human Capital Officer for the agency and the Associate Administrator for Acquisition Workforce Programs, a succession plan consistent with the agency's strategic human capital plan for the recruitment, development, and retention of the agency's acquisition workforce, with a particular focus on warranted contracting officers and program managers of the agency.

(2) Content of plan

The acquisition workforce succession plan shall address—

- (A) recruitment goals for personnel from procurement intern programs;
- (B) the agency's acquisition workforce training needs;
- (C) actions to retain high performing acquisition professionals who possess critical relevant skills;
- (D) recruitment goals for personnel from the Federal Career Intern Program; and
- (E) recruitment goals for personnel from the Presidential Management Fellows Program.

(f) Training in the acquisition of architect and engineering services

The Administrator for Federal Procurement Policy shall ensure that a sufficient number of Federal employees are trained in the acquisition of architect and engineering services.

(g) Utilization of recruitment and retention authorities

The Administrator for Federal Procurement Policy, in coordination with the Director of the Office of Personnel Management, shall encourage executive agencies to utilize existing authorities, including direct hire authority and tuition assistance programs, to recruit and retain acquisition personnel and consider recruiting acquisition personnel who may be retiring from the private sector, consistent with existing laws and regulations.

(h) Definitions

In this section:

(1) Executive agency

The term "executive agency" has the meaning provided in section 403(1) of this title.

(2) Chief acquisition officer

The term "Chief Acquisition Officer" means a Chief Acquisition Officer for an executive agency appointed pursuant to section 414 of this title.

(Pub. L. 110-181, div. A, title VIII, §855, Jan. 28, 2008, 122 Stat. 251.)

CODIFICATION

Section was enacted as part of the Acquisition Improvement and Accountability Act of 2007, and also as

part of the National Defense Authorization Act for Fiscal Year 2008, and not as part of the Office of Federal Procurement Policy Act which comprises this chapter.

ACQUISITION WORKFORCE DEVELOPMENT STRATEGIC PLAN

Pub. L. 110-417, [div. A], title VIII, § 869, Oct. 14, 2008, 122 Stat. 4553, provided that:

“(a) PURPOSE.—The purpose of this section is to authorize the preparation and completion of a plan (to be known as the ‘Acquisition Workforce Development Strategic Plan’) for Federal agencies other than the Department of Defense to develop a specific and actionable 5-year plan to increase the size of the acquisition workforce, and to operate a government-wide acquisition intern program, for such Federal agencies.

“(b) ESTABLISHMENT OF PLAN.—The Associate Administrator for Acquisition Workforce Programs designated under section 855(a) of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181; 122 Stat. 251; 41 U.S.C. 433(a) [433a(a)]) shall be responsible for the management, oversight, and administration of the Acquisition Workforce Development Strategic Plan in cooperation and consultation with the Office of Federal Procurement Policy and the assistance of the Federal Acquisition Institute.

“(c) CRITERIA.—The Acquisition Workforce Development Strategic Plan shall include, at a minimum, an examination of the following matters:

“(1) The variety and complexity of acquisitions conducted by each Federal agency covered by the plan, and the workforce needed to effectively carry out such acquisitions.

“(2) The development of a sustainable funding model to support efforts to hire, retain, and train an acquisition workforce of appropriate size and skill to effectively carry out the acquisition programs of the Federal agencies covered by the plan, including an examination of interagency funding methods and a discussion of how the model of the Defense Acquisition Workforce Development Fund could be applied to civilian agencies.

“(3) Any strategic human capital planning necessary to hire, retain, and train an acquisition workforce of appropriate size and skill at each Federal agency covered by the plan.

“(4) Methodologies that Federal agencies covered by the plan can use to project future acquisition workforce personnel hiring requirements, including an appropriate distribution of such personnel across each category of positions designated as acquisition workforce personnel under section 37(j) [probably should be 37(g)] of the Office of Federal Procurement Policy Act (41 U.S.C. 433(j) [433(g)]).

“(5) Government-wide training standards and certification requirements necessary to enhance the mobility and career opportunities of the Federal acquisition workforce within the Federal agencies covered by the plan.

“(6) If the Associate Administrator recommends as part of the plan a growth in the acquisition workforce of the Federal agencies covered by the plan below 25 percent over the next 5 years, an examination of each of the matters specified in paragraphs (1) through (5) in the context of a 5-year plan that increases the size of such acquisition workforce by not less than 25 percent, or an explanation why such a level of growth would not be in the best interest of the Federal Government.

“(d) DEADLINE FOR COMPLETION.—The Acquisition Workforce Development Strategic Plan shall be completed not later than one year after the date of the enactment of this Act [Oct. 14, 2008] and in a fashion that allows for immediate implementation of its recommendations and guidelines.

“(e) FUNDS.—The Acquisition Workforce Development Strategic Plan shall be funded from the Acquisition Workforce Training Fund under section 37(h)(3) of the Office of Federal Procurement Policy Act (41 U.S.C. 433(h)(3)).”

§ 434. Modular contracting for information technology

(a) In general

The head of an executive agency should, to the maximum extent practicable, use modular contracting for an acquisition of a major system of information technology.

(b) Modular contracting described

Under modular contracting, an executive agency’s need for a system is satisfied in successive acquisitions of interoperable increments. Each increment complies with common or commercially accepted standards applicable to information technology so that the increments are compatible with other increments of information technology comprising the system.

(c) Implementation

The Federal Acquisition Regulation shall provide that—

(1) under the modular contracting process, an acquisition of a major system of information technology may be divided into several smaller acquisition increments that—

(A) are easier to manage individually than would be one comprehensive acquisition;

(B) address complex information technology objectives incrementally in order to enhance the likelihood of achieving workable solutions for attainment of those objectives;

(C) provide for delivery, implementation, and testing of workable systems or solutions in discrete increments each of which comprises a system or solution that is not dependent on any subsequent increment in order to perform its principal functions; and

(D) provide an opportunity for subsequent increments of the acquisition to take advantage of any evolution in technology or needs that occur during conduct of the earlier increments;

(2) a contract for an increment of an information technology acquisition should, to the maximum extent practicable, be awarded within 180 days after the date on which the solicitation is issued and, if the contract for that increment cannot be awarded within such period, the increment should be considered for cancellation; and

(3) the information technology provided for in a contract for acquisition of information technology should be delivered within 18 months after the date on which the solicitation resulting in award of the contract was issued.

(Pub. L. 93-400, § 38, formerly § 35, as added Pub. L. 104-106, div. E, title LII, § 5202(a), Feb. 10, 1996, 110 Stat. 690; renumbered § 38, Pub. L. 104-201, div. A, title X, § 1074(d)(1), Sept. 23, 1996, 110 Stat. 2660.)

EFFECTIVE DATE

Section effective 180 days after Feb. 10, 1996, see section 5701 of Pub. L. 104-106, Feb. 10, 1996, 110 Stat. 702.

§ 435. Levels of compensation of certain contractor personnel not allowable as costs under certain contracts

(a) Determination required

For purposes of section 2324(e)(1)(P) of title 10 and section 256(e)(1)(P) of this title, the Administrator shall review commercially available surveys of executive compensation and, on the basis of the results of the review, determine a benchmark compensation amount to apply for each fiscal year. In making determinations under this subsection the Administrator shall consult with the Director of the Defense Contract Audit Agency and such other officials of executive agencies as the Administrator considers appropriate.

(b) Benchmark compensation amount

The benchmark compensation amount applicable for a fiscal year is the median amount of the compensation provided for all senior executives of all benchmark corporations for the most recent year for which data is available at the time the determination under subsection (a) of this section is made.

(c) Definitions

In this section:

(1) The term “compensation”, for a fiscal year, means the total amount of wages, salary, bonuses and deferred compensation for the fiscal year, whether paid, earned, or otherwise accruing, as recorded in an employer’s cost accounting records for the fiscal year.

(2) The term “senior executives”, with respect to a contractor, means the five most highly compensated employees in management positions at each home office and each segment of the contractor.

(3) The term “benchmark corporation”, with respect to a fiscal year, means a publicly-owned United States corporation that has annual sales in excess of \$50,000,000 for the fiscal year.

(4) The term “publicly-owned United States corporation” means a corporation organized under the laws of a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a possession of the United States the voting stock of which is publicly traded.

(5) The term “fiscal year” means a fiscal year established by a contractor for accounting purposes.

(Pub. L. 93-400, § 39, as added Pub. L. 105-85, div. A, title VIII, § 808(c)(1), Nov. 18, 1997, 111 Stat. 1837; amended Pub. L. 105-261, div. A, title VIII, § 804(c)(1), Oct. 17, 1998, 112 Stat. 2083.)

CODIFICATION

Another section 39 of Pub. L. 93-400 was renumbered section 40 and is classified to section 436 of this title.

AMENDMENTS

1998—Subsec. (c)(2). Pub. L. 105-261 amended par. (2) generally. Prior to amendment, par. (2) read as follows: “The term ‘senior executive’, with respect to a corporation, means—

“(A) the chief executive officer of the corporation or any individual acting in a similar capacity for the corporation;

“(B) the four most highly compensated employees in management positions of the corporation other than the chief executive officer; and

“(C) in the case of a corporation that has components which report directly to the corporate headquarters, the five most highly compensated individuals in management positions at each such component.”

EFFECTIVE DATE OF 1998 AMENDMENT

Amendment by Pub. L. 105-261 applicable with respect to costs of compensation of senior executives incurred after Jan. 1, 1999, under covered contracts entered into before, on, or after Oct. 17, 1998, see section 804(d) of Pub. L. 105-261, set out as a note under section 2324 of Title 10, Armed Forces.

EFFECTIVE DATE

Section 808(e) of Pub. L. 105-85 provided that: “The amendments made by this section [enacting this section and amending section 256 of this title and section 2324 of Title 10, Armed Forces] shall—

“(1) take effect on the date that is 90 days after the date of the enactment of this Act [Nov. 18, 1997]; and

“(2) apply with respect to costs of compensation incurred after January 1, 1998, under covered contracts entered into before, on, or after the date of the enactment of this Act.”

REGULATIONS

Section 808(d) of Pub. L. 105-85 provided that: “Regulations implementing the amendments made by this section [see Effective Date note set out above] shall be published in the Federal Register not later than the effective date of the amendments under subsection (e) [see Effective Date note set out above].”

EXCLUSIVE APPLICABILITY OF PROVISIONS LIMITING ALLOWABILITY OF COMPENSATION FOR CERTAIN CONTRACTOR PERSONNEL

Section 808(f) of Pub. L. 105-85 provided that: “Notwithstanding any other provision of law, no other limitation in law on the allowability of costs of compensation of senior executives under covered contracts shall apply to such costs of compensation incurred after January 1, 1998.”

DEFINITIONS FOR PURPOSES OF SECTION 808 OF PUB. L. 105-85

Section 808(g) of Pub. L. 105-85, as amended by Pub. L. 105-261, div. A, title VIII, § 804(c)(2), Oct. 17, 1998, 112 Stat. 2083, provided that: “In this section [enacting this section, amending section 256 of this title and section 2324 of Title 10, Armed Forces, and enacting provisions set out as notes under this section]:

“(1) The term ‘covered contract’ has the meaning given such term in section 2324(l) of title 10, United States Code, and section 306(l) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 256(l)).

“(2) The terms ‘compensation’ and ‘senior executives’ have the meanings given such terms in section 2324(l) of title 10, United States Code, and section 306(m) of the Federal Property and Administrative Services Act of 1949.”

§ 436. Protection of constitutional rights of contractors

(a) Prohibition

A contractor may not be required, as a condition for entering into a contract with the Federal Government, to waive any right under the Constitution for any purpose related to Chemical Weapons Convention Implementation Act of 1997 [22 U.S.C. 6701 et seq.] or the Chemical Weapons Convention (as defined in section 3 of such Act [22 U.S.C. 6701]).

(b) Construction

Nothing in subsection (a) of this section shall be construed to prohibit an executive agency from including in a contract a clause that requires the contractor to permit inspections for the purpose of ensuring that the contractor is performing the contract in accordance with the provisions of the contract.

(Pub. L. 93-400, § 40, formerly § 39, as added Pub. L. 105-277, div. I, title III, § 308(a), Oct. 21, 1998, 112 Stat. 2681-879; renumbered § 40, Pub. L. 108-136, div. A, title XIV, § 1431(d)(2), Nov. 24, 2003, 117 Stat. 1672.)

REFERENCES IN TEXT

The Chemical Weapons Convention Implementation Act of 1997, referred to in subsec. (a), probably means the Chemical Weapons Convention Implementation Act of 1998, which is div. I of Pub. L. 105-277, Oct. 21, 1998, 112 Stat. 2681-856, and is classified principally to chapter 75 (§ 6701 et seq.) of Title 22, Foreign Relations and Intercourse. For complete classification of this Act to the Code, see Short Title note set out under section 6701 of Title 22 and Tables.

§ 437. Incentives for efficient performance of services contracts**(a) Incentive for use of performance-based services contracts**

A performance-based contract for the procurement of services entered into by an executive agency or a performance-based task order for services issued by an executive agency may be treated as a contract for the procurement of commercial items if—

(1) the value of the contract or task order is estimated not to exceed \$25,000,000;

(2) the contract or task order sets forth specifically each task to be performed and, for each task—

(A) defines the task in measurable, mission-related terms;

(B) identifies the specific end products or output to be achieved; and

(C) contains firm, fixed prices for specific tasks to be performed or outcomes to be achieved; and

(3) the source of the services provides similar services to the general public under terms and conditions similar to those offered to the Federal Government.

(b) Regulations

The regulations implementing this section shall require agencies to collect and maintain reliable data sufficient to identify the contracts or task orders treated as contracts for commercial items using the authority of this section. The data may be collected using the Federal Procurement Data System or other reporting mechanism.

(c) Report

Not later than two years after November 24, 2003, the Director of the Office of Management and Budget shall prepare and submit to the Committees on Governmental Affairs and on Armed Services of the Senate and the Committees on Government Reform and on Armed Services of the House of Representatives a report on the contracts or task orders treated as contracts

for commercial items using the authority of this section. The report shall include data on the use of such authority both government-wide and for each department and agency.

(d) Expiration

The authority under this section shall expire 10 years after November 24, 2003.

(Pub. L. 93-400, § 41, as added Pub. L. 108-136, div. A, title XIV, § 1431(a), Nov. 24, 2003, 117 Stat. 1671.)

CHANGE OF NAME

Committee on Government Reform of House of Representatives changed to Committee on Oversight and Government Reform of House of Representatives by House Resolution No. 6, One Hundred Tenth Congress, Jan. 5, 2007.

§ 438. Civilian Board of Contract Appeals**(a) Board established**

There is established in the General Services Administration a board of contract appeals to be known as the Civilian Board of Contract Appeals (in this section referred to as the “Civilian Board”).

(b) Membership**(1) Appointment**

(A) The Civilian Board shall consist of members appointed by the Administrator of General Services (in consultation with the Administrator for Federal Procurement Policy) from a register of applicants maintained by the Administrator of General Services, in accordance with rules issued by the Administrator of General Services (in consultation with the Administrator for Federal Procurement Policy) for establishing and maintaining a register of eligible applicants and selecting Civilian Board members. The Administrator of General Services shall appoint a member without regard to political affiliation and solely on the basis of the professional qualifications required to perform the duties and responsibilities of a Civilian Board member.

(B) The members of the Civilian Board shall be selected and appointed to serve in the same manner as administrative law judges appointed pursuant to section 3105 of title 5, with an additional requirement that such members shall have had not fewer than five years of experience in public contract law.

(C) Notwithstanding subparagraph (B) and subject to paragraph (2), the following persons shall serve as Civilian Board members: any full-time member of any agency board of contract appeals other than the Armed Services Board of Contract Appeals, the Postal Service Board of Contract Appeals, and the board of contract appeals of the Tennessee Valley Authority serving as such on the day before the effective date of this section.

(2) Removal

Members of the Civilian Board shall be subject to removal in the same manner as administrative law judges, as provided in section 7521 of title 5.

(3) Compensation

Compensation for members of the Civilian Board shall be determined under section 5372a of title 5.

(c) Functions**(1) In general**

The Civilian Board shall have jurisdiction as provided by section 607(d) of this title.

(2) Additional jurisdiction

The Civilian Board may, with the concurrence of the Federal agency or agencies affected—

(A) assume jurisdiction over any additional category of laws or disputes over which an agency board of contract appeals established pursuant to section 607 of this title exercised jurisdiction before the effective date of this section; and

(B) assume any other functions performed by such a board before such effective date on behalf of such agencies.

(Pub. L. 93-400, § 42, as added Pub. L. 109-163, div. A, title VIII, § 847(a), Jan. 6, 2006, 119 Stat. 3391.)

REFERENCES IN TEXT

For the effective date of this section, referred to in subsecs. (b)(1)(C) and (c)(2), see Effective Date note below.

Section 607 of this title, referred to in subsec. (c)(2)(A), was in the original “section 8 of the Contract Disputes Act”, and was translated as reading “section 8 of the Contract Disputes Act of 1978”, to reflect the probable intent of Congress.

CHANGE OF NAME

References to an agency board of contract appeals other than the Armed Services Board of Contract Appeals, the board of contract appeals of the Tennessee Valley Authority, or the Postal Service Board of Contract Appeals, deemed to refer to the Civilian Board of Contract Appeals, see section 847(e) of Pub. L. 109-163, set out as a note under section 607 of this title.

EFFECTIVE DATE

Section effective 1 year after Jan. 6, 2006, see section 847(g) of Pub. L. 109-163, set out as an Effective Date of 2006 Amendment note under section 5372a of Title 5, Government Organization and Employees.

TRANSFERS

For transfer of personnel, property, etc. of agency boards of contract appeals to the Civilian Board of Contract Appeals, with certain exceptions, see section 847(b) of Pub. L. 109-163, set out as a note under section 607 of this title.

§ 439. Public-private competition required before conversion to contractor performance**(a) Public-private competition**

(1) A function of an executive agency performed by 10 or more agency civilian employees may not be converted, in whole or in part, to performance by a contractor unless the conversion is based on the results of a public-private competition that—

(A) formally compares the cost of performance of the function by agency civilian employees with the cost of performance by a contractor;

(B) creates an agency tender, including a most efficient organization plan, in accordance with Office of Management and Budget Circular A-76, as implemented on May 29, 2003, or any successor circular;

(C) includes the issuance of a solicitation;

(D) determines whether the submitted offers meet the needs of the executive agency with respect to factors other than cost, including quality, reliability, and timeliness;

(E) examines the cost of performance of the function by agency civilian employees and the cost of performance of the function by one or more contractors to demonstrate whether converting to performance by a contractor will result in savings to the Government over the life of the contract, including—

(i) the estimated cost to the Government (based on offers received) for performance of the function by a contractor;

(ii) the estimated cost to the Government for performance of the function by agency civilian employees; and

(iii) an estimate of all other costs and expenditures that the Government would incur because of the award of such a contract;

(F) requires continued performance of the function by agency civilian employees unless the difference in the cost of performance of the function by a contractor compared to the cost of performance of the function by agency civilian employees would, over all performance periods required by the solicitation, be equal to or exceed the lesser of—

(i) 10 percent of the personnel-related costs for performance of that function in the agency tender; or

(ii) \$10,000,000; and

(G) examines the effect of performance of the function by a contractor on the agency mission associated with the performance of the function.

(2) A function that is performed by the executive agency and is reengineered, reorganized, modernized, upgraded, expanded, or changed to become more efficient, but still essentially provides the same service, shall not be considered a new requirement.

(3) In no case may a function being performed by executive agency personnel be—

(A) modified, reorganized, divided, or in any way changed for the purpose of exempting the conversion of the function from the requirements of this section; or

(B) converted to performance by a contractor to circumvent a civilian personnel ceiling.

(b) Requirement to consult employees

(1) Each civilian employee of an executive agency responsible for determining under Office of Management and Budget Circular A-76 whether to convert to contractor performance any function of the executive agency—

(A) shall, at least monthly during the development and preparation of the performance work statement and the management efficiency study used in making that determination, consult with civilian employees who will be affected by that determination and consider the views of such employees on the development and preparation of that statement and that study; and

(B) may consult with such employees on other matters relating to that determination.

(2)(A) In the case of employees represented by a labor organization accorded exclusive recogni-

tion under section 7111 of title 5, consultation with representatives of that labor organization shall satisfy the consultation requirement in paragraph (1).

(B) In the case of employees other than employees referred to in subparagraph (A), consultation with appropriate representatives of those employees shall satisfy the consultation requirement in paragraph (1).

(C) The head of each executive agency shall prescribe regulations to carry out this subsection. The regulations shall include provisions for the selection or designation of appropriate representatives of employees referred to in paragraph (2)(B) for purposes of consultation required by paragraph (1).

(c) Congressional notification

(1) Before commencing a public-private competition under subsection (a), the head of an executive agency shall submit to Congress a report containing the following:

(A) The function for which such public-private competition is to be conducted.

(B) The location at which the function is performed by agency civilian employees.

(C) The number of agency civilian employee positions potentially affected.

(D) The anticipated length and cost of the public-private competition, and a specific identification of the budgetary line item from which funds will be used to cover the cost of the public-private competition.

(E) A certification that a proposed performance of the function by a contractor is not a result of a decision by an official of an executive agency to impose predetermined constraints or limitations on such employees in terms of man years, end strengths, full-time equivalent positions, or maximum number of employees.

(2) The report required under paragraph (1) shall include an examination of the potential economic effect of performance of the function by a contractor on—

(A) agency civilian employees who would be affected by such a conversion in performance; and

(B) the local community and the Government, if more than 50 agency civilian employees perform the function.

(3)(A) A representative individual or entity at a facility where a public-private competition is conducted may submit to the head of the executive agency an objection to the public-private competition on the grounds that the report required by paragraph (1) has not been submitted or that the certification required by paragraph (1)(E) is not included in the report submitted as a condition for the public-private competition. The objection shall be in writing and shall be submitted within 90 days after the following date:

(i) In the case of a failure to submit the report when required, the date on which the representative individual or an official of the representative entity authorized to pose the objection first knew or should have known of that failure.

(ii) In the case of a failure to include the certification in a submitted report, the date on which the report was submitted to Congress.

(B) If the head of the executive agency determines that the report required by paragraph (1) was not submitted or that the required certification was not included in the submitted report, the function for which the public-private competition was conducted for which the objection was submitted may not be the subject of a solicitation of offers for, or award of, a contract until, respectively, the report is submitted or a report containing the certification in full compliance with the certification requirement is submitted.

(d) Exemption for the purchase of products and services of the blind and other severely handicapped persons

This section shall not apply to a commercial or industrial type function of an executive agency that—

(1) is included on the procurement list established pursuant to section 2 of the Javits-Wagner-O'Day Act (41 U.S.C. 47); or

(2) is planned to be changed to performance by a qualified nonprofit agency for the blind or by a qualified nonprofit agency for other severely handicapped persons in accordance with that Act [41 U.S.C. 46 et seq.].

(e) Inapplicability during war or emergency

The provisions of this section shall not apply during war or during a period of national emergency declared by the President or Congress.

(Pub. L. 93-400, § 43, as added Pub. L. 110-181, div. A, title III, § 327(a), Jan. 28, 2008, 122 Stat. 63.)

REFERENCES IN TEXT

That Act, referred to in subsec. (d)(2), meaning the Javits-Wagner-O'Day Act, is act June 25, 1938, ch. 697, 52 Stat. 1196, which is classified to sections 46 to 48c of this title. For complete classification of this Act to the Code, see Short Title note set out under section 46 of this title and Tables.

§ 440. Contingency Contracting Corps

(a) Establishment

The Administrator of General Services, pursuant to policies established by the Office of Management and Budget, and in consultation with the Secretary of Defense and the Secretary of Homeland Security, shall establish a Governmentwide Contingency Contracting Corps (in this section referred to as the "Corps"). The members of the Corps shall be available for deployment in responding to an emergency or major disaster, or a contingency operation, both within or outside the continental United States.

(b) Applicability

The authorities provided in this section apply with respect to any procurement of property or services by or for an executive agency that, as determined by the head of such executive agency, are to be used—

(1) in support of a contingency operation as defined in section 101(a)(13) of title 10; or

(2) to respond to an emergency or major disaster as defined in section 5122 of title 42.

(c) Membership

Membership in the Corps shall be voluntary and open to all Federal employees and members of the Armed Forces who are members of the Federal acquisition workforce.

(d) Education and training

The Administrator may, in consultation with the Director of the Federal Acquisition Institute and the Chief Acquisition Officers Council, establish educational and training requirements for members of the Corps. Education and training carried out pursuant to such requirements shall be paid for from funds available in the acquisition workforce training fund established pursuant to section 433(h)(3) of this title.

(e) Salary

The salary for a member of the Corps shall be paid—

(1) in the case of a member of the Armed Forces, out of funds available to the Armed Force concerned; and

(2) in the case of a Federal employee, out of funds available to the employing agency.

(f) Authority to deploy the Corps

(1) The Director of the Office of Management and Budget shall have the authority, upon request by an executive agency, to determine when members of the Corps shall be deployed, with the concurrence of the head of the agency or agencies employing the members to be deployed.

(2) Nothing in this section shall preclude the Secretary of Defense or the Secretary's designee from deploying members of the Armed Forces or civilian personnel of the Department of Defense in support of a contingency operation as defined in section 101(a)(13) of title 10.

(g) Annual report

(1) In general

The Administrator of General Services shall provide to the Committee on Homeland Security and Governmental Affairs and the Committee on Armed Services of the Senate and the Committee on Oversight and Government Reform and the Committee on Armed Services of the House of Representatives an annual report on the status of the Contingency Contracting Corps as of September 30 of each fiscal year.

(2) Content

At a minimum, each report under paragraph (1) shall include the number of members of the Contingency Contracting Corps, the total cost of operating the program, the number of deployments of members of the program, and the performance of members of the program in deployment.

(Pub. L. 93-400, §44, as added Pub. L. 110-417, [div. A], title VIII, §870(a), Oct. 14, 2008, 122 Stat. 4554.)

CHAPTER 8—FEDERAL GRANTS AND COOPERATIVE AGREEMENTS

§§ 501 to 509. Repealed. Pub. L. 97-258, §5(b), Sept. 13, 1982, 96 Stat. 1083

Section 501, Pub. L. 95-224, §2, Feb. 3, 1978, 92 Stat. 3, set out the Congressional findings and statement of purposes in enacting the Federal Grant and Cooperative Agreement Act of 1977 [this chapter]. Sections 1 and 10(b) of Pub. L. 95-224, setting out the short title provisions and savings provisions respectively of that Act, were set out as notes under this section, and were

repealed by Pub. L. 97-258, §5(b), Sept. 13, 1982, 96 Stat. 1083. Section 10(d) of Pub. L. 95-224, as amended by Pub. L. 97-162, Apr. 1, 1982, 96 Stat. 23, setting out the expected transactions provisions of that Act was set out as a note under this section, and was repealed by Pub. L. 97-258, §5(b), Sept. 13, 1982, 96 Stat. 1083. See sections 6301 and 6307(2) of Title 31, Money and Finance.

Section 502, Pub. L. 95-224, §3, Feb. 3, 1978, 92 Stat. 4, defined "State government", "local government", "other recipient", "executive agency", and "grant or cooperative agreement". See section 6302 of Title 31.

Section 503, Pub. L. 95-224, §4, Feb. 3, 1978, 92 Stat. 4, provided for use of procurement contracts by executive agencies. See section 6303 of Title 31.

Section 504, Pub. L. 95-224, §5, Feb. 3, 1978, 92 Stat. 4, provided for use of grant agreements by executive agencies. See section 6304 of Title 31.

Section 505, Pub. L. 95-224, §6, Feb. 3, 1978, 92 Stat. 5, provided for use of cooperative agreements by executive agencies. See section 6305 of Title 31.

Section 506, Pub. L. 95-224, §7, Feb. 3, 1978, 92 Stat. 5, pertained to required and discretionary authorities. See section 6306 of Title 31.

Section 507, Pub. L. 95-224, §8, Feb. 3, 1978, 92 Stat. 5, directed Director of Office of Management and Budget to undertake a study to develop a better understanding of alternate means of implementing Federal assistance programs.

Section 508, Pub. L. 95-224, §9, Feb. 3, 1978, 92 Stat. 6, authorized Director of Office of Management and Budget to issue supplemental interpretive guidelines to promote consistent and efficient use of contracts, grant agreements, and cooperative agreements. See section 6307(1) of Title 31.

Section 509, Pub. L. 95-224, §10(c), Feb. 3, 1978, 92 Stat. 6, related to use of multiple relationships for different components of jointly funded projects. See section 6308 of Title 31.

CHAPTER 9—CONTRACT DISPUTES

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§ 601. Definitions

As used in this chapter—

(1) the term "agency head" means the head and any assistant head of an executive agency, and may "upon the designation by" the head of an executive agency include the chief official of any principal division of the agency;

(2) the term "executive agency" means an executive department as defined in section 101 of title 5, an independent establishment as defined by section 104 of title 5 (except that it shall not include the Government Accountability Office), a military department as defined by section 102 of title 5, and a wholly owned Government corporation as defined by section 9101(3) of title 31;

(3) the term "contracting officer" means any person who, by appointment in accordance with applicable regulations, has the authority to enter into and administer contracts and