

## TITLE 41—PUBLIC CONTRACTS

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EXECUTIVE ORDER NO. 10925

Ex. Ord. No. 10925, Mar. 6, 1961, 26 F.R. 1977, which related to nondiscrimination provisions in Government contracts and established the President's Committee

on Equal Employment Opportunity, was revoked by section 403 of Ex. Ord. No. 11246, Sept. 24, 1965, 30 F.R. 12319, set out as a note under section 2000e of Title 42, The Public Health and Welfare.

**§§ 1 to 4a. Repealed. Oct. 21, 1941, ch. 452, 55 Stat. 743**

Section 1, R.S. §512; act Feb. 4, 1929, ch. 146, §§1, 3, 45 Stat. 1147, establish a return office for filing returns of contracts made by Secretaries of War, Navy and Interior and appointed a clerk for this office.

Section 2, R.S. §513, required clerk to file all returns. Section 3, R.S. §514, required clerk to keep an index book.

Section 4, R.S. §515, required clerk to provide certified copies of any returns for an established fee.

Section 4a, act Feb. 4, 1929, ch. 146, §§1, 3, 45 Stat. 1147, transferred returns office to General Accounting Office and imposed duties relating thereto upon Comptroller General.

**§ 5. Advertisements for proposals for purchases and contracts for supplies or services for Government departments; application to Government sales and contracts to sell and to Government corporations**

Unless otherwise provided in the appropriation concerned or other law, purchases and contracts for supplies or services for the Government may be made or entered into only after advertising a sufficient time previously for proposals, except (1) when the amount involved in any one case does not exceed \$25,000, (2) when the public exigencies require the immediate delivery of the articles or performance of the service, (3) when only one source of supply is available and the Government purchasing or contracting officer shall so certify, or (4) when the services are required to be performed by the contractor in person and are (A) of a technical and professional nature or (B) under Government supervision and paid for on a time basis. Except (1) as authorized by section 1638<sup>1</sup> of Appendix to title 50, (2) when otherwise authorized by law, or (3) when the reasonable value involved in any one case does not exceed \$500, sales and contracts of sale by the Government shall be governed by the requirements of this section for advertising.

In the case of wholly owned Government corporations, this section shall apply to their administrative transactions only.

(R.S. §3709; Aug. 2, 1946, ch. 744, §9(a), (c), 60 Stat. 809; June 30, 1949, ch. 288, title VI, §602(f), formerly title V, §502(e), 63 Stat. 403; renumbered Sept. 5, 1950, ch. 849, §§6(a), (b), 8(c), 64 Stat. 583, and amended Aug. 28, 1958, Pub. L. 85-800, §7, 72 Stat. 967; July 25, 1974, Pub. L. 93-356, §1, 88 Stat. 390; Dec. 1, 1983, Pub. L. 98-191, §9(b), 97 Stat. 1332.)

REFERENCES IN TEXT

Section 1638 of Appendix to title 50, referred to in text, was repealed by act June 30, 1949, ch. 288, title VI, §602(a)(1), formerly title V, §502(a)(1), 63 Stat. 399, eff. July 1, 1949, renumbered by act Sept. 5, 1950, ch. 849, §6(a), (b), 64 Stat. 583. See section 471 et seq. of Title 40, Public Buildings, Property, and Works.

CODIFICATION

R.S. §3709 derived from act Mar. 2, 1861, ch. 84, §10, 12 Stat. 220.

<sup>1</sup> See References in Text note below.

Section is also set out in the District of Columbia Code, §1-1110.

#### AMENDMENTS

1983—Pub. L. 98-191 substituted “\$25,000” for “\$10,000”.

1974—Pub. L. 93-356 substituted “\$10,000” for “\$2,500”.

1958—Pub. L. 85-800 substituted “\$2,500” for “\$500”.

1949—Act June 30, 1949, substituted “\$500” for “\$100”.

1946—Act Aug. 2, 1946, among other changes, inserted cls. (1), (3), and (4), and made section applicable to sales and contracts of sale by the Government, except in certain cases.

#### EFFECTIVE DATE OF 1949 AMENDMENT

Amendment by act June 30, 1949, effective July 1, 1949, see section 605 of act June 30, 1949, set out as an Effective Date note under section 471 of Title 40, Public Buildings, Property, and Works.

#### EXEMPTION OF FUNCTIONS

Functions authorized by Foreign Assistance Act of 1961, as amended, as exempt, see Ex. Ord. No. 11223, May 12, 1965, 30 F.R. 6635, set out as a note under section 2393 of Title 22, Foreign Relations and Intercourse.

#### SECTION INAPPLICABLE TO ARMED SERVICES AND NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

Section inapplicable to procurement of supplies or services by Armed Services and National Aeronautics and Space Administration, see section 2314 of Title 10, Armed Forces.

#### REPEAL OF EXEMPTIONS

Section 9(b) of act Aug. 2, 1946, provided: “Exemptions from section 3709, Revised Statutes [this section], in other law in amounts of \$100 or less are hereby repealed.”

#### CROSS REFERENCES

Architect of Capitol, procurement of supplies and services, see section 6a-1 of this title.

Armed services, procurement of supplies and services, see sections 2301 et seq. and 2381 et seq. of Title 10, Armed Forces.

#### Conservation, National Park Service—

Hiring of work animals and equipment not required to comply with this section in certain cases, see section 17i of Title 16, Conservation.

Seeding and tree planting within national forests, open purchases without advertisement, see section 504 of Title 16.

Services and accommodations for public in national parks and national monuments, see section 17b of Title 16.

Contracts for transportation of moneys, bullion, coin, etc., see section 24 of this title.

Control of coal-mine fires, employment of equipment by Secretary of Interior without regard to this section, see section 556 of Title 30, Mineral Lands and Mining.

Definition of terms employed in this section, see section 5a of this title.

Farm Credit Administration, maintenance and disposal of properties by, see section 1141b of Title 12, Banks and Banking.

Farm Housing, service and supply contracts less than specified amount unaffected by provisions of this section, see section 1480 of Title 42, The Public Health and Welfare.

Federal Deposit Insurance Corporation, Comptroller General authorized for purposes of audit thereof to employ by contract professional services of firms and organizations of certified public accountants without regard to this section, see section 1827 of Title 12, Banks and Banking.

#### Federal Power Commission—

Bonneville power project, purchase of supplies and services without advertisement, see section 832g of Title 16, Conservation.

Contracts for engraving, lithographing, and photolithographing, without advertisement for proposals, see section 825k of Title 16.

Fort Peck power project, purchase of supplies and services without advertisement, see section 833f of Title 16.

Fishery resources, authority of Secretary of Interior to contract to utilize state facilities and services without regard to this section, see section 757 of Title 16.

Highway research program, inapplicability of this section to contracts, see section 307 of Title 23, Highways.

House of Representatives, procurement of packing boxes, see section 100 of Title 2, The Congress.

#### Housing—

Contracts for hazard insurance and purchases by Federal Housing Commissioner, excepted, see sections 1703, 1710, and 1713 of Title 12, Banks and Banking.

Purchases and contracts by Department of Housing and Urban Development and Office of Thrift Supervision excepted from this section, see section 1701c of Title 12.

Purchases and contracts for services or supplies under specified amount for national defense housing excepted from this section, see section 1750c of Title 12.

International health research, authority of President to contract with public and nonprofit private institutions and agencies and individuals in participating foreign countries without regard to provisions of this section, see section 2103 of Title 22, Foreign Relations and Intercourse.

Menominee Indian Reservation, supplies for operations on reservation, and sale of Indian-produced forest products, see section 6b of this title.

National Fisheries Center and Aquarium, authority of Secretary of Interior to provide for vessels for specimen collecting purposes without regard to this section, see section 1052 of Title 16, Conservation.

National Science Foundation, contracts and other arrangements, see section 1870 of Title 42, The Public Health and Welfare.

Procurement of transportation services from common carrier, exception of, see section 10721 of Title 49, Transportation.

#### Public Printing—

Authority required to authorize publication of advertisements, notices, or proposals for any Executive Department, see section 3702 of Title 44, Public Printing and Documents.

Purchase of paper and materials for the Government Printing Office, see section 501 et seq. of Title 44.

Railroad Retirement Board, services and supplies for, see section 361 of Title 45, Railroads.

Reconditioning of foreign merchant vessels acquired under emergency authority, see section 198 of Title 50, War and National Defense.

References to this section deemed references to section 252 of this title, see section 260 of this title.

Small Business Administrator, power to pursue assigned claims to final collection in connection with loans, see section 634 of Title 15, Commerce and Trade.

#### State Department—

Institution for training, acquisition of realty and other property and equipment for without regard to this section, see section 4024 of Title 22, Foreign Relations and Intercourse.

International Labour Conference, printing and binding for without regard to this section, see section 272a of Title 22.

International Refugee Organization, funds available for expenditure without regard to this section, see section 289c of Title 22.

South Pacific Commission, printing and binding for without regard to this section, see section 280b of Title 22.

United Nations, printing and binding for without regard to this section, see section 287e of Title 22.

Stationery for United States Senate and House of Representatives, advertisement for sealed proposals, see section 106 of Title 2, The Congress.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 5a, 6a, 6a-1, 6a-2, 6b, 252, 260 of this title; title 2 sections 61g-7, 72a, 135a, 475, 604, 1108; title 5 sections 3109, 4105, 8709, 8714a, 8714b, 8714c, 8902; title 7 sections 87e-1, 427i, 1624, 2007b, 3318; title 8 sections 1252, 1355; title 10 section 2314; title 12 sections 1141b, 1701c, 1701z-2, 1703, 1710, 1713, 1739, 1747g, 1747k, 1750c, 1788, 1827; title 15 sections 634, 2218, 2507, 2609, 2626; title 16 sections 17b, 17i, 343b, 450jj-1, 504, 580c, 590z-3, 594-5, 757, 916l, 961, 1052, 2104; title 18 section 3672; title 20 sections 1034, 1070a-11, 1132d-1, 2012, 2106, 4513, 4710, 5608, 5708, 8508; title 21 sections 360ii, 872; title 22 sections 272a, 280b, 280i, 280k, 287e, 287r, 289c, 290b, 2103, 2179, 2509, 4024; title 23 sections 140, 307, 321; title 24 sections 322, 324; title 25 section 450j; title 28 sections 524, 604, 624, 753; title 29 section 671; title 30 section 556; title 31 sections 781, 9703; title 33 sections 1123, 1254; title 38 sections 1966, 3720, 7317, 7802, 8122, 8201; title 40 sections 71a, 212a-4, 216c, 276a-7, 481, 484, 609, 758; title 42 sections 238m, 242k, 242m, 285a-2, 285b-3, 285n, 289c, 289e, 290aa-9, 295o, 299c-3, 300c-22, 300u, 300cc-41, 1395u, 1395ww, 1480, 1532, 1543, 1563, 1592d, 1592h, 1870, 2051, 2061, 2063, 2075, 2096, 2210, 2293, 2295, 2310, 2349, 2362, 3211, 3535, 4081, 4082, 4101, 4372, 6616, 7403, 7404, 7412; title 45 sections 361, 719; title 46 App. section 1295d; title 49 sections 1113, 5334, 10721, 13712, 15504, 47305; title 50 sections 198, 1902; title 50 App. section 1918.

#### § 5a. Definitions

The word “department” as used in this Act shall be construed to include independent establishments, other agencies, wholly owned Government corporations (the transactions of which corporations shall be subject to the authorizations and limitations of this Act, except that section 5 of this title shall apply to their administrative transactions only), and the government of the District of Columbia, but shall not include the Senate, House of Representatives, or office of the Architect of the Capitol, or the officers or employees thereof. The words “continental United States” as used herein shall be construed to mean the forty-eight States and the District of Columbia. The word “Government” shall be construed to include the government of the District of Columbia. The word “appropriation” shall be construed as including funds made available by legislation under section 9104 of title 31.

(Aug. 2, 1946, ch. 744, §18, 60 Stat. 811.)

#### REFERENCES IN TEXT

This Act, referred to in text, means act Aug. 2, 1946, ch. 744, 60 Stat. 806. For complete classification of this Act to the Code see Tables.

#### CODIFICATION

“Section 9104 of title 31” substituted in text for “section 104 of the Government Corporation Control Act, approved December 6, 1945 [31 U.S.C. 849]” on authority of Pub. L. 97-258, §4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

Section was formerly classified to section 73b-4 of title 5 prior to the general revision and reenactment of Title 5, Government Organization and Employees by Pub. L. 89-554, Sept. 6, 1966 80 Stat. 378.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 31 section 1344.

#### § 6. Repealed. Oct. 31, 1951, ch. 654, §1(98)-(105), 65 Stat. 705

Section, acts Oct. 10, 1940, ch. 851, §1, 54 Stat. 1109; June 28, 1941, ch. 258, titles II, III, IV, 55 Stat. 281, 289, 292, 302; June 8, 1942, ch. 396, 56 Stat. 347; July 2, 1942, ch. 472, titles II, III, IV, 56 Stat. 483, 500, 505; June 28, 1943, ch. 173, titles I, II, 57 Stat. 236, 243; June 26, 1944, ch. 277, titles I, II, 58 Stat. 351, 358; June 13, 1945, ch. 189, 59 Stat. 256; July 1, 1946, ch. 530, 60 Stat. 405; June 30, 1947, ch. 166, title II, §204, 61 Stat. 208; June 30, 1949, ch. 288, title I, §§103, 104(a), 63 Stat. 380, which excepted from provisions of section 5 of this title a number of specified Government departments and agencies, when purchases or services were not in excess of certain specified amounts up to \$500.

Another provision of title III of act July 2, 1942, ch. 472, 56 Stat. 493, which also had been shown as one of the sources of this former section, made an exception with respect to purchases or services rendered for the Office of the Administrator of Civil Aeronautics, when the aggregate amount involved did not exceed \$100. That provision was not repealed, but, if it did not expire with that act, which was an appropriation act, it was superseded by section 5 of this title, as amended.

A prior section 6, acts Feb. 27, 1893, ch. 168, 27 Stat. 485; Mar. 1, 1899, ch. 325, 30 Stat. 957; Mar. 2, 1911, ch. 192, 36 Stat. 975; May 18, 1916, ch. 125, 39 Stat. 126; Mar. 1, 1919, ch. 86, 40 Stat. 1262; May 29, 1920, ch. 214, 41 Stat. 677; June 12, 1922, ch. 218, 42 Stat. 638; Feb. 13, 1923, ch. 72, 42 Stat. 1244; Feb. 15, 1934, ch. 13, 48 Stat. 351, related to exceptions to the requirements of section 5 of this title, prior to repeal by act Oct. 10, 1940, ch. 851, §4, 54 Stat. 1111. See sections 5, 6a, and 6b of this title.

#### § 6a. Advertisements for proposals for purchases and contracts for supplies or services for Government departments; limited to particular agencies under specified circumstances

Section 5 of this title shall not be construed to apply under any appropriation Act to the following departments and independent offices under the circumstances specified herein:

(a) American Battle Monuments Commission—to any leases in foreign countries for office or garage space.

(b) to (e) Repealed. Oct. 31, 1951, ch. 654, §1(107), 65 Stat. 705.

(f) The Bureau of Interparliamentary Union for Promotion of International Arbitration—to stenographic reporting services by contract if deemed necessary.

(g) Repealed. Oct. 31, 1951, ch. 654, §1(107), 65 Stat. 705.

(h) Department of State—when the purchase or service relates to the packing of personal and household effects of Diplomatic, Consular, and Foreign Service officers and clerks for foreign shipment.

(i) Repealed. Oct. 31, 1951, ch. 654, §1(107), 65 Stat. 705.

(j) The International Committee of Aerial Legal Experts—to stenographic and other service by contract as deemed necessary.

(June 12, 1917, ch. 27, 40 Stat. 144; May 13, 1926, ch. 294, 44 Stat. 547; Oct. 10, 1940, ch. 851, §2, 54 Stat. 1110; June 28, 1941, ch. 259, 55 Stat. 344; Oct. 31, 1951, ch. 654, §§1(106)-(108), 3(8), (9), 4(9), 65 Stat. 705, 708, 709; July 1, 1957, Pub. L. 85-75, 71 Stat. 251.)

#### CODIFICATION

Opening par., and subsecs. (a), (f), (h), and (j) of this section are from act Oct. 10, 1940, §2, opening par., and

pars. (a), (f), and (j). Remainder of paragraphs of section 2 were repealed. See 1951 amendment note set out under this section.

Subsec. (o) of this section, which was from Act May 13, 1926, ch. 294, § 1, 44 Stat. 547, made section 5 of this title inapplicable to the Architect of the Capitol in the purchase of supplies and equipment and procurement of services when the aggregate amount thereof did not exceed \$1,000 in any instance and was omitted as superseded by section 6a-1 of this title.

Subsec. (p) of this section, which was from act June 12, 1917, ch. 27, § 1, 40 Stat. 144, made section 5 of this title inapplicable to expenditures not exceeding \$50 by the United States Geological Survey and was repealed by act Oct. 31, 1951, ch. 654, §1(106), 66 Stat. 705.

#### PRIOR PROVISIONS

A prior section 6a, acts Jan. 25, 1929, ch. 102, title IV, 45 Stat. 1136; Apr. 18, 1930, ch. 184, title IV, 46 Stat. 215; Feb. 23, 1931, ch. 280, title IV, 46 Stat. 1352; July 1, 1932, ch. 361, title IV, 47 Stat. 520; Mar. 1, 1933, ch. 144, title IV, 47 Stat. 1409; Apr. 7, 1934, ch. 104, title IV, 48 Stat. 568; Mar. 22, 1935, ch. 39, § 1, 49 Stat. 102; May 15, 1936, ch. 405, 49 Stat. 1347; June 16, 1937, ch. 359, title IV, 50 Stat. 298; Apr. 27, 1938, ch. 180, title IV, 52 Stat. 285; June 29, 1939, ch. 249, 53 Stat. 921; June 26, 1940, ch. 428, title I, 54 Stat. 575, excepted Department of Labor from the provisions of section 5 of this title, prior to repeal by act Oct. 10, 1940, ch. 851, § 4, 54 Stat. 1111.

#### AMENDMENTS

1957—Subsec. (o). Pub. L. 85-75 substituted “\$1,000” for “\$500”.

1951—Subsec. (a). Act Oct. 31, 1951, §3(8), struck out “to any purchases when the aggregate amount involved does not exceed \$500, nor” before “to any leases”.

Subsec. (b). Act Oct. 31, 1951, §1(107), repealed subsec. (b) which related to Botanic Garden.

Subsec. (c). Act Oct. 31, 1951, §1(107), repealed subsec. (c) which also related to Botanic Garden.

Subsec. (d). Act Oct. 31, 1951, §1(107), repealed subsec. (d) which related to Bureau of the Budget.

Subsec. (e). Act Oct. 31, 1951, §1(107), repealed subsec. (e) which related to Bureau of Foreign and Domestic Commerce.

Subsec. (g). Act Oct. 31, 1951, §1(107), repealed subsec. (g) which related to Department of the Interior.

Subsec. (h). Act Oct. 31, 1951, §3(9), struck out “to any purchase or service when the aggregate amount does not exceed \$100, or with respect to articles, materials, or supplies for use outside the United States when the aggregate amount involved does not exceed \$300; or” before “when the purchase”.

Subsec. (i). Act Oct. 31, 1951, §1(107), repealed subsec. (i) which related to Federal Communications Commission.

Subsec. (k). Act Oct. 31, 1951, §1(107), repealed subsec. (k) which related to Medical Department of the Army.

Subsec. (l). Act Oct. 31, 1951, §1(107), repealed subsec. (l) which related to Social Security Board.

Subsec. (m). Act Oct. 31, 1951, §1(107), repealed subsec. (m) which related to Bureau of Mines.

Subsec. (n). Act Oct. 31, 1951, §1(107), repealed subsec. (n) which related to Bureau of Reclamation.

Subsec. (o). Act Oct. 31, 1951, §4(9), increased the maximum from \$200 to \$500.

1941—Subsec. (m). Act June 28, 1941, reaffirmed provision respecting Bureau of Mines.

#### REPEALS

Section 1(108) of act Oct. 31, 1951, repealed the proviso in act June 28, 1941, cited as a credit to this section, which excepted expenditures not exceeding \$500 by the Bureau of Mines from section 5 of this title.

Section 1(106) of act Oct. 31, 1951, repealed the proviso in act June 12, 1917, cited as a credit to this section, which excepted expenditures not exceeding \$50 by the United States Geological Survey from section 5 of this title.

Section 4(a) of act Oct. 10, 1940, provided for repeal of all prior laws, which are covered by that act and that any rights or liabilities existing under those repealed sections or parts of sections shall not be affected by their repeal.

#### LEASES FOR FOREIGN SERVICE OFFICES

Provisions contained in annual appropriation acts for the Department of State authorizing the Secretary of State to enter into leases for Foreign Service offices and grounds for periods not exceeding ten years without regard to section 5 of this title were made permanent, and are covered by section 2670 of Title 22, Foreign Relations and Intercourse.

#### BUREAU OF EMPLOYEES' COMPENSATION

Section 5 of this title not applicable to any purchase or service of the Bureau of Employees' Compensation outside continental United States when the aggregate amount involved does not exceed \$500 under acts July 8, 1947, ch. 210, title II, 61 Stat. 264; June 14, 1948, ch. 465, title II, 62 Stat. 396; June 29, 1949, ch. 275, title II, 63 Stat. 284. This Bureau, with its functions, transferred from Federal Security Agency to Department of Labor by Reorg. Plan No. 19, of 1950, § 1, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1271, set out in the Appendix to Title 5, Government Organization and Employees.

#### GOVERNMENT-OWNED FURNITURE REMOVED TO WASHINGTON, D.C.

Act July 30, 1947, ch. 359, title I, 61 Stat. 594, provided in part: “That removal to the seat of government of Government-owned or leased furniture, equipment, supplies, and other property and household goods and personal effects of employees, and costs of restoration of leased office space when required, may be accomplished without regard to section 3709 of the Revised Statutes [section 5 of this title]”.

#### SECTION INAPPLICABLE TO ARMED SERVICES AND NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

Section inapplicable to procurement of supplies or services by Armed Services and National Aeronautics and Space Administration, see section 2314 of Title 10, Armed Forces.

#### CROSS REFERENCES

Exemption of all purchases and contracts when the amount involved does not exceed specified amount, see section 5 of this title.

General Services Administration, section inapplicable to procurement of property or services by, see section 260 of this title.

#### § 6a-1. Architect of the Capitol, exception from advertisement requirements

On and after July 27, 1965, the purchase of supplies and equipment and the procurement of services for all branches under the Architect of the Capitol may be made in the open market without compliance with section 5 of this title in the manner common among businessmen, when the aggregate amount of the purchase or the service does not exceed \$25,000 in any instance.

(Pub. L. 89-90, July 27, 1965, 79 Stat. 276; Pub. L. 93-356, § 2, July 25, 1974, 88 Stat. 390; Pub. L. 98-191, §9(c), Dec. 1, 1983, 97 Stat. 1332.)

#### PRIOR PROVISIONS

A prior section 6a-1, acts June 25, 1910, ch. 431, § 23, 36 Stat. 861; May 18, 1916, ch. 125, § 1, 39 Stat. 126; Jan. 12, 1927, ch. 27, 44 Stat. 936, related to purchase of Indian supplies, prior to repeal by act Oct. 10, 1940, ch. 851, § 4, 54 Stat. 1111.

## AMENDMENTS

1983—Pub. L. 98-191 substituted “\$25,000” for “\$10,000”.

1974—Pub. L. 93-356 substituted “\$10,000” for “\$2,500”.

**§ 6a-2. Architect of the Capitol, authority for personal services contracts with legal entities**

Notwithstanding any other provision of law, the Architect of the Capitol is authorized to contract for personal services with any firm, partnership, corporation, association, or other legal entity in the same manner as he is authorized to contract for personal services with individuals under the provisions of section 5 of this title.

(Pub. L. 96-558, Dec. 19, 1980, 94 Stat. 3263.)

**§ 6b. Miscellaneous exceptions from advertisement requirements**

**(a) Control of insects, pests, and grass diseases**

Materials and equipment for the control of insect or emergency outbreaks of insects, pests, or grass diseases, including grasshoppers, Mormon crickets, and chinch bugs, may be procured with any sums appropriated to carry out the provisions of sections 148 to 148e of title 7 without regard to the provisions of section 5 of this title, and the transportation thereof may be under such conditions and means as shall be determined by the Secretary of Agriculture to be most advantageous.

**(b) Omitted**

**(c) Operations on Menominee Indian Reservation**

All contracts for labor or supplies necessary for the carrying on of operations on the Menominee Indian Reservation pursuant to the Act of March 28, 1908 (35 Stat. 51), as amended, shall be exempt from the requirements of section 5 of this title.

**(d) Sale of Indian produced forest products**

The lumber and other forest products produced by Indian enterprises from the forests on Indian reservations may be sold under such regulations as the Secretary of the Interior may prescribe, without compliance with section 5 of this title.

(June 24, 1940, ch. 412, 54 Stat. 504; Oct. 10, 1940, ch. 851, § 3, 54 Stat. 1111.)

## REFERENCES IN TEXT

Act of March 28, 1908 (35 Stat. 51), referred to in subsec. (c), probably means act Mar. 28, 1908, ch. 111, 35 Stat. 51, which is not classified to the Code.

## CODIFICATION

Subsecs. (a) to (c) are from act Oct. 10, 1940. Subsec. (b), which related to obligations of Civilian Conservation Corps, was omitted because the Corps was liquidated June 30, 1944.

Subsec. (d) is from act June 24, 1940, which was formerly classified to section 6mm of this title.

Subsec. (e), which related to the employment of experts or consultants in the Canal Zone, was from the General Government Matters Appropriation Act, 1962, Pub. L. 87-125, title III, § 301, Aug. 3, 1961, 75 Stat. 279, and was omitted as not repeated in subsequent appropriation acts. Provisions similar to former subsec. (e) were contained in the following prior appropriation acts:

May 13, 1960, Pub. L. 86-451, title II, § 201, 74 Stat. 101.  
 July 13, 1959, Pub. L. 86-88, title II, § 201, 73 Stat. 208.  
 June 25, 1958, Pub. L. 85-469, title II, § 203, 72 Stat. 236.  
 June 13, 1957, Pub. L. 85-52, title II, § 203, 71 Stat. 79, as amended Mar. 28, 1958, Pub. L. 85-352, ch. II, § 201, 72 Stat. 52.

June 20, 1956, ch. 415, title II, § 203, 70 Stat. 324.  
 June 30, 1955, ch. 253, title II, § 203, 69 Stat. 236.  
 June 30, 1954, ch. 425, § 104, 68 Stat. 335.  
 July 27, 1953, ch. 245, § 104, 67 Stat. 202.  
 July 11, 1952, ch. 669, § 104, 66 Stat. 584.  
 Oct. 24, 1951, ch. 556, § 104, 65 Stat. 622.  
 Sept. 6, 1950, ch. 896, Ch. IX, § 103, 64 Stat. 730.  
 Oct. 13, 1949, ch. 688, § 4, 63 Stat. 852.  
 June 25, 1948, ch. 655, § 4, 62 Stat. 1026.  
 July 31, 1947, ch. 411, § 4, 61 Stat. 694.  
 May 2, 1946, ch. 247, § 4, 60 Stat. 167.  
 Mar. 31, 1945, ch. 45, § 4, 59 Stat. 45.  
 June 26, 1944, ch. 275, § 4, 58 Stat. 333.  
 June 2, 1943, ch. 115, § 4, 57 Stat. 99.  
 Apr. 28, 1942, ch. 246, § 5, 56 Stat. 225.  
 June 24, 1940, ch. 412, 54 Stat. 504.

## PRIOR PROVISIONS

A prior section 6b, acts Feb. 23, 1931, ch. 281, 46 Stat. 1363; June 30, 1932, ch. 330, 47 Stat. 460; June 16, 1933, ch. 101, 48 Stat. 292; Mar. 28, 1934, ch. 102, title I, 48 Stat. 514; Feb. 2, 1935, ch. 3, 49 Stat. 11; Mar. 19, 1936, ch. 156, 49 Stat. 1173; June 28, 1937, ch. 396, 50 Stat. 336; May 23, 1938, ch. 259, 52 Stat. 418; Mar. 16, 1939, ch. 11, 53 Stat. 532; Apr. 18, 1940, ch. 107, 54 Stat. 131, excepted General Accounting Office from provisions of section 5 of this title, prior to repeal by act Oct. 10, 1940, ch. 851, § 4, 54 Stat. 1111.

## TRANSFER OF FUNCTIONS

Functions of all officers, agencies and employees of Department of Agriculture transferred, with certain exceptions, to Secretary of Agriculture by Reorg. Plan No. 2 of 1953, § 1, eff. June 4, 1953, 18 F.R. 3219, 67 Stat. 633, set out in the Appendix to Title 5, Government Organization and Employees.

**§§ 6c to 6jj. Repealed. Oct. 10, 1940, ch. 851, § 4, 54 Stat. 1111**

Section 6c, acts June 22, 1936, ch. 689, 49 Stat. 1604; June 28, 1937, ch. 396, 50 Stat. 341; May 23, 1938, ch. 259, 52 Stat. 424; Mar. 16, 1939, ch. 11, 53 Stat. 539; June 25, 1940, ch. 421, 54 Stat. 566, excepted Rural Electrification Administration from provisions of section 5 of this title when aggregate amount involved did not exceed \$100.

Section 6d, acts June 22, 1936, ch. 689, 49 Stat. 1605; June 28, 1937, ch. 396, 50 Stat. 344; May 23, 1938, ch. 259, 52 Stat. 426; Mar. 16, 1939, ch. 11, 53 Stat. 540, excepted Social Security Board from provisions of section 5 of this title when aggregate amount involved did not exceed \$100.

Section 6e, acts May 14, 1937, ch. 180, title I, 50 Stat. 139; Mar. 28, 1938, ch. 55, 52 Stat. 123; May 6, 1939, ch. 115, title I, 53 Stat. 656; Mar. 25, 1940, ch. 71, title I, 54 Stat. 56, excepted Treasury Department from provisions of section 5 of this title when aggregate amount involved did not exceed \$50.

Section 6f, acts June 16, 1937, ch. 359, title I, 50 Stat. 273; Apr. 27, 1938, ch. 180, title I, 52 Stat. 258; June 29, 1939, ch. 248, title I, 53 Stat. 896; May 14, 1940, ch. 189, title I, 54 Stat. 192, excepted Department of State from provisions of section 5 of this title when aggregate amount involved did not exceed certain specified amounts.

Section 6g, acts June 16, 1937, ch. 359, title II, 50 Stat. 275; Apr. 27, 1938, ch. 180, title II, 52 Stat. 260; June 29, 1939, ch. 248, title II, 53 Stat. 898; May 14, 1940, ch. 189, title III, 54 Stat. 201, 202, excepted Federal Bureau of Investigation from provisions of section 5 of this title when aggregate amount did not exceed \$50.

Section 6h, acts June 16, 1937, ch. 359, title III, 50 Stat. 285; Apr. 27, 1938, ch. 180, title III, 52 Stat. 272, ex-

cepted Bureau of Air Commerce from provisions of section 5 of this title when aggregate amount involved did not exceed \$100.

Section 6i, acts June 28, 1937, ch. 396, 50 Stat. 335; May 23, 1938, ch. 259, 52 Stat. 417; Mar. 16, 1939, ch. 11, 53 Stat. 532; Apr. 18, 1940, ch. 107, 54 Stat. 124, excepted Federal Trade Commission from provisions of section 5 of this title when aggregate amount involved did not exceed \$50.

Section 6j, acts June 28, 1937, ch. 396, 50 Stat. 338; May 23, 1938, ch. 259, 52 Stat. 420; Mar. 16, 1939, ch. 11, 53 Stat. 534; Apr. 18, 1940, ch. 107, 54 Stat. 133, excepted Interstate Commerce Commission from provisions of section 5 of this title when aggregate amount involved did not exceed \$50.

Section 6k, acts June 28, 1937, ch. 396, 50 Stat. 339; May 23, 1938, ch. 259, 52 Stat. 421; Mar. 16, 1939, ch. 11, 53 Stat. 536; Apr. 18, 1940, ch. 107, 54 Stat. 135, excepted National Archives from provisions of section 5 of this title when aggregate amount did not exceed \$50.

Section 6l, acts June 28, 1937, ch. 396, 50 Stat. 339; May 23, 1938, ch. 259, 52 Stat. 422; Mar. 16, 1939, ch. 11, 53 Stat. 537; June 26, 1940, ch. 428, title IV, 54 Stat. 595, excepted National Labor Relations Board from provisions of section 5 of this title when aggregate amount involved did not exceed \$50.

Section 6m, acts June 28, 1937, ch. 396, 50 Stat. 341; May 23, 1938, ch. 259, 52 Stat. 423; Mar. 16, 1939, ch. 11, 53 Stat. 538; June 26, 1940, ch. 428, title VI, 54 Stat. 596, excepted Railroad Retirement Board from provisions of section 5 of this title when aggregate amount involved did not exceed \$50.

Section 6n, acts June 28, 1937, ch. 396, 50 Stat. 342; May 23, 1938, ch. 259, 52 Stat. 425; Mar. 16, 1939, ch. 11, 53 Stat. 539; Apr. 18, 1940, ch. 107, 54 Stat. 136, excepted Securities and Exchange Commission from provisions of section 5 of this title when aggregate amount involved did not exceed \$50.

Section 6o, act Apr. 6, 1937, ch. 69, § 3, as added May 9, 1938, ch. 192, 52 Stat. 344, excepted control of insects and plant diseases from provisions of section 5 of this title.

Section 6p, act May 23, 1938, ch. 259, 52 Stat. 417, Mar. 16, 1939, ch. 11, 53 Stat. 531; Apr. 18, 1940, ch. 107, 54 Stat. 124, excepted Federal Power Commission from provisions of section 5 of this title when aggregate amount involved did not exceed \$50.

Section 6q, acts June 25, 1938, ch. 681, title I, 52 Stat. 1117; Mar. 16, 1939, ch. 11, 53 Stat. 535; Apr. 18, 1940, ch. 107, 54 Stat. 134, excepted Maritime Labor Board from provisions of section 5 of this title when aggregate amount involved did not exceed \$100.

Section 6r, acts Mar. 16, 1939, ch. 11, 53 Stat. 527; Apr. 18, 1940, ch. 107, 54 Stat. 116, excepted Civil Aeronautics Authority from provisions of section 5 of this title when aggregate amount involved did not exceed \$100.

Section 6s, acts Aug. 7, 1935, ch. 455, 49 Stat. 540; Feb. 11, 1936, ch. 49, 49 Stat. 1123; May 15, 1936, ch. 405, 49 Stat. 1316; June 16, 1937, ch. 359, 50 Stat. 267; Apr. 27, 1938, ch. 180, 52 Stat. 254; June 29, 1939, ch. 248, title I, 53 Stat. 892; May 14, 1940, ch. 189, title I, 54 Stat. 188, excepted International Technical Committee of Aerial Legal Experts from provisions of section 5 of this title.

Section 6t, acts May 15, 1936, ch. 405, 49 Stat. 1315; June 16, 1937, ch. 359, 50 Stat. 267; Apr. 27, 1938, ch. 180, 52 Stat. 253; June 29, 1939, ch. 248, title I, 53 Stat. 891, excepted Bureau of Interparliamentary Union for Promotion of International Arbitration from provisions of section 5 of this title.

Section 6u, acts Feb. 20, 1929, ch. 270, 45 Stat. 1243; Apr. 19, 1930, ch. 201, 46 Stat. 243; Feb. 23, 1931, ch. 281, 46 Stat. 1370; Feb. 2, 1935, ch. 3, 49 Stat. 16; Mar. 19, 1936, ch. 156, 49 Stat. 1180; June 28, 1937, ch. 396, 50 Stat. 345; May 23, 1938, ch. 259, 52 Stat. 427; Mar. 16, 1939, ch. 11, 53 Stat. 542; Apr. 18, 1940, ch. 107, 54 Stat. 137, excepted Tariff Commission (now International Trade Commission) from provisions of section 5 of this title when aggregate amount involved did not exceed \$50.

Section 6v, acts June 28, 1937, ch. 396, 50 Stat. 331; May 23, 1938, ch. 259, 52 Stat. 412; Mar. 16, 1939, ch. 11,

53 Stat. 525; Apr. 18, 1940, ch. 107, 54 Stat. 113, excepted American Battle Monuments Commission from provisions of section 5 of this title when aggregate amount involved did not exceed \$500.

Section 6v-1, act Apr. 18, 1940, ch. 107, 54 Stat. 113, excepted American Battle Monuments Commission, when entering into leases in foreign countries, from provisions of section 5 of this title.

Section 6w, acts June 16, 1938, ch. 464, 52 Stat. 750; June 30, 1939, ch. 253, title II, 53 Stat. 978; June 25, 1940, ch. 421, 54 Stat. 568, excepted Farm Credit Administration from provisions of section 5 of this title when aggregate amount did not exceed \$50.

Section 6x, act Aug. 25, 1937, ch. 757, title I, 50 Stat. 759, excepted United States Maritime Commission from provisions of section 5 of this title when aggregate amount did not exceed \$100.

Section 6y, acts Aug. 9, 1939, ch. 633, title I, 53 Stat. 1318; June 18, 1940, ch. 395, 54 Stat. 443, excepted Bureau of Mines from provisions of section 5 of this title when aggregate amount did not exceed \$500.

Section 6z, act Apr. 18, 1940, ch. 107, 54 Stat. 112, excepted Bureau of the Budget (now Office of Management and Budget) from provisions of section 5 of this title when aggregate amounts involved did not exceed certain specified sums.

Section 6aa, act Apr. 18, 1940, ch. 107, 54 Stat. 118, excepted Federal Communications Commission from provisions of section 5 of this title when aggregate amount did not exceed \$50.

Section 6bb, act Apr. 18, 1940, ch. 107, 54 Stat. 119, excepted Federal Loan Agency from provisions of section 5 of this title when aggregate amounts involved did not exceed certain specified sums.

Section 6cc, act Apr. 18, 1940, ch. 107, 54 Stat. 120, excepted Federal Home Loan Bank from provisions of section 5 of this title when aggregate amounts involved did not exceed certain specified sums.

Section 6dd, act Apr. 18, 1940, ch. 107, 54 Stat. 131, excepted General Accounting Office from provisions of section 5 of this title when aggregate amount involved did not exceed \$50.

Section 6ee, acts Feb. 11, 1927, ch. 104, 44 Stat. 1081; Apr. 18, 1940, ch. 107, 54 Stat. 137, excepted Tariff Commission (now International Trade Commission) from provisions of section 5 of this title when aggregate amount involved did not exceed \$50.

Section 6ff, act May 14, 1940, ch. 189, title I, 54 Stat. 189, excepted International Boundary Commission, United States and Mexico, from provisions of section 5 of this title when aggregate amount involved did not exceed \$500.

Section 6gg, act May 14, 1940, ch. 189, title IV, 54 Stat. 211, excepted Administrative Office of United States Courts from provisions of section 5 of this title when aggregate amount involved did not exceed \$50.

Section 6hh, act June 11, 1940, ch. 313, title I, 54 Stat. 290, excepted Navy Department from provisions of section 5 of this title when aggregate amount involved did not exceed \$50.

Section 6ii, acts Jan. 25, 1929, ch. 102, title III, 45 Stat. 1119; Apr. 18, 1930, ch. 184, title III, 46 Stat. 198; Feb. 23, 1931, ch. 280, title III, 46 Stat. 1334; July 1, 1932, ch. 361, title III, 47 Stat. 502; Mar. 1, 1933, ch. 144, title III, 47 Stat. 1393; Apr. 7, 1934, ch. 104, title III, 48 Stat. 551; Mar. 22, 1935, ch. 39, 49 Stat. 90; May 15, 1936, ch. 405, 49 Stat. 1336; June 16, 1937, ch. 359, title III, 50 Stat. 287; Apr. 27, 1938, ch. 180, title III, 52 Stat. 273; June 29, 1939, ch. 248, title III, 53 Stat. 909, excepted Bureau of Foreign and Domestic Commerce from provisions of section 5 of this title when aggregate amount involved did not exceed \$100.

Section 6jj, acts May 13, 1926, ch. 294, 44 Stat. 548; Feb. 23, 1927, ch. 168, 44 Stat. 1157; May 14, 1928, ch. 551, 45 Stat. 528; Feb. 28, 1929, ch. 367, 45 Stat. 1397; June 6, 1930, ch. 407, 46 Stat. 516; Feb. 20, 1931, ch. 234, 46 Stat. 1186; June 30, 1932, ch. 314, 47 Stat. 393; Feb. 28, 1933, ch. 134, 47 Stat. 1362; May 30, 1934, ch. 372, 48 Stat. 828; July 8, 1935, ch. 374, 49 Stat. 471; Apr. 17, 1936, ch. 233, 49 Stat. 1226; May 18, 1937, ch. 223, 50 Stat. 181; May 17, 1938, ch.

236, 52 Stat. 392; June 16, 1939, ch. 208, 53 Stat. 834; June 18, 1940, ch. 396, 54 Stat. 474, excepted Botanic Garden, in purchase of trees and plants, from provisions of section 5 of this title when aggregate amount involved did not exceed \$300.

#### § 6kk. Omitted

##### CODIFICATION

Section, acts Apr. 17, 1936, ch. 233, 49 Stat. 1226; May 18, 1937, ch. 223, 50 Stat. 181; May 17, 1938, ch. 236, 52 Stat. 393; June 16, 1939, ch. 208, 53 Stat. 834; June 18, 1940, ch. 396, 54 Stat. 474, which excepted Botanic Garden, in purchase of supplies and equipment, from provisions of section 5 of this title when aggregate amount did not exceed \$50, was superseded by subsection (b) of section 6a of this title which was itself repealed by act Oct. 31, 1951, ch. 654, §1(107), 65 Stat. 705.

#### § 6ll. Repealed. Oct. 10, 1940, ch. 851, § 4, 54 Stat. 1111

Section, act Apr. 22, 1926, ch. 171, 44 Stat. 314, excepted National Advisory Committee for Aeronautics from provisions of section 5 of this title when aggregate amount involved did not exceed \$50.

#### § 6mm. Transferred

##### CODIFICATION

Section, act June 24, 1940, ch. 412, 54 Stat. 504, which excepted forest products by Indian enterprises from the forests on Indian reservations, was transferred to subsec. (d) of section 6b of this title.

#### §§ 7 to 7d. Repealed. June 30, 1949, ch. 288, title VI, § 602(a)(29)–(31), formerly title V, § 502(a)(29)–(31), 63 Stat. 401; renumbered Sept. 5, 1950, ch. 849, § 6(a), (b), 64 Stat. 583

Section 7, act June 17, 1910, ch. 297, § 4, 36 Stat. 531; Ex. Ord. No. 6166, §1, eff. June 10, 1933, as amended by Ex. Ord. No. 6623, eff. Mar. 1, 1934, related to advertisements and contracts for miscellaneous supplies for executive departments and other government establishments in Washington; Procurement Division in Department of Treasury; bond of contractor; and purchase or drawing of supplies.

Section 7a, act Feb. 27, 1929, ch. 354, §1, 45 Stat. 1341; Ex. Ord. No. 6166, §1, eff. June 10, 1933, as amended by Ex. Ord. No. 6623, eff. Mar. 1, 1934, related to consolidation and coordination of government purchases.

Section 7b, act Feb. 27, 1929, ch. 354, § 2, 45 Stat. 1342; Ex. Ord. No. 6166, §1, June 10, 1933, as amended by Ex. Ord. No. 6623, Mar. 1, 1934, provided for requisition of supplies and reimbursement.

Section 7c, act Feb. 27, 1929, ch. 354, § 3, 45 Stat. 1342; Ex. Ord. No. 6166, §1, eff. June 10, 1933, as amended by Ex. Ord. No. 6623, eff. Mar. 1, 1934, provided for a general supply fund and reports and audits.

Section 7c–1, act May 14, 1935, ch. 110, 49 Stat. 234; Ex. Ord. No. 6166, §1, eff. June 10, 1933, as amended by Ex. Ord. No. 6623, eff. Mar. 1, 1934, related to expenditures incidental to operation of government fuel yards.

Section 7d, act Feb. 27, 1929, ch. 354, § 4, 45 Stat. 1342, related to Secretary of Treasury's authority to prescribe regulations.

For similar subject matter, see section 201 et seq. of this title and sections 471 et seq. and 751 et seq. of Title 40, Public Buildings, Property, and Works.

##### EFFECTIVE DATE OF REPEAL

Repeal effective July 1, 1949, see section 605 of act June 30, 1949.

#### § 8. Opening bids

Whenever proposals for supplies have been solicited, the parties responding to such solicita-

tion shall be duly notified of the time and place of opening the bids, and be permitted to be present either in person or by attorney, and a record of each bid shall then and there be made. (R.S. §3710.)

##### CODIFICATION

R.S. §3710 derived from Res. Jan. 31, 1868, No. 8, 15 Stat. 246.

##### EXEMPTION OF FUNCTIONS

Functions authorized by Foreign Assistance Act of 1961, as amended, as exempt, see Ex. Ord. No. 11223, eff. May 12, 1965, 30 F.R. 6635, set out as a note under section 2393 of Title 22, Foreign Relations and Intercourse.

##### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 252, 260 of this title.

#### § 9. Repealed. Feb. 19, 1948, ch. 65, § 11(a), 62 Stat. 25

Section, R.S. §3717, related to separate proposals for works or material or labor. See sections 2303 to 2305 of Title 10, Armed Forces.

##### EFFECTIVE DATE OF REPEAL

Repeal effective 90 days after Feb. 19, 1948, see section 13 of act Feb. 19, 1948.

#### § 10. Omitted

##### CODIFICATION

Section, act Mar. 3, 1875, ch. 133, §2, 18 Stat. 455, related to preferential treatment of American material in contracts for public improvements, was superseded. See sections 10a to 10d of this title.

#### § 10a. American materials required for public use

Notwithstanding any other provision of law, and unless the head of the Federal agency concerned shall determine it to be inconsistent with the public interest, or the cost to be unreasonable, only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, shall be acquired for public use. This section shall not apply with respect to articles, materials, or supplies for use outside the United States, or if articles, materials, or supplies of the class or kind to be used or the articles, materials, or supplies from which they are manufactured are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality. This section shall not apply to manufactured articles, materials, or supplies procured under any contract the award value of which is less than or equal to the micro-purchase threshold under section 428 of this title.

(Mar. 3, 1933, ch. 212, title III, §2, 47 Stat. 1520; Aug. 23, 1988, Pub. L. 100-418, title VII, §7005(b), 102 Stat. 1553; Oct. 13, 1994, Pub. L. 103-355, title IV, §4301(b), 108 Stat. 3347.)



## AMENDMENT OF SECTION

*For termination of amendment by section 7004 of Pub. L. 100-418, see Effective and Termination Dates of 1988 Amendment note below.*

## AMENDMENTS

1994—Pub. L. 103-355 inserted at end “This section shall not apply to manufactured articles, materials, or supplies procured under any contract the award value of which is less than or equal to the micro-purchase threshold under section 428 of this title.”

1988—Pub. L. 100-418, §§ 7004, 7005(b), temporarily substituted “Federal agency” for “department or independent establishment”. See Effective and Termination Dates of 1988 Amendment note below.

## EFFECTIVE DATE OF 1994 AMENDMENT

Section 4301(c) of Pub. L. 103-355 provided that: “Notwithstanding any other provision of law—

“(1) section 32 of the Office of Federal Procurement Policy Act [41 U.S.C. 428], as added by subsection (a); and

“(2) the amendment made by subsection (b) [amending this section];

shall take effect on the date of the enactment of this Act [Oct. 13, 1994] and shall be implemented in the Federal Acquisition Regulation not later than 60 days after such date of enactment.”

## EFFECTIVE AND TERMINATION DATES OF 1988 AMENDMENT

Section 7004 of title VII of Pub. L. 100-418 provided that: “The amendments made by this title [see Short Title of 1988 Amendment note below] shall cease to be effective on April 30, 1996, unless the Congress, after reviewing the report required by section 305(k) of the Trade Agreements Act of 1979 [19 U.S.C. 2515(k)], and other relevant information, extends such date. After such date, the President may modify or terminate any or all actions taken pursuant to such amendments.”

Section 7005(f) of title VII of Pub. L. 100-418 provided that: “The amendments made by this section [amending sections 10a, 10b, 10c, and 10d of this title and section 2511 of Title 19, Customs Duties] shall take effect upon enactment [Aug. 23, 1988].”

## SHORT TITLE OF 1988 AMENDMENT

Section 7001 of title VII of Pub. L. 100-418 provided that: “This title [enacting section 10b-1 of this title, amending this section, sections 10b, 10c, and 10d of this title, and sections 2511 and 2515 of Title 19, Customs Duties, enacting provisions set out as notes under section 10a of this title, and amending provisions set out as notes under section 10c of this title] may be cited as the ‘Buy American Act of 1988’.”

## SHORT TITLE

Section 5 of act Mar. 3, 1933, as added by Pub. L. 103-355, title X, § 10005(f)(4), Oct. 13, 1994, 108 Stat. 3409, provided that: “This Act [enacting this section, sections 10b, 10b-1, and 10c of this title, and provisions set out as notes under section 10c of this title] may be cited as the ‘Buy American Act’.” [Another section 5 of act Mar. 3, 1933, is set out as an Effective Date note under section 10c of this title.]

## IMPLEMENTATION OF BUY AMERICAN ACT WITH RESPECT TO CERTAIN WATER RESOURCE PROJECTS

Pub. L. 100-371, title V, § 508, July 19, 1988, 102 Stat. 875, provided that:

“(a) GENERAL RULE.—For purposes of title III of the Act of March 3, 1933 (47 Stat. 1520; 41 U.S.C. 10a-10c), commonly known as the Buy American Act, a cofferdam or any other temporary structure to be constructed by the Secretary of the Army, acting through the Chief of Engineers, shall be treated in the same manner as a permanent dam constructed by the Secretary of the Army.

“(b) APPLICABILITY.—Subsection (a) shall only apply to contracts entered into after the date of the enactment of this Act [July 19, 1988].”

## EXEMPTION OF FUNCTIONS

Functions authorized by Foreign Assistance Act of 1961, as amended, as exempt, see Ex. Ord. No. 11223, eff. May 12, 1965, 30 F.R. 6635, set out as a note under section 2393 of Title 22, Foreign Relations and Intercourse.

## APPLICABILITY OF BUY AMERICAN ACT WITH RESPECT TO EUROPEAN COMMUNITY

For applicability of Buy American Act to procurements covered by agreement with the European Community on government procurement, see Ex. Ord. No. 12849, May 25, 1993, 58 F.R. 30931, set out as a note under section 2511 of Title 19, Customs Duties.

## SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 10b, 10b-2, 10c, 10d, 42, 428 of this title; title 10 sections 2457, 2533; title 15 sections 2507, 5528; title 19 sections 2512, 2513; title 20 section 6067; title 24 section 225h; title 25 section 1638b.

**§ 10b. Contracts for public works; specification for use of American materials; blacklisting contractors violating requirements**

(a) Every contract for the construction, alteration, or repair of any public building or public work in the United States growing out of an appropriation heretofore made or hereafter to be made shall contain a provision that in the performance of the work the contractor, subcontractors, material men, or suppliers, shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States except as provided in section 10a of this title: *Provided, however,* That if the head of the Federal agency making the contract shall find that in respect to some particular articles, materials, or supplies it is impracticable to make such requirement or that it would unreasonably increase the cost, an exception shall be noted in the specifications as to that particular article, material, or supply, and a public record made of the findings which justified the exception.

(b) If the head of a Federal agency which has made any contract containing the provision required by subsection (a) of this section finds that in the performance of such contract there has been a failure to comply with such provisions, he shall make public his findings, including therein the name of the contractor obligated under such contract, and no other contract for the construction, alteration, or repair of any public building or public work in the United States or elsewhere shall be awarded to such contractor, subcontractors, material men, or suppliers with which such contractor is associated or affiliated, within a period of three years after such findings is made public.

(Mar. 3, 1933, ch. 212, title III, § 3, 47 Stat. 1520; Aug. 23, 1988, Pub. L. 100-418, title VII, § 7005(c), 102 Stat. 1553.)

## AMENDMENT OF SECTION

*For termination of amendment by section 7004 of Pub. L. 100-418, see Termination Date of 1988 Amendment note below.*

## AMENDMENTS

1988—Subsec. (a). Pub. L. 100-418, §§7004, 7005(c)(1), which directed that this section be temporarily amended by substituting “Federal agency” for “department or independent establishment”, was executed to subsec. (a) as the probable intent of Congress. See Termination Date of 1988 Amendment note below.

Subsec. (b). Pub. L. 100-418, §§7004, 7005(c)(2), temporarily substituted “Federal agency” for “department, bureau, agency, or independent establishment”. See Termination Date of 1988 Amendment note below.

## TERMINATION DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100-418 to cease to be effective on Apr. 30, 1996, unless Congress, after reviewing report required by section 2515(k) of Title 19, Customs Duties, extends such date, see section 7004 of Pub. L. 100-418, set out as an Effective and Termination Dates of 1988 Amendment note under section 10a of this title.

## PROHIBITION ON USE OF FUNDS FOR CONSTRUCTION CONTRACTS WITH CONTRACTORS OF FOREIGN COUNTRIES WHICH DENY UNITED STATES CONTRACTORS FAIR OPPORTUNITIES IN CONSTRUCTION PROJECTS OF THAT COUNTRY'S GOVERNMENT

Provisions prohibiting the obligation or expenditure of funds to enter into any contract for construction, alteration, or repair of any public building or public work in the United States or any territory or possession of the United States with any contractor or subcontractor of a foreign country, or any supplier of products of a foreign country, during any period in which such foreign country denies fair and equitable market opportunities for products and services of the United States in procurement or bidding for construction projects that cost more than \$500,000 and are funded in whole or in part by the government of such foreign country or by an entity controlled directly or indirectly by such foreign country were contained in the following appropriation acts:

Pub. L. 101-516, title III, §340, Nov. 5, 1990, 104 Stat. 2187.

Pub. L. 101-514, title V, §511, Nov. 5, 1990, 104 Stat. 2098.

Pub. L. 100-202, §109, Dec. 22, 1987, 101 Stat. 1329-434.

## SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 10b-2, 10c, 10d, 42, 428 of this title; title 10 section 2533; title 15 sections 2507, 5528; title 19 sections 2512, 2513; title 20 section 6067; title 24 section 225h; title 25 section 1638b.

**§ 10b-1. Prohibition on procurement contracts; exceptions****(a) Federal contracts for goods or services of foreign origin**

A Federal agency shall not award any contract—

(1) for the procurement of an article, material, or supply mined, produced, or manufactured—

(A) in a signatory country that is considered to be a signatory not in good standing of the Agreement pursuant to section 2515(f)(3)(A)<sup>1</sup> of title 19; or

(B) in a foreign country whose government maintains, in government procurement, a significant and persistent pattern or prac-

tice of discrimination against United States products or services which results in identifiable harm to United States businesses, as identified by the President pursuant to section 2515(g)(1)(A) of title 19; or

(2) for the procurement of a service of any contractor or subcontractor that is a citizen or national of a foreign country identified by the President pursuant to section 2515(f)(3)(A)<sup>1</sup> or 2515(g)(1)(A) of title 19, or is owned or controlled directly or indirectly by citizens or nationals of such a foreign country.

**(b) Exceptions to prohibition**

The prohibition on procurement in subsection (a) of this section is subject to sections 2515(h) and 2515(j) of title 19 and shall not apply—

(1) with respect to services, articles, materials, or supplies procured and used outside the United States and its territories;

(2) notwithstanding section 2515(g) of title 19, to an eligible product of a country which is a signatory country unless that country is considered to be a signatory not in good standing pursuant to section 2515(f)(3)(A)<sup>1</sup> of title 19; or

(3) notwithstanding section 2515(g) of title 19, to a country that is a least developed country (as that term is defined in section 2518(6) of title 19).

**(c) Authority of President or Federal agency heads to authorize contracts**

Notwithstanding subsection (a) of this section, the President or the head of a Federal agency may authorize the award of a contract or class of contracts if the President or the head of the Federal agency—

(1) determines that such action is necessary—

(A) in the public interest;

(B) to avoid the restriction of competition in a manner which would limit the procurement in question to, or would establish a preference for, the services, articles, materials, or supplies of a single manufacturer or supplier; or

(C) because there would be or are an insufficient number of potential or actual bidders to assure procurement of services, articles, materials, or supplies of requisite quality at competitive prices; and

(2) notifies the Committee on Governmental Affairs of the Senate, as well as other appropriate Senate committees, and the appropriate committees of the House of Representatives, of such determination—

(A) not less than 30 days prior to the date of the award of the contract or the date of authorization of the award of a class of contracts; or

(B) if the agency's need for the service, article, material, or supply is of such urgency that the United States would be seriously injured by delaying the award or authorization, not more than 90 days after the date of such award or authorization.

**(d) Limitation on authority of Federal agency heads to authorize contracts**

The authority of the head of a Federal agency under subsection (c) of this section shall not

<sup>1</sup> See References in Text note below.

apply to contracts subject to memorandums of understanding entered into by the Department of Defense (or any military department) and a representative of a foreign country (or agency or instrumentality thereof). In the case of any such contracts, any determinations and notice required by subsection (c) of this section shall be made by—

- (1) the President, or
- (2) if delegated, by the Secretary of Defense or the Secretary of the Army, Navy, or Air Force, subject to review and policy guidance by the organization established under section 1872(a) of title 19.

**(e) Non-delegability of agency heads' authority**

The authority of the head of a Federal agency under subsection (c) or (d) of this section may not be delegated.

**(f) Other authorities to bar procurement from non-designated countries not affected**

Nothing in this section shall restrict the application of the prohibition under section 2512(a)(1) of title 19.

**(g) Ownership or control of contractors or subcontractors by citizens or nationals of foreign countries**

(1) For purposes of this section with respect to construction services, a contractor or subcontractor is owned or controlled directly or indirectly by citizens or nationals of a foreign country if—

(A) 50 percent or more of the voting stock of the contractor or subcontractor is owned by one or more citizens or nationals of the foreign country;

(B) the title to 50 percent or more of the stock of the contractor or subcontractor is held subject to trust or fiduciary obligations in favor of one or more citizens or nationals of the foreign country;

(C) 50 percent or more of the voting stock of the contractor or subcontractor is vested in or exercisable on behalf of one or more citizens or nationals of the foreign country;

(D) the case of a corporation—

(i) the number of its directors necessary to constitute a quorum are citizens or nationals of the foreign country; or

(ii) the corporation is organized under the laws of the foreign country or any subdivision, territory, or possession thereof; or

(E) in the case of a contractor or subcontractor who is a participant in a joint venture or a member of a partnership, any participant of the joint venture or partner meets any of the criteria in subparagraphs (A) through (D) of this paragraph.

(2)(A) For purposes of this section, except as provided in paragraph (1), a determination of whether a contractor or subcontractor is a citizen or national of a foreign country or is owned or controlled directly or indirectly by citizens or nationals of a foreign country shall be made in accordance with policy guidance prescribed by the Administrator for Federal Procurement Policy after conducting one or more public hearings at which interested parties may present comments. Sections 556 and 557 of title 5 shall not apply to the conduct of any such hearing.

(B) The Administrator shall include in the policy guidance prescribed under subparagraph (A) definitions, procedures, standards, and rules that, to the extent the Administrator considers appropriate and consistent with the applicability of such policy guidance to all services (other than construction services), is the same as or similar to the definitions, procedures, standards, and rules that the Administrator has developed and issued for the administration of section 109 of the Treasury, Postal Service, and General Government Appropriations Act, 1988 (101 Stat. 1329-434).

**(h) Definitions**

As used in this section—

(1) the term "Agreement" means the Agreement on Government Procurement as defined in section 2518(1) of title 19;

(2) the term "signatory" means a party to the Agreement; and

(3) the term "eligible product" has the meaning given such term by section 2518(4) of title 19.

(Mar. 3, 1933, ch. 212, title III, § 4, as added Aug. 23, 1988, Pub. L. 100-418, title VII, § 7002(2), 102 Stat. 1545; amended Oct. 13, 1994, Pub. L. 103-355, title VII, § 7206(a), 108 Stat. 3382.)

TERMINATION OF SECTION

*For termination of section by section 7004 of Pub. L. 100-418, see Termination Date note below.*

REFERENCES IN TEXT

Section 2515(f)(3) of title 19, referred to in subsecs. (a)(1)(A), (2) and (b)(2), was amended generally by Pub. L. 103-465, title III, § 341(b)(1), Dec. 8, 1994, 108 Stat. 4952, and, as so amended, provisions formerly appearing in section 2515(f)(3)(A) of title 19 are contained in section 2515(f)(3)(B)(i)(I) of title 19.

Section 109 of the Treasury, Postal Service, and General Government Appropriations Act, 1988, referred to in subsec. (g)(2)(B), is section 109 of Pub. L. 100-202, which is set out as a note under section 601 of Title 40, Public Buildings, Property, and Works.

PRIOR PROVISIONS

A prior section 4 of act Mar. 3, 1933, was renumbered section 5 and is set out as a note under section 10c of this title.

AMENDMENTS

1994—Subsec. (g)(2)(C), (3). Pub. L. 103-355 struck out pars. (2)(C) and (3) which read as follows:

“(C) The policy guidance required by subparagraph (A) shall be prescribed not later than 180 days after August 23, 1988.

“(3)(A) The Administrator for Federal Procurement Policy shall conduct an assessment of the current rules under sections 10a, 10b, 10b-1, and 10c of this title for making determinations of country of origin and alternatives to such rules. Such assessment shall identify and evaluate (i) reasonable alternatives to such rules of origin, including one or more alternative rules that require a determination on the basis of total cost, and (ii) the specific cost factors that should be included in determining total cost.

“(B) In conducting the analysis, the Administrator shall consult and seek comment from representatives of United States labor and business, other interested United States persons, and other Federal agencies. The Administrator shall hold public hearings for the purpose of obtaining such comment, and a transcript of such hearings shall be appended to the report required by subparagraph (C).

“(C) A report on the results of the analysis shall be submitted to the appropriate committees of the House of Representatives and to the Committee on Governmental Affairs and other appropriate committees of the Senate not later than 18 months after August 23, 1988. Such report shall include proposed policy guidance or any recommended legislative changes on the factors to be used in making determinations of country of origin.”

#### TERMINATION DATE

Section to cease to be effective on Apr. 30, 1996, unless Congress, after reviewing report required by section 2515(k) of Title 19, Customs Duties, extends such date, see section 7004 of Pub. L. 100-418, set out as an Effective and Termination Dates of 1988 Amendment note under section 10a of this title.

#### DELEGATION OF FUNCTIONS

Functions of President under this section delegated to Secretary of Defense, see section 4-101(1) of Ex. Ord. No. 12661, Dec. 27, 1988, 54 F.R. 779, set out as a note under section 2901 of Title 19, Customs Duties.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 10b-2, 10c, 42, 428 of this title; title 10 sections 2324, 2533; title 15 sections 2507, 5528; title 19 sections 2512, 2513, 2515; title 20 section 6067; title 24 section 225h; title 25 section 1638b.

### § 10b-2. Limitation on authority to waive Buy American Act requirement

#### (a) Determination by Secretary of Defense

(1) If the Secretary of Defense, after consultation with the United States Trade Representative, determines that a foreign country which is party to an agreement described in paragraph (2) has violated the terms of the agreement by discriminating against certain types of products produced in the United States that are covered by the agreement, the Secretary of Defense shall rescind the Secretary's blanket waiver of the Buy American Act with respect to such types of products produced in that foreign country.

(2) An agreement referred to in paragraph (1) is any reciprocal defense procurement memorandum of understanding, between the United States and a foreign country pursuant to which the Secretary of Defense has prospectively waived the Buy American Act for certain products in that country.

#### (b) Report to Congress

The Secretary of Defense shall submit to Congress a report on the amount of Department of Defense purchases from foreign entities in fiscal year 1996. Such report shall separately indicate the dollar value of items for which the Buy American Act was waived pursuant to any agreement described in subsection (a)(2) of this section, the Trade Agreement Act of 1979 (19 U.S.C. 2501 et seq.), or any international agreement to which the United States is a party.

#### (c) “Buy American Act” defined

For purposes of this section, the term “Buy American Act” means title III of the Act entitled “An Act making appropriations for the Treasury and Post Office Departments for the fiscal year ending June 30, 1934, and for other purposes”, approved March 3, 1933 (41 U.S.C. 10a et seq.).

(Pub. L. 104-61, title VIII, §8051, Dec. 1, 1995, 109 Stat. 662.)

#### REFERENCES IN TEXT

The Buy American Act, referred to in text, is title III of act Mar. 3, 1933, ch. 212, 47 Stat. 1520, as amended, which enacted sections 10a, 10b, 10b-1, and 10c of this title, and enacted provisions set out as notes under section 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.

The Trade Agreement Act of 1979, referred to in subsec. (b), probably means the Trade Agreements Act of 1979, Pub. L. 96-39, July 26, 1979, 93 Stat. 144. For complete classification of this Act to the Code, see References in Text note set out under section 2501 of Title 19, Customs Duties, and Tables.

#### PRIOR PROVISIONS

Provisions similar to those in this section were contained in the following prior acts:

Pub. L. 103-335, title VIII, §8058, Sept. 30, 1994, 108 Stat. 2631.

Pub. L. 103-139, title VIII, §8069, Nov. 11, 1993, 107 Stat. 1455.

Pub. L. 102-396, title IX, §9096, Oct. 6, 1992, 106 Stat. 1924, as amended by Pub. L. 103-355, title VII, §7206(b), Oct. 13, 1994, 108 Stat. 3382.

Pub. L. 102-190, div. A, title VIII, §833, Dec. 5, 1991, 105 Stat. 1447.

Pub. L. 102-172, title VIII, §8123, Nov. 26, 1991, 105 Stat. 1205.

Pub. L. 101-189, div. A, title VIII, §823, Nov. 29, 1989, 103 Stat. 1504.

#### BUY AMERICAN ACT WAIVER RESCISSIONS

Pub. L. 103-160, div. A, title VIII, §849(c), (d), Nov. 30, 1993, 107 Stat. 1725, provided that:

“(c) BUY AMERICAN ACT WAIVER RESCISSIONS.—(1) If the Secretary of Defense, after consultation with the United States Trade Representative, determines that a foreign country which is party to an agreement described in paragraph (2) has violated the terms of the agreement by discriminating against certain types of products produced in the United States that are covered by the agreement, the Secretary of Defense shall rescind the Secretary's blanket waiver of the Buy American Act with respect to such types of products produced in that foreign country.

“(2) An agreement referred to in paragraph (1) is any reciprocal defense procurement memorandum of understanding between the United States and a foreign country pursuant to which the Secretary of Defense has prospectively waived the Buy American Act for certain products in that country.

“(d) DEFINITION.—For purposes of this section, the term ‘Buy American Act’ means title III of the Act entitled ‘An Act making appropriations for the Treasury and Post Office Departments for the fiscal year ending June 30, 1934, and for other purposes’, approved March 3, 1933 (41 U.S.C. 10a et seq.).”

### § 10c. Definition of terms used in sections 10a, 10b, 10b-1, and 10c

When used in sections 10a, 10b, 10b-1, and 10c of this title—

(a) The term “United States”, when used in a geographical sense, includes the United States and any place subject to the jurisdiction thereof;

(b) The terms “public use”, “public building”, and “public work” shall mean use by, public building of, and public work of, the United States, the District of Columbia, Puerto Rico, American Samoa, the Canal Zone, and the Virgin Islands;

(c) The term “Federal agency” has the meaning given such term by section 472 of title 40, which includes the Departments of the Army, Navy, and Air Force.

(Mar. 3, 1933, ch. 212, title III, § 1, 47 Stat. 1520; Proc. No. 2695, eff. July 4, 1946, 11 F.R. 7517, 60 Stat. 1352; June 25, 1959, Pub. L. 86-70, § 43, 73 Stat. 151; July 12, 1960, Pub. L. 86-624, § 28, 74 Stat. 419; Aug. 23, 1988, Pub. L. 100-418, title VII, § 7005(a), 102 Stat. 1552.)

#### AMENDMENT OF SECTION

*For termination of amendment by section 7004 of Pub. L. 100-418, see Termination Date of 1988 Amendment note below.*

#### REFERENCES IN TEXT

For definition of Canal Zone, referred to in subsec. (b), see section 3602(b) of Title 22, Foreign Relations and Intercourse.

#### CODIFICATION

Words “the Philippine Islands” in subsec. (b) of this section were deleted as obsolete in view of recognition of independence of the Philippines by Proc. No. 2695, which was issued pursuant to section 1394 of Title 22, Foreign Relations and Intercourse, and is set out as a note under section 1394.

#### AMENDMENTS

1988—Subsec. (c). Pub. L. 100-418, §§ 7004, 7005(a), temporarily added subsec. (c). See Termination Date of 1988 Amendment note below.

1960—Subsec. (b). Pub. L. 86-624 struck out Hawaii.

1959—Subsec. (b). Pub. L. 86-70 struck out Alaska.

#### TERMINATION DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100-418 to cease to be effective on Apr. 30, 1996, unless Congress, after reviewing report required by section 2515(k) of Title 19, Customs Duties, extends such date, see section 7004 of Pub. L. 100-418, set out as an Effective and Termination Dates of 1988 Amendment note under section 10a of this title.

#### EFFECTIVE DATE

Section 5, formerly section 4 of act Mar. 3, 1933, as renumbered by Pub. L. 100-418, title VII, § 7002(1), Aug. 23, 1988, 102 Stat. 1545, provided: “This title [enacting sections 10a to 10c of this title] shall take effect on the date of its enactment [Mar. 3, 1933], but shall not apply to any contract entered into prior to such effective date.” [Another section 5 of act Mar. 3, 1933, is set out as a Short Title note under section 10a of this title.]

#### SEPARABILITY

Section 6, formerly section 5 of act Mar. 3, 1933, as renumbered by Pub. L. 100-418, title VII, § 7002(1), Aug. 23, 1988, 102 Stat. 1545, provided: “If any provision of this Act [enacting this section and sections 10a, 10b, and 10b-1 of this title], or the application thereof to any person or circumstances, is held invalid, the remainder of the Act, and the application thereof to other persons or circumstances, shall not be affected thereby.”

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 10b-2, 42, 428 of this title; title 10 section 2533; title 15 sections 2507, 5528; title 19 sections 2512, 2513; title 20 section 6067; title 24 section 225h; title 25 section 1638b.

### § 10d. Clarification of Congressional intent regarding sections 10a and 10b(a)

In order to clarify the original intent of Congress, hereafter, section 10a of this title and that part of section 10b(a) of this title preceding the words “*Provided, however,*” shall be regarded as requiring the purchase, for public use within the United States, of articles, materials, or supplies manufactured in the United States in sufficient

and reasonably available commercial quantities and of a satisfactory quality, unless the head of the Federal agency concerned shall determine their purchase to be inconsistent with the public interest or their cost to be unreasonable.

(Oct. 29, 1949, ch. 787, title VI, § 633, 63 Stat. 1024; Aug. 23, 1988, Pub. L. 100-418, title VII, § 7005(d), 102 Stat. 1553.)

#### AMENDMENT OF SECTION

*For termination of amendment by section 7004 of Pub. L. 100-418, see Termination Date of 1988 Amendment note below.*

#### AMENDMENTS

1988—Pub. L. 100-418, §§ 7004, 7005(d), temporarily substituted “Federal agency” for “department or independent establishment”. See Termination Date of 1988 Amendment note below.

#### TERMINATION DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100-418 to cease to be effective on Apr. 30, 1996, unless Congress, after reviewing report required by section 2515(k) of Title 19, Customs Duties, extends such date, see section 7004 of Pub. L. 100-418, set out as an Effective and Termination Dates of 1988 Amendment note under section 10a of this title.

#### EX. ORD. NO. 10582. UNIFORM PROCEDURES FOR DETERMINATIONS

Ex. Ord. No. 10582, Dec. 17, 1954, 19 F.R. 8723, as amended by Ex. Ord. No. 11051, Sept. 27, 1962, 27 F.R. 9683; Ex. Ord. No. 12148, July 20, 1979, 44 F.R. 43239; Ex. Ord. No. 12608, Sept. 9, 1987, 52 F.R. 34617, provided:

SECTION 1. As used in this order, (a) the term “materials” includes articles and supplies, (b) the term “executive agency” includes executive department, independent establishment, and other instrumentality of the executive branch of the Government, and (c) the term “bid or offered price of materials of foreign origin” means the bid or offered price of such materials delivered at the place specified in the invitation to bid including applicable duty and all costs incurred after arrival in the United States.

SEC. 2. (a) For the purposes of this order materials shall be considered to be of foreign origin if the cost of the foreign products used in such materials constitutes fifty per centum or more of the cost of all the products used in such materials.

(b) For the purposes of the said act of March 3, 1933 [41 U.S.C. 10a to 10c], and the other laws referred to in the first paragraph of the preamble of this order, the bid or offered price of materials of domestic origin shall be deemed to be unreasonable, or the purchase of such materials shall be deemed to be inconsistent with the public interest, if the bid or offered price thereof exceeds the sum of the bid or offered price of like materials of foreign origin and a differential computed as provided in subsection (c) of this section.

(c) The executive agency concerned shall in each instance determine the amount of the differential referred to in subsection (b) of this section on the basis of one of the following-described formulas, subject to the terms thereof:

(1) The sum determined by computing six per centum of the bid or offered price of materials of foreign origin.

(2) The sum determined by computing ten per centum of the bid or offered price of materials of foreign origin exclusive of applicable duty and all costs incurred after arrival in the United States: provided that when the bid or offered price of materials of foreign origin amounts to less than \$25,000, the sum shall be determined by computing ten per centum of such price exclusive only of applicable duty.

SEC. 3. Nothing in this order shall affect the authority or responsibility of an executive agency:

(a) To reject any bid or offer for reasons of the national interest not described or referred to in this order; or

(b) To place a fair proportion of the total purchases with small business concerns in accordance with section 302(b) of the Federal Property and Administrative Services Act of 1949, as amended [41 U.S.C. 252(b)], section 2(b) of the Armed Services Procurement Act of 1947, as amended [41 U.S.C. 151(b)], and section 202 of the Small Business Act of 1953 [15 U.S.C. 631]; or

(c) To reject a bid or offer to furnish material of foreign origin in any situation in which the domestic supplier offering the lowest price for furnishing the desired materials undertakes to produce substantially all of such materials in areas of substantial unemployment, as determined by the Secretary of Labor in accordance with such appropriate regulations as he may establish and during such period as the President may determine that it is in the national interest to provide to such areas preference in the award of Government contracts: *Provided*, that nothing in this section shall prevent the rejection of a bid or offered price which is excessive; or

(d) To reject any bid or offer for materials of foreign origin if such rejection is necessary to protect essential national-security interests after receiving advice with respect thereto from the President or from the Director of the Federal Emergency Management Agency. In providing this advice the Director shall be governed by the principle that exceptions under this section shall be made only upon a clear showing that the payment of a greater differential than the procedures of this section generally prescribe is justified by consideration of national security.

SEC. 4. The head of each executive agency shall issue such regulations as may be necessary to insure that procurement practices under his jurisdiction conform to the provisions of this order.

SEC. 5. This order shall apply only to contracts entered into after the date hereof. In any case in which the head of an executive agency proposing to purchase domestic materials determines that a greater differential than that provided in this order between the cost of such materials of domestic origin and materials of foreign origin is not unreasonable or that the purchase of materials of domestic origin is not inconsistent with the public interest, this order shall not apply. A written report of the facts of each case in which such a determination is made shall be submitted to the President through the Director of the Office of Management and Budget by the official making the determination within 30 days thereafter.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 15 section 5528.

### § 11. No contracts or purchases unless authorized or under adequate appropriation; report to the Congress

(a) No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the Department of Defense and in the Department of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy, for clothing, subsistence, forage, fuel, quarters,<sup>1</sup> transportation, or medical and hospital supplies, which, however, shall not exceed the necessities of the current year.

(b) The Secretary of Defense and the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy shall immediately advise the Congress of the exercise of the authority granted in subsection (a) of this section, and shall report quarterly on the estimated obligations incurred pursuant to the authority granted in subsection (a) of this section.

<sup>1</sup> So in original.

(R.S. § 3732; June 12, 1906, ch. 3078, 34 Stat. 255; Oct. 15, 1966, Pub. L. 89-687, title VI, § 612(e), 80 Stat. 993; Oct. 30, 1984, Pub. L. 98-557, § 17(e), 98 Stat. 2868.)

#### CODIFICATION

R.S. § 3732 derived from act Mar. 2, 1861, ch. 84, § 10, 12 Stat. 220.

#### AMENDMENTS

1984—Subsec. (a). Pub. L. 98-557, § 17(e)(1)(A), substituted “except in the Department of Defense and in the Department of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy” for “except in the War and Navy Departments”.

Pub. L. 98-557, § 17(e)(1)(B), substituted “, transportation, or medical and hospital supplies” for “or transportation”, such change having been made by Act June 12, 1906, thereby requiring no further change in text. See Repeals note below.

Subsec. (b). Pub. L. 98-557, § 17(e)(2), inserted provisions relating to the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy.

1966—Pub. L. 89-687 designated existing provisions as subsec. (a) and added subsec. (b).

1906—Act June 12, 1906, inserted “medical and hospital supplies”.

#### REPEALS

The first proviso under the heading “MEDICAL DEPARTMENT” in act June 12, 1906, ch. 3078, 34 Stat. 255, cited as a credit to this section, was repealed by Pub. L. 98-557, § 17(e)(3), Oct. 30, 1984, 98 Stat. 2868.

#### CROSS REFERENCES

Contracts for Indian supplies in advance of appropriations, see section 99 of Title 25, Indians.

Expenditure by any department in excess of appropriations prohibited, see section 1341 of Title 31, Money and Finance.

Printing appropriations not to be exceeded, see section 1102 of Title 44, Public Printing and Documents.

Projects under Mexican treaties, authority to enter into contracts beyond amount appropriated, notwithstanding this section, see section 277d-3 of Title 22, Foreign Relations and Intercourse.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 10 section 2201; title 19 section 2081; title 22 section 277d-3; title 26 section 7608; title 33 section 891d; title 42 section 9619.

### § 11a. Contracts for fuel by Secretary of the Army without regard to current fiscal year

When, in the opinion of the Secretary of the Army, it is in the interest of the United States so to do, he is authorized to enter into contracts and to incur obligations for fuel in sufficient quantities to meet the requirements for one year without regard to the current fiscal year, and payments for supplies delivered under such contracts may be made from funds appropriated for the fiscal year in which the contract is made, or from funds appropriated or which may be appropriated for such supplies for the ensuing fiscal year.

(June 30, 1921, ch. 33, § 1, 42 Stat. 78; July 26, 1947, ch. 343, title II, § 205(a), 61 Stat. 501.)

#### CODIFICATION

Section was formerly classified to section 668 of Title 31 prior to the general revision and enactment of Title 31, Money and Finance, by Pub. L. 97-258, § 1, Sept. 13, 1982, 96 Stat. 877.

## CHANGE OF NAME

Department of War designated Department of the Army and title of Secretary of War changed to Secretary of the Army by section 205(a) of act July 26, 1947, ch. 343, title II, 61 Stat. 501. Section 205(a) of act July 26, 1947, was repealed by section 53 of act Aug. 10, 1956, ch. 1041, 70A Stat. 641. Section 1 of act Aug. 10, 1956, enacted "Title 10, Armed Forces" which in sections 3010 to 3013 continued Department of the Army under administrative supervision of Secretary of the Army.

## TRANSFER OF FUNCTIONS

For transfer of certain procurement and related functions and property, and functions relating to finance and fiscal matters, insofar as they pertain to Air Force, from Secretary of the Army to Secretary of the Air Force, see Secretary of Defense Transfer Order Nos. 6, eff. Jan. 15, 1948; 25, Oct. 14, 1948; 39, May 18, 1949; and 40 [App. B(93)], July 22, 1949.

Public Buildings Administration abolished by act June 30, 1949, ch. 288, title I, §103, 63 Stat. 380, and functions transferred to General Services Administration. See section 753 of Title 40, Public Buildings, Property, and Works.

Public Buildings Branch of Procurement Division (Bureau of Federal Supply) of Treasury Department transferred to Public Buildings Administration within Federal Works Agency, see Reorg. Plan No. I of 1939, §§301, 303, eff. July 1, 1939, 4 F.R. 2729, 53 Stat. 1426, 1427, set out in the Appendix to Title 5, Government Organization and Employees.

Functions of procurement of supplies, services, stores, etc., exercised by any other agency transferred to Procurement Division in Treasury Department by Ex. Ord. No. 6166, §1, June 10, 1933, set out as a note under section 901 of Title 5. Name of Procurement Division changed to Bureau of Federal Supply by Treasury Department Order 73 dated Nov. 19, 1946. Bureau transferred on July 1, 1949, to General Services Administration, where it functions as Federal Supply Service, pursuant to act June 30, 1949, ch. 288, §102, 63 Stat. 380.

**§ 12. No contract to exceed appropriation**

No contract shall be entered into for the erection, repair, or furnishing of any public building, or for any public improvement which shall bind the Government to pay a larger sum of money than the amount in the Treasury appropriated for the specific purpose.

(R.S. §3733.)

## CODIFICATION

R.S. §3733 derived from act July 25, 1868, ch. 233, §3, 15 Stat. 177.

## CROSS REFERENCES

Contracting officer paying larger amount than specific appropriation, punishment for, see section 435 of Title 18, Crimes and Criminal Procedure.

Foreign military personnel, furnishing facilities for training of without regard to this section, see section 2396 of Title 22, Foreign Relations and Intercourse.

Making of contracts for public buildings on partial appropriations, see section 261 of Title 40, Public Buildings, Property, and Works.

Projects under Mexican treaties, authority to enter into contracts beyond amount appropriated, notwithstanding this section, see section 277d-3 of Title 22, Foreign Relations and Intercourse.

Section inapplicable to lease-purchase contracts, see section 356 of Title 40, Public Buildings, Property, and Works.

## SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 22 sections 277d-3, 2396; title 40 section 356.

**§ 13. Contracts limited to one year**

Except as otherwise provided, it shall not be lawful for any of the executive departments to make contracts for stationery or other supplies for a longer term than one year from the time the contract is made.

(R.S. §3735.)

## CODIFICATION

R.S. §3735 derived from Res. Jan. 31, 1868, No. 8, 15 Stat. 246; Res. Mar. 24, 1874, No. 6, 18 Stat. 286.

"Except as otherwise provided," was first inserted by the Revisers of the 1934 edition of the Code.

## EXEMPTION OF FUNCTIONS

Functions authorized by Foreign Assistance Act of 1961, as amended, as exempt, see Ex. Ord. No. 11223, eff. May 12, 1965, 30 F.R. 6635, set out as a note under section 2393 of Title 22, Foreign Relations and Intercourse.

## SECTION INAPPLICABLE TO ARMED SERVICES AND NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

Section inapplicable to procurement of supplies or services by Armed Services and National Aeronautics and Space Administration, see section 2314 of Title 10, Armed Forces.

## CROSS REFERENCES

Contracts by Secretary of the Treasury for manufacture of distinctive paper for United States securities, see section 5114 of Title 31, Money and Finance.

General Services Administration, section inapplicable to procurement of property or services, see section 260 of this title.

## SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 260 of this title; title 10 section 2314.

**§ 13a. Repealed. Pub. L. 86-682, § 12(c), Sept. 2, 1960, 74 Stat. 710**

Section, Joint Res. Mar. 24, 1874, No. 6, 18 Stat. 286, excepted mail bags, mail locks, and keys from provisions of section 13 of this title.

**§ 14. Restriction on purchases of land**

No land shall be purchased on account of the United States, except under a law authorizing such purchase.

(R.S. §3736.)

## CODIFICATION

R.S. §3736 derived from act May 1, 1820, ch. 52, §7, 3 Stat. 568.

## CROSS REFERENCES

Section inapplicable to lease-purchase contracts, see section 356 of Title 40, Public Buildings, Property, and Works.

## SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 40 section 356.

**§ 15. Transfers of contracts; assignments; assignee not subject to reduction or setoff****(a) Transfer**

No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the

United States is concerned. All rights of action, however, for any breach of such contract by the contracting parties, are reserved to the United States.

**(b) Assignment**

The provisions of subsection (a) of this section shall not apply in any case in which the moneys due or to become due from the United States or from any agency or department thereof, under a contract providing for payments aggregating \$1,000 or more, are assigned to a bank, trust company, or other financing institution, including any Federal lending agency, provided:

(1) That, in the case of any contract entered into after October 9, 1940, no claim shall be assigned if it arises under a contract which forbids such assignment.

(2) That, unless otherwise expressly permitted by such contract, any such assignment shall cover all amounts payable under such contract and not already paid, shall not be made to more than one party, and shall not be subject to further assignment, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing.

(3) That, in the event of any such assignment, the assignee thereof shall file written notice of the assignment together with a true copy of the instrument of the assignment with—

(A) the contracting officer or the head of his department or agency;

(B) the surety or sureties upon the bond or bonds, if any, in connection with such contract; and

(C) the disbursing officer, if any, designated in such contract to make payment.

**(c) Validity of assignment**

Notwithstanding any law to the contrary governing the validity of assignments, any assignment pursuant to this section shall constitute a valid assignment for all purposes.

**(d) Assignee liability**

In any case in which moneys due or to become due under any contract are or have been assigned pursuant to this section, no liability of any nature of the assignor to the United States or any department or agency thereof, whether arising from or independently of such contract, shall create or impose any liability on the part of the assignee to make restitution, refund, or repayment to the United States of any amount heretofore since July 1, 1950, or hereafter received under the assignment.

**(e) Amendment of contract**

Any contract of the Department of Defense, the General Services Administration, the Department of Energy, or any other department or agency of the United States designated by the President, except any such contract under which full payment has been made, may, upon a determination of need by the President, provide or be amended without consideration to provide that payments to be made to the assignee of any moneys due or to become due under such contract shall not be subject to reduction or setoff. Each such determination of need shall be published in the Federal Register.

**(f) Assignor liability arising independent of contract**

If a provision described in subsection (e) of this section or a provision to the same general effect has been at any time heretofore or is hereafter included or inserted in any such contract, payments to be made thereafter to an assignee of any moneys due or to become due under such contract shall not be subject to reduction or setoff for any liability of any nature of the assignor to the United States or any department or agency thereof which arises independently of such contract, or hereafter for any liability of the assignor on account of—

(1) renegotiation under any renegotiation statute or under any statutory renegotiation article in the contract;

(2) fines;

(3) penalties (which term does not include amounts which may be collected or withheld from the assignor in accordance with or for failure to comply with the terms of the contract); or

(4) taxes, social security contributions, or the withholding or non withholding of taxes or social security contributions, whether arising from or independently of such contract.

**(g) Accrued rights and obligations**

Except as herein otherwise provided, nothing in this section shall be deemed to affect or impair rights of obligations heretofore accrued.

(R.S. §3737; Oct. 9, 1940, ch. 779, §1, 54 Stat. 1029; May 15, 1951, ch. 75, 65 Stat. 41; Oct. 13, 1994, Pub. L. 103-355, title II, §2451, 108 Stat. 3324.)

CODIFICATION

R.S. §3737 derived from act July 17, 1862, ch. 200, §14, 12 Stat. 596.

AMENDMENTS

1994—Pub. L. 103-355, §2451, amended section generally, revising it as follows:

Subsec. (a), designated first par. as subsec. (a) and substituted “is concerned” for “are concerned”.

Subsec. (b), designated second par. as subsec. (b) and inserted subpar. and cl. designations; substituted in introductory provisions “provisions of subsection (a) of this section” for “provisions of the preceding paragraph” and “lending agency, provided:” for “lending agency: *Provided,*”; in par. designations, “That,” for “That” and periods for semicolons at end; and struck out former par. 1 which read as follows: “That in the case of any contract entered into prior to October 9, 1940, no claim shall be assigned without the consent of the head of the department or agency concerned;”.

Subsec. (c), designated third par. as subsec. (c) and substituted “this section” for “this section,”.

Subsec. (d), designated fourth par. as subsec. (d).

Subsec. (e), designated first part of fifth par. as subsec. (e), substituted “Department of Energy” for “Atomic Energy Commission”, “may, upon a determination of need by the President, provide” for “may, in time of war or national emergency proclaimed by the President (including the national emergency proclaimed December 16, 1950) or by Act or joint resolution of the Congress and until such war or national emergency has been terminated in such manner, provide”, and “subject to reduction or set-off.” for “subject to reduction or set-off,”, and inserted “Each such determination of need shall be published in the Federal Register.”

Subsec. (f), designated last part of fifth par. as subsec. (f), realigned margins of pars. (1) to (4) and sub-



stituted semicolons for commas at end, and substituted, in introductory provisions, “If a provision described in subsection (e) of this section or a provision to the same general effect has been at any time heretofore or is hereafter included or inserted in any such contract, payments to be made thereafter to an assignee of any moneys due or to become due under such contract shall not be subject to reduction or setoff for any liability of any nature of the assignor to the United States or any department or agency thereof which arises independently of such contract, or hereafter for any liability of the assignor on account of—” for “and if such provision or one to the same general effect has been at any time heretofore or is hereafter included or inserted in any such contract, payments to be made thereafter to an assignee of any moneys due or to become due under such contract, whether during or after such war or emergency, shall not be subject to reduction or set-off for any liability of any nature of the assignor to the United States or any department or agency thereof which arises independently of such contract, or hereafter for any liability of the assignor on account of” and, in par. (4), “non withholding” for “nonwithholding”.

Subsec. (g), designated sixth par. as subsec. (g).

1951—Act May 15, 1951, made it clear that a bank or other financing institution taking an assignment of claims pursuant to this section would not be subject to later recovery by the Government of amounts previously paid to the bank by the assignee except in cases of fraud.

1940—Act Oct. 9, 1940, inserted second and third pars.

#### 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.

#### DELEGATION OF AUTHORITY

Memorandum of President of the United States, Oct. 3, 1995, 60 F.R. 52289, provided:

Memorandum for the Heads of Executive Departments and Agencies

Section 2451 of the Federal Acquisition Streamlining Act of 1994, Public Law 103-355 (amending 41 U.S.C. 15) (“Act”), provides, in part, that “[a]ny contract of the Department of Defense, the General Services Administration, the Department of Energy or any other department or agency of the United States designated by the President, except [contracts where] . . . full payment has been made, may, upon a determination of need by the President, provide or be amended without consideration to provide that payments to be made to the assignee of any moneys due or to become due under [the] contract shall not be subject to reduction or set-off.”

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 301 of title 3, United States Code, I hereby designate all other departments and agencies of the United States as subject to this provision. Furthermore, I hereby delegate to the Secretaries of Defense and Energy, the Administrator of General Services, and the heads of all other departments and agencies, the authority under section 2451 of the Act to make determinations of need for their respective agency’s contracts, subject to such further guidance as issued by the Office of Federal Procurement Policy.

The authority delegated by this memorandum may be further delegated within the departments and agencies.

This memorandum shall be published in the Federal Register.

WILLIAM J. CLINTON.

#### NON-APPLICABILITY OF NATIONAL EMERGENCIES ACT

The provisions of the National Emergencies Act (Pub. L. 94-412, Sept. 14, 1976, 90 Stat. 1255) not applicable to the powers and authorities conferred by this section

and actions taken hereunder, see section 1651 of Title 50, War and National Defense.

#### MONEYS DUE UNDER LETTERS OF COMMITMENT ISSUED IN CONNECTION WITH DISPOSITION OF SURPLUS AGRICULTURAL COMMODITIES

Moneys due under letters of commitment issued against funds or guaranties of funds supplied by Commodity Credit Corporation in connection with disposition of surplus agricultural commodities to foreign countries, as assignable under the Assignment of Claims Act of 1940, which constitutes this section and former section 203 of Title 31, Money and Finance, see section 1702 of Title 7, Agriculture.

#### CROSS REFERENCES

Assignment of claims, generally, see section 3727 of Title 31, Money and Finance.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 22 section 2392; title 50 section 1651; title 50 App. section 1215.

#### § 16. Repealed. Oct. 21, 1941, ch. 452, 55 Stat. 743

Section, R.S. §3744; acts June 15, 1917, ch. 29, 40 Stat. 198; Feb. 4, 1929, ch. 146, 45 Stat. 1147, related to requirement that contracts made by Secretaries of War, Navy, and Interior be in writing, and that copies thereof be filed in returns office of Department of the Interior.

#### §§ 16a to 16d. Omitted

#### CODIFICATION

Section 16a, acts June 25, 1910, ch. 431, §23, 36 Stat. 861; May 18, 1916, ch. 125, 39 Stat. 126; Jan. 12, 1927, ch. 27, 44 Stat. 936, authorized purchases by Department of the Interior without compliance with section 16 of this title.

Section 16b, acts Apr. 17, 1936, ch. 233, 49 Stat. 1226; May 18, 1937, ch. 223, 50 Stat. 181; May 17, 1938, ch. 236, 52 Stat. 393; June 16, 1939, ch. 208, 53 Stat. 834; June 18, 1940, ch. 396, 54 Stat. 474, authorized purchases by Botanic Garden without compliance with section 16 of this title.

Section 16c, act May 13, 1926, ch. 294, 44 Stat. 547, authorized purchases by Architect of Capitol without compliance with section 16 of this title.

Section 16d, act Aug. 4, 1939, ch. 418, §13, 53 Stat. 1197, authorized purchases by Bureau of Reclamation without compliance with section 16 of this title.

#### §§ 17 to 19. Repealed. Oct. 21, 1941, ch. 452, 55 Stat. 743

Section 17, R.S. §3745, provided that an affidavit be affixed to the return of contract required by section 16 of this title.

Section 18, R.S. §3746, provided punishment for failure to make returns of contracts as required by sections 16 and 17 of this title.

Section 19, R.S. §3747, imposed duty on Secretaries of War, Navy, and Interior to furnish officers with letters of instruction relating to their duties under sections 17 and 18, contract forms, and affidavits, to insure uniformity.

#### § 20. Repealed. Pub. L. 103-355, title II, §2452, Oct. 13, 1994, 108 Stat. 3326

Section, R.S. §3743; Feb. 27, 1877, ch. 69, 19 Stat. 249; July 31, 1894, ch. 174, §18, 28 Stat. 210; June 10, 1921, ch. 18, title III, §304, 42 Stat. 24, provided for deposit of all contracts which required advance money or settlement of public accounts in the General Accounting Office.

#### 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.

### §§ 20a, 20b. Omitted

#### CODIFICATION

Section 20a, act June 15, 1940, ch. 367, 54 Stat. 398, provided exemption from section 20 of this title for contracts, etc., concerning national-forest lands.

Section 20b, act Nov. 28, 1943, ch. 328, 57 Stat. 592, provided exemption from section 20 of this title for contracts, etc., concerning use of lands or water under jurisdiction of Department of the Interior.

### § 21. Repealed. Pub. L. 97-258, § 5(b), Sept. 13, 1982, 96 Stat. 1069

Section, acts July 31, 1894, ch. 174, § 22, 28 Stat. 210; June 10, 1921, ch. 18, §§ 304, 310, 42 Stat. 24, 25, provided that the heads of the several executive departments and the proper officers of other Government establishments, not within the jurisdiction of any executive department, make appropriate rules and regulations to secure a proper administrative examination of all accounts sent to them before their transmission to the General Accounting Office, and for the execution of other requirements of section 20 of this title, insofar as the same related to the several departments or establishments. See section 3521(a) of Title 31, Money and Finance.

### § 22. Interest of Member of Congress

No member<sup>1</sup> of Congress shall be admitted to any share or part of any contract or agreement made, entered into, or accepted by or on behalf of the United States, or to any benefit to arise thereupon. The provisions of this section shall not apply to any contracts or agreements heretofore or hereafter entered into under the Agricultural Adjustment Act [7 U.S.C. 601 et seq.], the Federal Farm Loan Act, the Emergency Farm Mortgage Act of 1933, the Federal Farm Mortgage Corporation Act, the Farm Credit Act of 1933, and the Home Owners' Loan Act of 1933 [12 U.S.C. 1461 et seq.], and shall not apply to contracts or agreements of a kind which the Secretary of Agriculture may enter into with farmers: *Provided*, That such exemption shall be made a matter of public record.

(R.S. § 3741; Feb. 27, 1877, ch. 69, § 1, 19 Stat. 249; Jan. 25, 1934, ch. 5, 48 Stat. 337; June 27, 1934, ch. 847, title V, § 510, 48 Stat. 1264; Aug. 26, 1937, ch. 821, 50 Stat. 838; Oct. 13, 1994, Pub. L. 103-355, title VI, § 6004, 108 Stat. 3364.)

#### REFERENCES IN TEXT

The Agricultural Adjustment Act, referred to in text, is title I of act May 12, 1933, ch. 25, 48 Stat. 31, as amended, which is classified generally to chapter 26 (§ 601 et seq.) of Title 7, Agriculture. For complete classification of this Act to the Code, see Short Title note set out under section 601 of Title 7 and Tables.

The Federal Farm Loan Act, referred to in text, is act July 17, 1916, ch. 245, 39 Stat. 360, as amended, and was classified principally to sections 641 et seq. of Title 12, Banks and Banking. The Federal Farm Loan Act, as amended, was repealed by section 5.26(a) of the Farm Credit Act of 1971, Pub. L. 92-181, Dec. 10, 1971, 85 Stat. 624. Section 5.26(a) of the Farm Credit Act of 1971 also provided that all references in other legislation to the Acts repealed thereby "shall be deemed to refer to comparable provisions of this Act". For further details, see notes set out under section 2001 of Title 12. For com-

plete classification of the Federal Farm Loan Act to the Code prior to such repeal, see Tables.

The Emergency Farm Mortgage Act of 1933, referred to in text, is title II of act May 12, 1933, ch. 25, 48 Stat. 31. Such title II was substantially repealed by act June 30, 1947, ch. 166, title II, § 206(c), 61 Stat. 208; act Aug. 6, 1953, ch. 335, § 19, 67 Stat. 400; act Oct. 4, 1961, Pub. L. 87-353, § 3(a), (b), (w), 75 Stat. 773, 774; act Dec. 10, 1971, Pub. L. 92-181, title V, § 5.26(a), 85 Stat. 624. For complete classification of this Act to the Code, see Tables.

The Federal Farm Mortgage Corporation Act, referred to in text, is act Jan. 31, 1934, ch. 7, 48 Stat. 344, which enacted section 992a of Title 12, Banks and Banking, and amended sections 347, 355, 723, 772, 781, 897, 1016, 1020, 1020a, 1020b, 1020c, 1020d to 1020h, 1061, 1131i, 1138b and 1138d of Title 12, has been substantially repealed. For complete classification of this Act to the Code, see Tables.

The Farm Credit Act of 1933, referred to in text, is act June 16, 1933, ch. 98, 48 Stat. 2, as amended, and was classified principally to subchapter IV (§ 1131 et seq.) of chapter 7 of Title 12. The Farm Credit Act of 1933, as amended, was repealed by section 5.26(a) of the Farm Credit Act of 1971, Pub. L. 92-181, Dec. 10, 1971, 85 Stat. 624. Section 5.26(a) of the Farm Credit Act of 1971 also provided that all references in other legislation to the Acts repealed thereby "shall be deemed to refer to comparable provisions of this Act". For further details, see notes set out under section 2001 of Title 12. For complete classification of the Farm Credit Act of 1933 to the Code prior to such repeal, see Tables.

The Home Owners' Loan Act of 1933, referred to in text, is act June 13, 1933, ch. 64, 48 Stat. 128, as amended, now known as the Home Owners' Loan Act, which is classified generally to chapter 12 (§ 1461 et seq.) of Title 12. For complete classification of this Act to the Code, see section 1461 of Title 12 and Tables.

#### CODIFICATION

R.S. § 3741 derived from act Apr. 21, 1808, ch. 48, § 3, 2 Stat. 484.

First sentence of section is based on R.S. § 3741, as amended, and second sentence is based on act Jan. 25, 1934, ch. 5, as amended and as applicable to R.S. § 3741.

#### AMENDMENTS

1994—Pub. L. 103-355 amended first sentence generally. Prior to amendment, first sentence read as follows: "In every contract or agreement to be made or entered into, or accepted by or on behalf of the United States, there shall be inserted an express condition that no Member of or Delegate to Congress shall be admitted to any share or part of such contract or agreement, or to any benefit to arise thereupon."

1937—Act Aug. 26, 1937, inserted provision at end of second sentence beginning with "and shall not apply".

1934—Act June 27, 1934, inserted in second sentence "the Federal Farm Loan Act, the Emergency Farm Mortgage Act of 1933, the Federal Farm Mortgage Corporation Act, the Farm Credit Act of 1933, and the Home Owners' Loan Act of 1933".

Act Jan. 25, 1934, added second sentence providing that this section shall not apply to any contracts or agreements heretofore or hereafter entered into under the Agricultural Adjustment Act.

1877—Act Feb. 27, 1877, inserted "or Delegate to" after "that no Member of" in first sentence.

#### 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.

#### CROSS REFERENCES

Contracts by Members of Congress and exemptions with respect to certain contracts, see sections 431 and 433 of Title 18, Crimes and Criminal Procedure.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 7 sections 1386, 1514; title 10 section 2343; title 15 section 714i; title 19 section

<sup>1</sup> So in original. Probably should be capitalized.

2081; title 22 sections 1472, 2676; title 26 section 7608; title 33 section 702m.

**§ 23. Orders or contracts for material placed with Government-owned establishments deemed obligations**

All orders or contracts for work or material or for the manufacture of material pertaining to approved projects heretofore or hereafter placed with Government-owned establishments shall be considered as obligations in the same manner as provided for similar orders or contracts placed with commercial manufacturers or private contractors, and the appropriations shall remain available for the payment of the obligations so created as in the case of contracts or orders with commercial manufacturers or private contractors.

(June 5, 1920, ch. 240, 41 Stat. 975; July 1, 1922, ch. 259, 42 Stat. 812; June 2, 1937, ch. 293, 50 Stat. 245.)

AMENDMENTS

1937—Act June 2, 1937, continued this section in effect.

1922—Act July 1, 1922, inserted “for work or material” after “All orders or contracts”, “or contracts” after “similar orders” and “or private contractors” after “commercial manufacturers” in two places.

**§ 24. Contracts for transportation of moneys, bullion, coin, and securities**

Whenever it is practicable contracts for the transportation of moneys, bullion, coin, notes, bonds, and other securities of the United States, and paper shall be let to the lowest responsible bidder therefor, after notice to all parties having means of transportation.

(July 7, 1884, ch. 332, 23 Stat. 204.)

CODIFICATION

Section is from Sundry Civil Appropriation Act July 7, 1884, fiscal year 1885.

**§ 24a. Omitted**

CODIFICATION

Section, acts June 16, 1933, ch. 101, § 5, 48 Stat. 305; Apr. 24, 1935, ch. 78, 49 Stat. 161; Aug. 29, 1935, ch. 816, 49 Stat. 991, provided for cancellation on or before March 31, 1936, of contracts for transportation entered into prior to June 16, 1933.

**§ 25. Repealed. Feb. 19, 1948, ch. 65, § 11(a), 62 Stat. 25**

Section, R.S. § 3729, related to contracts for bunting. See section 2301 et seq. of Title 10, Armed Forces.

**§ 26. Repealed. June 30, 1949, ch. 288, title VI, § 602(a)(26), formerly title V, § 502(a)(26), 63 Stat. 401; renumbered Sept. 5, 1950, ch. 849, § 6(a), (b), 64 Stat. 583**

Section, acts Mar. 4, 1915, ch. 147, § 5, 38 Stat. 1161; May 29, 1928, ch. 901, § 1(5), 45 Stat. 986, related to exchange of typewriters and adding machines in part payment for new machines. See section 481 of Title 40, Public Buildings, Property, and Works.

EFFECTIVE DATE OF REPEAL

Repeal effective July 1, 1949, see section 605 of act June 30, 1949.

**§ 27. Repealed. Oct. 31, 1951, ch. 654, § 1(109), 65 Stat. 705**

Section, act June 5, 1920, ch. 235, § 7, 41 Stat. 947, related to disposition of typewriting machines by Government departments and establishments. See sections 481, 483, and 484 of Title 40, Public Buildings, Property, and Works.

**§§ 28 to 34. Omitted**

CODIFICATION

Section 28, act June 16, 1934, ch. 553, § 1, 48 Stat. 974, related to adjustment and settlement of claims by persons who entered into contracts with the United States prior to Aug. 10, 1933 and claim loss due to compliance with codes of fair competition.

Section 29, act June 16, 1934, ch. 553, § 2, 48 Stat. 975, related to amount allowed for settlement.

Section 30, act June 16, 1934, ch. 553, § 3, 48 Stat. 975, related to limitation on the amount of profits.

Section 31, act June 16, 1934, ch. 553, § 4, 48 Stat. 975, related to time for presentment of claims.

Section 32, act June 16, 1934, ch. 553, § 5, 48 Stat. 975, authorized appropriations for settlement of claims.

Section 33, act June 16, 1934, ch. 553, § 6, 48 Stat. 975, related to procedure for settlement of claims and reservation of right to prosecute for fraud and criminal conduct.

Section 34, act Aug. 29, 1935, ch. 815, 49 Stat. 990, provided that bids made subject to codes of fair competition prior to Aug. 29, 1935 should not be rejected where bidder agreed to be subject to Acts of Congress requiring observance of minimum wages, maximum hours, or limitations as to age of employees in performance of contracts, with Federal agencies.

**§ 35. Contracts for materials, etc., exceeding \$10,000; representations and stipulations**

In any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States (all the foregoing being hereinafter designated as agencies of the United States), for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding \$10,000, there shall be included the following representations and stipulations:

(a) That all persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract;

(b) That no person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract shall be permitted to work in excess of forty hours in any one week: *Provided*, That the provisions of this subsection shall not apply to any employer who shall have entered into an agreement with his employees pursuant to the provisions of paragraphs (1) or (2) of subsection (b) of section 207 of title 29;

(c) That no male person under sixteen years of age and no female person under eighteen years of age and no convict labor will be employed by the contractor in the manufacture or production or furnishing of any of the materials, supplies, articles, or equipment included in such contract, except that this section, or any other law or Executive order containing similar prohibitions against purchase of goods by the Federal Government, shall not apply to convict labor which satisfies the conditions of section 1761(c) of title 18; and

(d) That no part of such contract will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of said contract. Compliance with the safety, sanitary, and factory inspection laws of the State in which the work or part thereof is to be performed shall be prima-facie evidence of compliance with this subsection.

(June 30, 1936, ch. 881, § 1, 49 Stat. 2036; May 13, 1942, ch. 306, 56 Stat. 277; Pub. L. 90-351, title I, § 819(b), formerly § 827(b), as added Dec. 27, 1979, Pub. L. 96-157, § 2, 93 Stat. 1215; renumbered Oct. 12, 1984, Pub. L. 98-473, title II, § 609B(f), 98 Stat. 2093; Nov. 8, 1985, Pub. L. 99-145, title XII, § 1241(b), 99 Stat. 734; Oct. 13, 1994, Pub. L. 103-355, title VII, § 7201(1), 108 Stat. 3378.)

#### AMENDMENTS

1994—Subsecs. (a) to (e). Pub. L. 103-355 redesignated subsecs. (b) to (e) as (a) to (d), respectively, and struck out former subsec. (a) which read as follows: "That the contractor is the manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract;"

1985—Subsec. (c). Pub. L. 99-145 struck out "eight hours in any one day or in excess of" before "forty hours".

1979—Subsec. (d). Pub. L. 90-351, § 827(b), as added by Pub. L. 96-157, inserted provisions relating to convict labor which satisfies the conditions of section 1761(c) of title 18.

1942—Subsec. (c). Act May 13, 1942, inserted proviso.

#### 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 1985 AMENDMENT

Section 1241(c) of Pub. L. 99-145 provided that: "The amendments made by this section [amending this section and section 328 of Title 40, Public Buildings, Property, and Works] shall take effect on January 1, 1986."

#### SHORT TITLE

Section 12 of act June 30, 1936, as added by Pub. L. 103-355, title X, § 10005(f)(5), Oct. 13, 1994, 108 Stat. 3409, provided that: "This Act [enacting this section and sections 36 to 45 of this title] may be cited as the 'Walsh-Healey Act'." [Another section 12 of act June 30, 1936, is classified to section 45 of this title.]

#### EXEMPTIONS TO FEDERAL RESTRICTIONS ON MARKETABILITY OF PRISON MADE GOODS

Provisions of this section creating exemptions to Federal regulations on marketability of prison made

goods are not applicable unless representatives of local union central bodies or similar labor union organizations have been consulted prior to the initiation of any project qualifying of any exemption created by this section and such paid inmate employment will not result in the displacement of employed workers, or be applied in skills, crafts, or trades in which there is a surplus of available gainful labor in the locality, or impair existing contracts for services, see section 819(c) of Pub. L. 90-351, set out as a note under section 1761 of Title 18, Crimes and Criminal Procedure.

#### EXCEPTIONS AND EXEMPTIONS

7 F.R. 9399 (amending Exemption Order Apr. 21, 1942, 7 F.R. 3003), which exempted female persons under 18 years of age from the provisions of subsec. (d) of this section, was superseded by 10 F.R. 10438.

#### CONTRACTING AUTHORITY OF GOVERNMENT AGENCIES IN CONNECTION WITH NATIONAL DEFENSE FUNCTIONS

Provisions of sections 35 to 45 of this title as applicable to Government agencies exercising certain contracting authority in connection with national-defense functions, see section 13 of Ex. Ord. No. 10789, set out as a note under section 1431 of Title 50, War and National Defense.

#### ACT REFERRED TO IN OTHER SECTIONS

The Walsh-Healey Act is referred to in section 356 of this title; title 10 section 2304; title 15 section 637; title 29 sections 251 to 256, 258, 259, 262, 653; title 30 section 846; title 39 section 410; title 40 section 329.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 36, 37, 38, 39, 40, 41, 42, 43, 43a, 44, 45, 356 of this title; title 10 section 2304; title 15 sections 636, 637; title 25 section 450j; title 39 section 410.

#### § 36. Liability for contract breach; cancellation; completion by Government agency; employee's wages

Any breach or violation of any of the representations and stipulations in any contract for the purposes set forth in section 35 of this title shall render the party responsible therefor liable to the United States of America for liquidated damages, in addition to damages for any other breach of such contract, the sum of \$10 per day for each male person under sixteen years of age or each female person under eighteen years of age, or each convict laborer knowingly employed in the performance of such contract, and a sum equal to the amount of any deductions, rebates, refunds, or underpayment of wages due to any employee engaged in the performance of such contract; and, in addition, the agency of the United States entering into such contract shall have the right to cancel same and to make open-market purchases or enter into other contracts for the completion of the original contract, charging any additional cost to the original contractor. Any sums of money due to the United States of America by reason of any violation of any of the representations and stipulations of said contract set forth in section 35 of this title may be withheld from any amounts due on any such contracts or may be recovered in suits brought in the name of the United States of America by the Attorney General thereof. All sums withheld or recovered as deductions, rebates, refunds, or underpayments of wages shall be held in a special deposit account and shall be paid, on order of the Secretary of

Labor, directly to the employees who have been paid less than minimum rates of pay as set forth in such contracts and on whose account such sums were withheld or recovered: *Provided*, That no claims by employees for such payments shall be entertained unless made within one year from the date of actual notice to the contractor of the withholding or recovery of such sums by the United States of America.

(June 30, 1936, ch. 881, § 2, 49 Stat. 2037.)

#### CROSS REFERENCES

Conduct and argument of cases by Attorney General, see section 518 of Title 28, Judiciary and Judicial Procedure.

Power of Solicitor General to assist Attorney General, see section 505 of Title 28.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 43a of this title; title 25 section 450j.

### § 37. Distribution of list of persons breaching contract; future contracts prohibited

The Comptroller General is authorized and directed to distribute a list to all agencies of the United States containing the names of persons or firms found by the Secretary of Labor to have breached any of the agreements or representations required by sections 35 to 45 of this title. Unless the Secretary of Labor otherwise recommends no contracts shall be awarded to such persons or firms or to any firm, corporation, partnership, or association in which such persons or firms have a controlling interest until three years have elapsed from the date the Secretary of Labor determines such breach to have occurred.

(June 30, 1936, ch. 881, § 3, 49 Stat. 2037.)

#### CROSS REFERENCES

Exemptions and exceptions to section 35 of this title, see note set out under that section.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 43a of this title; title 25 section 450j.

### § 38. Administration of Walsh-Healey provisions; officers and employees; appointment; investigations; rules and regulations

The Secretary of Labor is authorized and directed to administer the provisions of sections 35 to 45 of this title and to utilize such Federal officers and employees and, with the consent of the State, such State and local officers and employees as he may find necessary to assist in the administration of said sections and to prescribe rules and regulations with respect thereto. The Secretary shall appoint, subject to chapter 51 and subchapter III of chapter 53 of title 5, an administrative officer, and such attorneys and experts, and other employees with regard to existing laws applicable to the employment and compensation of officers and employees of the United States, as he may from time to time find necessary for the administration of sections 35 to 45 of this title. The Secretary of Labor or his authorized representatives shall have power to make investigations and findings as provided in sections 35 to 45 of this title, and prosecute any

inquiry necessary to his functions in any part of the United States. The Secretary of Labor shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of sections 35 to 45 of this title.

(June 30, 1936, ch. 881, § 4, 49 Stat. 2038; Oct. 28, 1949, ch. 782, title XI, § 1106(a), 63 Stat. 972.)

#### CODIFICATION

Provisions of second sentence of this section that authorized the Secretary to appoint an administrative officer and such attorneys and experts "without regard to the provisions of the civil service laws" were omitted as obsolete. Such appointments are subject to the civil service laws unless specifically excepted by such laws or by laws enacted subsequent to Executive Order 8743, Apr. 23, 1941, issued by the President pursuant to the Act of Nov. 26, 1940, ch. 919, title I, § 1, 54 Stat. 1211, which covered most excepted positions into the classified (competitive) civil service. The Order is set out as a note under section 3301 of Title 5, Government Organization and Employees.

"Chapter 51 and subchapter III of chapter 53 of title 5" substituted in text for "the Classification Act of 1949, as amended" on authority of Pub. L. 89-554, § 7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5.

#### AMENDMENTS

1949—Act Oct. 28, 1949, substituted "Classification Act of 1949" for "Classification Act of 1923".

#### REPEALS

Act Oct. 28, 1949, ch. 782, cited as a credit to this section, was repealed (subject to a savings clause) by Pub. L. 89-554, Sept. 6, 1966, § 8, 80 Stat. 632, 655.

#### TRANSFER OF FUNCTIONS

For transfer of functions of all other officers, employees, and agencies of Department of Labor, with certain exceptions, to Secretary of Labor, with power to delegate, see Reorg. Plan No. 6 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3174, 64 Stat. 1263, set out in the Appendix to Title 5, Government Organization and Employees.

#### CROSS REFERENCES

Exemptions and exceptions to section 35 of this title, see note set out under that section.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 43a, 353 of this title; title 25 section 450j; title 40 section 333.

### § 39. Hearings on Walsh-Healey provisions by Secretary of Labor; witness fees; failure to obey order; punishment

Upon his own motion or on application of any person affected by any ruling of any agency of the United States in relation to any proposal or contract involving any of the provisions of sections 35 to 45 of this title, and on complaint of a breach or violation of any representation or stipulation as provided in said sections, the Secretary of Labor, or an impartial representative designated by him, shall have the power to hold hearings and to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy, failure, or refusal of any person to obey such an order, any District Court of the United States or of any Terri-

tory or possession within the jurisdiction of which the inquiry is carried on, or within the jurisdiction of which said person who is guilty of contumacy, failure, or refusal is found, or resides or transacts business, upon the application by the Secretary of Labor or representative designated by him, shall have jurisdiction to issue to such person an order requiring such person to appear before him or representative designated by him, to produce evidence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof; and shall make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States; and the Secretary of Labor or authorized representative shall have the power, and is authorized, to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of sections 35 to 45 of this title.

(June 30, 1936, ch. 881, § 5, 49 Stat. 2038; June 25, 1948, ch. 646, § 32(b), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107.)

CODIFICATION

As originally enacted, the words “, or the district court of the United States for the District of Columbia,” were set out following “Territory or possession”. Act June 25, 1948, as amended by act May 24, 1949, substituted “United States District Court for the District of Columbia” for “district court of the United States for the District of Columbia”. The words “United States District Court for the District of Columbia” have been deleted entirely as superfluous in view of section 132(a) of Title 28, Judiciary and Judicial Procedure, which states that “There shall be in each judicial district a district court which shall be a court of record known as the United States District Court for the district”, and section 88 of title 28 which states that “the District of Columbia constitutes one judicial district”.

FEDERAL RULES OF CIVIL PROCEDURE

Findings by the Court, see rule 52, Title 28, Appendix, Judiciary and Judicial Procedure.  
Subpoena, see rule 45.

FEDERAL RULES OF CRIMINAL PROCEDURE

Contempt, see rule 42, Title 18, Appendix, Crimes and Criminal Procedure.  
Subpoena, see rule 17.

CROSS REFERENCES

Criminal contempt, see sections 401, 402, 3285, 3691 of Title 18, Crimes and Criminal Procedure.  
Exemptions and exceptions to section 35 of this title, see note set out under that section.  
Per diem and mileage of witnesses, see section 1821 of Title 28, Judiciary and Judicial Procedure.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 43a, 353 of this title; title 25 section 450j; title 33 section 941; title 40 section 333.

**§ 40. Exceptions from Walsh-Healey provisions; modification of contracts; variations; overtime; suspension of representations and stipulations**

Upon a written finding by the head of the contracting agency or department that the inclu-

sion in the proposal or contract of the representations or stipulations set forth in section 35 of this title will seriously impair the conduct of Government business, the Secretary of Labor shall make exceptions in specific cases or otherwise when justice or public interest will be served thereby. Upon the joint recommendation of the contracting agency and the contractor, the Secretary of Labor may modify the terms of an existing contract respecting minimum rates of pay and maximum hours of labor as he may find necessary and proper in the public interest or to prevent injustice and undue hardship. The Secretary of Labor may provide reasonable limitations and may make rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of sections 35 to 45 of this title respecting minimum rates of pay and maximum hours of labor or the extent of the application of said sections to contractors, as hereinbefore described. Whenever the Secretary of Labor shall permit an increase in the maximum hours of labor stipulated in the contract, he shall set a rate of pay for any overtime, which rate shall be not less than one and one-half times the basic hourly rate received by any employee affected: *Provided*, That whenever in his judgment such course is in the public interest, the President is authorized to suspend any or all of the representations and stipulations contained in section 35 of this title.

(June 30, 1936, ch. 881, § 6, 49 Stat. 2038; June 28, 1940, ch. 440, title I, § 13, 54 Stat. 681.)

AMENDMENTS

1940—Act June 28, 1940, inserted proviso.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 25 section 450j.

**§ 41. “Person” defined in Walsh-Healey provisions**

Whenever used in sections 35 to 45 of this title, the word “person” includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under title 11, or receivers.

(June 30, 1936, ch. 881, § 7, 49 Stat. 2039; Nov. 6, 1978, Pub. L. 95-598, title III, § 326, 92 Stat. 2679.)

AMENDMENTS

1978—Pub. L. 95-598 substituted “trustees in cases under title 11” for “trustees in bankruptcy”.

EFFECTIVE DATE OF 1978 AMENDMENT

Amendment by Pub. L. 95-598 effective Oct. 1, 1979, see section 402(a) of Pub. L. 95-598, set out as an Effective Date note preceding section 101 of Title 11, Bankruptcy.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 43a of this title; title 25 section 450j.

**§ 42. Effect of Walsh-Healey provisions on other laws**

The provisions of sections 35 to 45 of this title shall not be construed to modify or amend Title III of the act entitled “An Act making appropriations for the Treasury and Post Office Departments for the fiscal year ending June 30, 1934, and for other purposes”, approved May 3,

1933 (commonly known as the Buy American Act) [41 U.S.C. 10a et seq.], nor shall the provisions of sections 35 to 45 of this title be construed to modify or amend the Act entitled “An Act relating to the rate of wages for laborers and mechanics employed on public buildings of the United States and the District of Columbia by contractors and subcontractors, and for other purposes”, approved March 3, 1931 (commonly known as the Bacon-Davis Act), as amended from time to time [40 U.S.C. 276a et seq.], nor the labor provisions of Title II of the National Industrial Recovery Act, approved June 16, 1933, as extended, or of section 7 of the Emergency Relief Appropriation Act, approved April 8, 1935; nor shall the provisions of sections 35 to 45 of this title be construed to modify or amend chapter 307 and section 4162<sup>1</sup> of title 18.

(June 30, 1936, ch. 881, § 8, 49 Stat. 2039.)

#### REFERENCES IN TEXT

Title III of the act entitled “An Act making appropriations for the Treasury and Post Office Departments for the fiscal year ending June 30, 1934, and for other purposes”, approved May 3, 1933 (commonly known as the Buy American Act), referred to in text, is act Mar. 3, 1933, ch. 212, title III, 47 Stat. 1520, as amended, known as the Buy American Act, which enacted sections 10a, 10b, 10b-1, and 10c of this title and enacted provisions set out as notes under section 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.

Act approved March 3, 1931 (commonly known as the Bacon-Davis Act), referred to in text, probably means act Mar. 3, 1931, ch. 411, 46 Stat. 1494, as amended, popularly known as the Davis-Bacon Act, which is classified generally to sections 276a to 276a-5 of Title 40, Public Buildings, Property, and Works. For complete classification of this Act to the Code, see Short Title note set out under section 276a of Title 40 and Tables.

The National Industrial Recovery Act, referred to in text, is act June 16, 1933, ch. 90, 48 Stat. 195. Title II of the National Industrial Recovery Act was classified principally to subchapter I (§401 et seq.) of chapter 8 of Title 40 and was terminated June 30, 1943, by act June 27, 1942, ch. 450, §1, 56 Stat. 410. For complete classification of this Act to the Code, see Tables.

Section 7 of the Emergency Relief Appropriation Act, approved April 8, 1935, referred to in text, is act Apr. 8, 1935, ch. 48, §7, 49 Stat. 115, which is not classified to the Code.

Section 4162 of title 18, referred to in text, was repealed by Pub. L. 98-473, title II, §218(a)(4), Oct. 12, 1984, 98 Stat. 2027.)

#### CODIFICATION

“Chapter 307 and section 4162 of title 18” substituted for “the Act entitled ‘An Act to provide for the diversification of employment of Federal prisoners, for their training and schooling in trades and occupations, and for other purposes’, approved May 27, 1930, as amended and supplemented by the Act approved June 23, 1934” on authority of act June 25, 1948, ch. 645, 62 Stat. 683, the first section of which enacted Title 18, Crimes and Criminal Procedure. Prior to the enactment of Title 18, the act of May 27, 1930, as amended, had been classified to sections 744a to 744n of Title 18.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 43a of this title; title 25 section 450j.

<sup>1</sup> See References in Text note below.

### § 43. Walsh-Healey provisions not applicable to certain contracts

Sections 35 to 45 of this title shall not apply to purchases of such materials, supplies, articles, or equipment as may usually be bought in the open market; nor shall they apply to perishables, including dairy, livestock and nursery products, or to agricultural or farm products processed for first sale by the original producers; nor to any contracts made by the Secretary of Agriculture for the purchase of agricultural commodities or the products thereof. Nothing in said sections shall be construed to apply to carriage of freight or personnel by vessel, airplane, bus, truck, express, or railway line where published tariff rates are in effect or to common carriers subject to the Communications Act of 1934 [47 U.S.C. 151 et seq.].

(June 30, 1936, ch. 881, § 9, 49 Stat. 2039.)

#### REFERENCES IN TEXT

The Communications Act of 1934, referred to in text, is act June 19, 1934, ch. 652, 48 Stat. 1064, as amended, which is classified principally to chapter 5 (§151 et seq.) of Title 47, Telegraphs, Telephones, and Radiotelegraphs. For complete classification of this Act to the Code see section 609 of Title 47 and Tables.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 43a of this title; title 25 section 450j.

### § 43a. Administrative procedure provisions

#### (a) Applicability

Notwithstanding any provision of section 553 of title 5, subchapter II of chapter 5, and chapter 7, of title 5 shall be applicable in the administration of sections 35 to 39 and 41 to 43 of this title.

#### (b) Wage determination; administrative review

All wage determinations under section 35(b)<sup>1</sup> of this title shall be made on the record after opportunity for a hearing. Review of any such wage determination, or of the applicability of any such wage determination, may be had within ninety days after such determination is made in the manner provided in chapter 7 of title 5 by any person adversely affected or aggrieved thereby, who shall be deemed to include any supplier of materials, supplies, articles or equipment purchased or to be purchased by the Government from any source, who is in any industry to which such wage determination is applicable.

#### (c) Judicial review

Notwithstanding the inclusion of any stipulations required by any provision of sections 35 to 45 of this title in any contract subject to said sections, any interested person shall have the right of judicial review of any legal question which might otherwise be raised, including, but not limited to, wage determinations and the interpretation of the terms “locality”,<sup>2</sup> and “open market”.

(June 30, 1936, ch. 881, §10, as added June 30, 1952, ch. 530, title III, §301, 66 Stat. 308; amended Oct. 13, 1994, Pub. L. 103-355, title VII, §7201(2), (3), 108 Stat. 3378.)

<sup>1</sup> See References in Text note below.

<sup>2</sup> So in original. The comma probably should not appear.

## REFERENCES IN TEXT

Section 35(b) of this title, referred to in subsec. (b), was redesignated section 35(a) by Pub. L. 103-355, title VII, § 7201(1), Oct. 13, 1994, 108 Stat. 3378.

## CODIFICATION

“Section 553 of title 5”, “subchapter II of chapter 5, and chapter 7, of title 5”, and “chapter 7 of title 5” substituted for “section 1003 of title 5”, “such Act [meaning the Administrative Procedure Act]”, and “section 1009 of title 5”, respectively, on authority of Pub. L. 89-554, § 7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5, Government Organization and Employees.

## AMENDMENTS

1994—Subsec. (b). Pub. L. 103-355, § 7201(2), substituted “supplier of materials” for “manufacturer of, or regular dealer in, materials”.

Subsec. (c). Pub. L. 103-355, § 7201(3), struck out “‘regular dealer’, ‘manufacturer’,” before “and ‘open market’”.

## 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.

## SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 25 section 450j.

**§ 43b. Manufacturers and regular dealers**

(a) The Secretary of Labor may prescribe in regulations the standards for determining whether a contractor is a manufacturer of or a regular dealer in materials, supplies, articles, or equipment to be manufactured or used in the performance of a contract entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States, for the manufacture or furnishing of materials, supplies, articles, and equipment.

(b) Any interested person shall have the right of judicial review of any legal question regarding the interpretation of the terms “regular dealer” and “manufacturer”, as defined pursuant to subsection (a) of this section.

(June 30, 1936, ch. 881, § 11, as added Oct. 13, 1994, Pub. L. 103-355, title VII, § 7201(4), 108 Stat. 3378.)

## CODIFICATION

Another section 11 of act June 30, 1936, is classified to section 44 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.

**§ 44. Separability of Walsh-Healey provisions**

If any provision of sections 35 to 45 of this title, or the application thereof to any persons or circumstances, is held invalid, the remainder of said sections, and the application of such provisions to other persons or circumstances, shall not be affected thereby.

(June 30, 1936, ch. 881, § 11, formerly § 10, 49 Stat. 2039; renumbered June 30, 1952, ch. 530, title III, § 301, 66 Stat. 308.)

## CODIFICATION

Another section 11 of act June 30, 1936, is classified to section 43b of this title.

## SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 25 section 450j.

**§ 45. Effective date of Walsh-Healey provisions; exception as to representations with respect to minimum wages**

Sections 35 to 45 of this title shall apply to all contracts entered into pursuant to invitations for bids issued on or after ninety days from June 30, 1936: *Provided, however,* That the provisions requiring the inclusion of representations with respect to minimum wages shall apply only to purchases or contracts relating to such industries as have been the subject matter of a determination by the Secretary of Labor.

(June 30, 1936, ch. 881, § 12, formerly § 11, 49 Stat. 2039; renumbered June 30, 1952, ch. 530, title III, § 301, 66 Stat. 308.)

## CODIFICATION

Another section 12 of act June 30, 1936, is set out as a Short Title note under section 35 of this title.

## SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 37, 38, 39, 40, 41, 42, 43, 43a, 44, 356 of this title; title 10 section 2304; title 25 section 450j; title 39 section 410.

**§ 46. Committee for Purchase From People Who Are Blind or Severely Disabled****(a) Establishment**

There is established a committee to be known as the Committee for Purchase From People Who Are Blind or Severely Disabled (hereafter in sections 46 to 48c of this title referred to as the “Committee”). The Committee shall be composed of fifteen members appointed as follows:

(1) The President shall appoint as a member one officer or employee from each of the following: The Department of Agriculture, the Department of Defense, the Department of the Army, the Department of the Navy, the Department of the Air Force, the Department of Health and Human Services, the Department of Commerce, the Department of Veterans Affairs, the Department of Justice, the Department of Labor, and the General Services Administration. The head of each such department and agency shall nominate one officer or employee in his department or agency for appointment under this paragraph.

(2)(A) The President shall appoint one member from persons who are not officers or employees of the Government and who are conversant with the problems incident to the employment of the blind.

(B) The President shall appoint one member from persons who are not officers or employees of the Government and who are conversant with the problems incident to the employment of other severely handicapped individuals.

(C) The President shall appoint one member from persons who are not officers or employees of the Government and who represent blind individuals employed in qualified nonprofit agencies for the blind.



(D) The President shall appoint one member from persons who are not officers or employees of the Government and who represent severely handicapped individuals (other than blind individuals) employed in qualified nonprofit agencies for other severely handicapped individuals.

**(b) Vacancy**

A vacancy in the membership of the Committee shall be filled in the manner in which the original appointment was made.

**(c) Chairman**

The members of the Committee shall elect one of their number to be Chairman.

**(d) Terms**

(1) Except as provided in paragraphs (2), (3), and (4), members appointed under paragraph (2) of subsection (a) of this section shall be appointed for terms of five years. Any member appointed to the Committee under such paragraph may be reappointed to the Committee if he meets the qualifications prescribed by that paragraph.

(2) Of the members first appointed under paragraph (2) of subsection (a) of this section—

(A) one shall be appointed for a term of three years,

(B) one shall be appointed for a term of four years, and

(C) one shall be appointed for a term of five years,

as designated by the President at the time of appointment.

(3) Any member appointed under paragraph (2) of subsection (a) of this section to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the remainder of such term. A member appointed under such paragraph may serve after the expiration of his term until his successor has taken office.

(4) The member first appointed under paragraph (2)(B) of subsection (a) of this section shall be appointed for a term of three years.

**(e) Pay and travel expenses**

(1) Except as provided in paragraph (2), members of the Committee shall each be entitled to receive the daily equivalent of the annual rate of basic pay in effect for grade GS-18 of the General Schedule for each day (including travel-time) during which they are engaged in the actual performance of services for the Committee.

(2) Members of the Committee who are officers or employees of the Government shall receive no additional pay on account of their service on the Committee.

(3) While away from their homes or regular places of business in the performance of services for the Committee, members of the Committee shall be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the Government service are allowed expenses under section 5703(b)<sup>1</sup> of title 5.

**(f) Staff**

(1) Subject to such rules as may be adopted by the Committee, the Chairman may appoint and

fix the pay of such personnel as the Committee determines are necessary to assist it in carrying out its duties and powers under sections 46 to 48c of this title.

(2) Upon request of the Committee, the head of any entity of the Government is authorized to detail, on a reimbursable basis, any of the personnel of such entity to the Committee to assist it in carrying out its duties and powers under section 46 to 48c of this title.

(3) The staff of the Committee appointed under paragraph (1) shall be appointed subject to the provisions of title 5 governing appointments in the competitive service, and shall be paid in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of such title 5 relating to classification and General Schedule pay rates.

**(g) Obtaining official data**

The Committee may secure directly from any entity of the Government information necessary to enable it to carry out sections 46 to 48c of this title. Upon request of the Chairman of the Committee, the head of such Government entity shall furnish such information to the Committee.

**(h) Administrative support services**

The Administrator of General Services shall provide to the Committee on a reimbursable basis such administrative support services as the Committee may request.

**(i) Annual report**

The Committee shall, not later than December 31 of each year, transmit to the President and to the Congress a report which shall include the names of the Committee members serving in the preceding fiscal year, the dates of Committee meetings in that year, a description of its activities under sections 46 to 48c of this title in that year, and any recommendations for changes in sections 46 to 48c of this title which it determines are necessary.

(June 25, 1938, ch. 697, §1, 52 Stat. 1196; June 23, 1971, Pub. L. 92-28, §1, 85 Stat. 77; July 25, 1974, Pub. L. 93-358, §1(1), (2), 88 Stat. 392, 393; Apr. 21, 1976, Pub. L. 94-273, §8(2), 90 Stat. 378; Oct. 17, 1979, Pub. L. 96-88, title V, §509(b), 93 Stat. 695; June 13, 1991, Pub. L. 102-54, §13(p), 105 Stat. 278; Oct. 29, 1992, Pub. L. 102-569, title IX, §911(a), 106 Stat. 4486; Aug. 11, 1993, Pub. L. 103-73, title III, §301, 107 Stat. 736.)

REFERENCES IN TEXT

Section 5703 of title 5, referred to in subsec. (e)(3), was amended generally by Pub. L. 94-22, §4, May 19, 1975, 89 Stat. 85, and, as so amended, does not contain a subsec. (b).

AMENDMENTS

1993—Subsec. (a). Pub. L. 103-73 substituted “Blind or Severely Disabled” for “Blind and Severely Disabled” in introductory provisions.

1992—Subsec. (a). Pub. L. 102-569 substituted “From People Who Are Blind and Severely Disabled” for “from the Blind and Other Severely Handicapped” in introductory provisions.

1991—Subsec. (a)(1). Pub. L. 102-54 substituted “Department of Veterans Affairs” for “Veterans’ Administration”.

1976—Subsec. (i). Pub. L. 94-273 substituted “December 31” for “September 30”.

<sup>1</sup> See References in Text note below.

1974—Subsec. (a). Pub. L. 93-358, §1(1)(A), (B), substituted “Committee for Purchase from Blind and Other Severely Handicapped” for “Committee for Purchase of Products and Services of the Blind and Other Severely Handicapped” and “fifteen” for “fourteen” in provisions preceding par. (1).

Subsec. (a)(2). Pub. L. 93-358, §1(1)(C), (D), struck out “and other severely handicapped individuals” after “employment of the blind” in subpar. (A), added subpar. (B), and redesignated former subpars. (B) and (C) as (C) and (D), respectively.

Subsec. (d)(1). Pub. L. 93-358, §1(2)(A), substituted “paragraphs (2), (3), and (4)” for “paragraphs (2) and (3)”.

Subsec. (d)(4). Pub. L. 93-358, §1(2)(B), added par. (4).

1971—Pub. L. 92-28, in substituting subsecs. (a) to (i) for former paragraph, among other changes: renamed Committee on Purchases of Blind-made Products as Committee for Purchase of Products and Services of the Blind and Other Severely Handicapped; increased membership of Committee from seven to fourteen members; provided for appointments from Departments of Defense, Air Force, Health, Education, and Welfare, Justice, and Labor and from Veterans’ Administration and General Services Administration; eliminated appointments from Treasury Department and Department of Interior; substituted appointment from Department of the Army for appointment from War Department; required one appointee to be also conversant with problems incident to employment of other severely handicapped individuals; substituted requirement that such appointment be from persons not officers or employees of the Government rather than that he be a private citizen; reenacted provision for Presidential appointment; substituted subsec. (e) pay and travel expenses provisions for former requirement for service of Committee members without additional compensation; incorporated in subsec. (c) provision for selection of a Chairman, substituting “election” for “designation”; and inserted provisions incorporated in subsecs. (a)(1) (for nomination by head of each department and agency of one officer or employee of the department or agency for appointment under par. (1)), (a)(2)(B), (C), (b), (d), and (f) to (i).

#### CHANGE OF NAME

“Department of Health and Human Services” substituted for “Department of Health, Education, and Welfare” in subsec. (a)(1) pursuant to section 509(b) of Pub. L. 96-88 which is classified to section 3508(b) of Title 20, Education.

#### EFFECTIVE DATE OF 1971 AMENDMENT

Section 2 of Pub. L. 92-28 provided that: “The amendment made by the first section of this Act [amending this section and sections 47 and 48 and enacting sections 48a to 48c of this title] shall take effect on the first day of the first month which begins more than thirty days after the date of enactment of this Act [June 23, 1971].”

#### SHORT TITLE

Section 7 of act June 25, 1938, as added by Pub. L. 103-355, title X, §10005(f)(6), Oct. 13, 1994, 108 Stat. 3409, provided that: “This Act [enacting this section and sections 47 to 48c of this title] may be cited as the ‘Javits-Wagner-O’Day Act.’”

#### 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.

#### ACT REFERRED TO IN OTHER SECTIONS

The Javits-Wagner-O’Day Act is referred to in section 253 of this title; title 10 sections 2304, 2410d, 2461; title 29 section 721; title 40 sections 481, 490c.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 47, 48a, 48b, 48c of this title; title 15 section 644.

### § 47. Duties and powers of the Committee

#### (a) Procurement list; publication in Federal Register; additions and removals

(1) The Committee shall establish and publish in the Federal Register a list (hereafter in sections 46 to 48c of this title referred to as the “procurement list”) of—

(A) the commodities produced by any qualified nonprofit agency for the blind or by any qualified nonprofit agency for other severely handicapped, and

(B) the services provided by any such agency,

which the Committee determines are suitable for procurement by the Government pursuant to sections 46 to 48c of this title. Such list shall be established and published in the Federal Register before the expiration of the thirty-day period beginning on Aug. 1, 1971, and shall initially consist of the commodities contained, on such date, in the schedule of blind-made products issued by the former Committee on Purchases of Blind-Made Products under its regulations.

(2) The Committee may, by rule made in accordance with the requirements of subsections (b), (c), (d), and (e) of section 553 of title 5, add to and remove from the procurement list commodities so produced and services so provided.

#### (b) Fair market price; price revisions

The Committee shall determine the fair market price of commodities and services which are contained on the procurement list and which are offered for sale to the Government by any qualified nonprofit agency for the blind or any such agency for other severely handicapped. The Committee shall also revise from time to time in accordance with changing market conditions its price determinations with respect to such commodities and services.

#### (c) Central nonprofit agency; designation

The Committee shall designate a central nonprofit agency or agencies to facilitate the distribution (by direct allocation, subcontract, or any other means) of orders of the Government for commodities and services on the procurement list among qualified nonprofit agencies for the blind or such agencies for other severely handicapped.

#### (d) Rules and regulations; blind-made products, priority

(1) The Committee may make rules and regulations regarding (A) specifications for commodities and services on the procurement list, (B) the time of their delivery, and (C) such other matters as may be necessary to carry out the purposes of sections 46 to 48c of this title.

(2) The Committee shall prescribe regulations providing that—

(A) in the purchase by the Government of commodities produced and offered for sale by

qualified nonprofit agencies for the blind or such agencies for other severely handicapped, priority shall be accorded to commodities produced and offered for sale by qualified nonprofit agencies for the blind, and

(B) in the purchase by the Government of services offered by nonprofit agencies for the blind or such agencies for other severely handicapped, priority shall, until the end of the calendar year ending December 31, 1976, be accorded to services offered for sale by qualified nonprofit agencies for the blind.

**(e) Problems and production methods; study and evaluation**

The Committee shall make a continuing study and evaluation of its activities under sections 46 to 48c of this title for the purpose of assuring effective and efficient administration of sections 46 to 48c of this title. The Committee may study (on its own or in cooperation with other public or nonprofit private agencies) (1) problems related to the employment of the blind and of other severely handicapped individuals, and (2) the development and adaptation of production methods which would enable a greater utilization of the blind and other severely handicapped individuals.

(June 25, 1938, ch. 697, § 2, 52 Stat. 1196; June 23, 1971, Pub. L. 92-28, § 1, 85 Stat. 79.)

AMENDMENTS

1971—Pub. L. 92-28, in substituting subsecs. (a) to (e) for former paragraph, among other changes: extended provisions to cover commodities and services of agencies for the blind and other severely handicapped, previously limited to brooms and mops and other suitable commodities manufactured by agencies for the blind; inserted provisions incorporated in subsecs. (a) and (e); incorporated in subsec. (b) provisions for determination of fair market price and price revisions; incorporated in subsec. (c) provisions for designation of a central nonprofit agency, providing for distribution by direct allocation, subcontract, or any other means; incorporated existing provisions in subsec. (d)(1), adding par. (2) thereof; and struck out provision that no change in prices shall become effective prior to expiration of fifteen days from date on which such change is made by the Committee.

EFFECTIVE DATE OF 1971 AMENDMENT

Amendment by Pub. L. 92-28 effective Aug. 1, 1971, see section 2 of Pub. L. 92-28, set out as a note under section 46 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 48a of this title; title 10 sections 2410d, 2461; title 15 section 644; title 40 section 481.

**§ 48. Procurement requirements for the Government; nonapplication to prison-made products**

If any entity of the Government intends to procure any commodity or service on the procurement list, that entity shall, in accordance with rules and regulations of the Committee, procure such commodity or service, at the price established by the Committee, from a qualified nonprofit agency for the blind or such an agency for other severely handicapped if the commodity or service is available within the period required by that Government entity; except that this sec-

tion shall not apply with respect to the procurement of any commodity which is available for procurement from an industry established under chapter 307 of title 18, and which, under section 4124 of such title 18, is required to be procured from such industry.

(June 25, 1938, ch. 697, § 3, 52 Stat. 1196; June 23, 1971, Pub. L. 92-28, § 1, 85 Stat. 80.)

AMENDMENTS

1971—Pub. L. 92-28 extended provisions to cover any commodity or service on the procurement list for former provision for brooms and mops and other suitable commodities, excepted section from application to prison-made products, and deleted provision for nonapplicability of sections 46 to 58 of this title to cases where brooms and mops were available for procurement from and Federal department or agency and procurement therefrom was required under provisions of any law in effect on June 25, 1938, or to cases where brooms and mops were procured outside continental United States.

EFFECTIVE DATE OF 1971 AMENDMENT

Amendment by Pub. L. 92-28 effective Aug. 1, 1971, see section 2 of Pub. L. 92-28, set out as a note under section 46 of this title.

**§ 48a. Audit**

The Comptroller General of the United States, or any of his duly authorized representatives, shall have access, for the purpose of audit and examination, to any books, documents, papers, and other records of the Committee and of each agency designated by the Committee under section 47(c) of this title. This section shall also apply to any qualified nonprofit agency for the blind and any such agency for other severely handicapped which have sold commodities or services under sections 46 to 48c of this title but only with respect to the books, documents, papers, and other records of such agency which relate to its activities in a fiscal year in which a sale was made under sections 46 to 48c of this title.

(June 25, 1938, ch. 697, § 4, as added June 23, 1971, Pub. L. 92-28, § 1, 85 Stat. 81.)

EFFECTIVE DATE

Section effective Aug. 1, 1971, see section 2 of Pub. L. 92-28, set out as an Effective Date of 1971 Amendment note under section 46 of this title.

**§ 48b. Definitions**

For purposes of sections 46 to 48c of this title—

(1) The term "blind" refers to an individual or class of individuals whose central visual acuity does not exceed 20/200 in the better eye with correcting lenses or whose visual acuity, if better than 20/200, is accompanied by a limit to the field of vision in the better eye to such a degree that its widest diameter subtends an angle of no greater than 20 degrees.

(2) The terms "other severely handicapped" and "severely handicapped individuals" mean an individual or class of individuals under a physical or mental disability, other than blindness, which (according to criteria established by the Committee after consultation with appropriate entities of the Government and taking into account the views of non-Government entities rep-

resenting the handicapped) constitutes a substantial handicap to employment and is of such a nature as to prevent the individual under such disability from currently engaging in normal competitive employment.

(3) The term "qualified nonprofit agency for the blind" means an agency—

(A) organized under the laws of the United States or of any State, operated in the interest of blind individuals, and the net income of which does not inure in whole or in part to the benefit of any shareholder or other individual;

(B) which complies with any applicable occupational health and safety standard prescribed by the Secretary of Labor; and

(C) which in the production of commodities and in the provision of services (whether or not the commodities or services are procured under sections 46 to 48c of this title) during the fiscal year employs blind individuals for not less than 75 per centum of the man-hours of direct labor required for the production or provision of the commodities or services.

(4) The term "qualified nonprofit agency for other severely handicapped" means an agency—

(A) organized under the laws of the United States or of any State, operated in the interest of severely handicapped individuals who are not blind, and the net income of which does not inure in whole or in part to the benefit of any shareholder or other individual;

(B) which complies with any applicable occupational health and safety standard prescribed by the Secretary of Labor; and

(C) which in the production of commodities and in the provision of services (whether or not the commodities or services are procured under sections 46 to 48c of this title) during the fiscal year employs blind or other severely handicapped individuals for not less than 75 per centum of the man-hours of direct labor required for the production or provision of the commodities or services.

(5) The term "direct labor" includes all work required for preparation, processing, and packing of a commodity, or work directly relating to the performance of a service, but not supervision, administration, inspection, or shipping.

(6) The term "fiscal year" means the twelve-month period beginning on October 1 of each year.

(7) The terms "Government" and "entity of the Government" include any entity of the legislative branch or the judicial branch, any executive agency or military department (as such agency and department are respectively defined by sections 102 and 105 of title 5), the United States Postal Service, and any nonappropriated fund instrumentality under the jurisdiction of the Armed Forces.

(8) The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Trust Territory of the Pacific Islands.

(June 25, 1938, ch. 697, § 5, as added June 23, 1971, Pub. L. 92-28, § 1, 85 Stat. 81; amended July 25, 1974, Pub. L. 93-358, § 1(3), 88 Stat. 393; Apr. 21, 1976, Pub. L. 94-273, § 3(22), 90 Stat. 377.)

#### AMENDMENTS

1976—Pub. L. 94-273 substituted "October" for "July" in par. (6).

1974—Pub. L. 93-358 added par. (5) defining "direct labor", struck out former par. (6) which defined "direct labor" without reference to work directly relating to the performance of a service, and redesignated former pars. (7), (8), and (9) as (6), (7), and (8), respectively.

#### EFFECTIVE DATE

Section effective Aug. 1, 1971, see section 2 of Pub. L. 92-28, set out as an Effective Date of 1971 Amendment note under section 46 of this title.

#### TERMINATION OF TRUST TERRITORY OF THE PACIFIC ISLANDS

For termination of Trust Territory of the Pacific Islands, see note set out preceding section 1681 of Title 48, Territories and Insular Possessions.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 10 section 2410d; title 40 section 481.

#### § 48c. Authorization of appropriations

There are authorized to be appropriated to the Committee to carry out sections 46 to 48c of this title \$240,000 for the fiscal year ending June 30, 1974, and such sums as may be necessary for the succeeding fiscal years.

(June 25, 1938, ch. 697, § 6, as added June 23, 1971, Pub. L. 92-28, § 1, 85 Stat. 82; amended July 30, 1973, Pub. L. 93-76, 87 Stat. 176; July 25, 1974, Pub. L. 93-358, § 1(4), 88 Stat. 393.)

#### AMENDMENTS

1974—Pub. L. 93-358 substituted "\$240,000 for the fiscal year ending June 30, 1974, and such sums as may be necessary for the succeeding fiscal years" for "\$200,000 each for the fiscal year ending June 30, 1972, and the next succeeding fiscal year, and \$240,000 for the fiscal year ending June 30, 1974".

1973—Pub. L. 93-76 increased authorization of appropriation to \$240,000 for fiscal year ending June 30, 1974.

#### EFFECTIVE DATE

Section effective Aug. 1, 1971, see section 2 of Pub. L. 92-28, set out as an Effective Date of 1971 Amendment note under section 46 of this title.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 46, 47, 48a, 48b of this title.

#### § 49. Defense employment; honorable discharge from land and naval forces as equivalent to birth certificate

No defense contractor shall deny employment, on account of failure to produce a birth certificate, to any person who submits, in lieu of a birth certificate, an honorable discharge certificate or certificate issued in lieu thereof from the Army, Air Force, Navy, Marine Corps, or Coast Guard of the United States, unless such honorable discharge certificate shows on its face that such person may have been an alien at the time of its issuance.

(June 22, 1942, ch. 432, § 1, 56 Stat. 375; July 26, 1947, ch. 343, title II, §§ 205(a), 207(a), (f), 61 Stat. 501-503.)

#### CHANGE OF NAME

Air Force inserted in text under authority of section 207(a), (f) of act July 26, 1947, ch. 343, title II, 61 Stat. 502, 503. Department of War designated Department of the Army and title of Secretary of War changed to Sec-

retary of the Army by section 205(a) of such act July 26, 1947. Sections 205(a) and 207(a), (f) of act July 26, 1947 were repealed by section 53 of act Aug. 10, 1956, ch. 1041, 70A Stat. 641. Section 1 of act Aug. 10, 1956, enacted "Title 10, Armed Forces", which in sections 3010 to 3013 and 8010 to 8013 continued Departments of the Army and Air Force under administrative supervision of Secretary of the Army and Secretary of the Air Force, respectively.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 50 of this title.

### § 50. "Defense contractor" defined

As used in sections 49 and 50 of this title the term "defense contractor" means an employer engaged in—

- (1) the production, maintenance, or storage of arms, armament, ammunition, implements of war, munitions, machinery, tools, clothing, food, fuel, or any articles or supplies, or parts or ingredients of any articles or supplies; or
- (2) the construction, reconstruction, repair, or installation of a building, plant, structure, or facility;

under a contract with the United States or under any contract which the President, the Secretary of the Army, the Secretary of the Air Force, the Secretary of the Navy, or the Secretary of Transportation certifies to such employer to be necessary to the national defense.

(June 22, 1942, ch. 432, §2, 56 Stat. 376; July 26, 1947, ch. 343, title II, §§205(a), 207(a), (f), 61 Stat. 501-503; Aug. 6, 1981, Pub. L. 97-31, §12(16), 95 Stat. 154.)

#### AMENDMENTS

1981—Pub. L. 97-31 substituted reference to Secretary of Transportation for reference to United States Maritime Commission.

#### CHANGE OF NAME

Secretary of the Air Force inserted in text under authority of section 207(a), (f) of act July 26, 1947, ch. 343, title II, 61 Stat. 501. Department of War designated Department of the Army and title of Secretary of War changed to Secretary of the Army by section 205(a) of such act July 26, 1947. Sections 205(a) and 207(a), (f) of act July 26, 1947 were repealed by section 53 of act Aug. 10, 1956, ch. 1041, 70A Stat. 641. Section 1 of act Aug. 10, 1956, enacted "Title 10, Armed Forces", which in sections 3010 to 3013 and 8010 to 8013 continued Departments of the Army and Air Force under administrative supervision of Secretary of the Army and Secretary of the Air Force, respectively.

### § 51. Short title

Sections 51 to 58 of this title may be cited as the "Anti-Kickback Act of 1986".

(Mar. 8, 1946, ch. 80, §1, 60 Stat. 37; Sept. 2, 1960, Pub. L. 86-695, 74 Stat. 740; Nov. 7, 1986, Pub. L. 99-634, §2(a), 100 Stat. 3523.)

#### AMENDMENTS

1986—Pub. L. 99-634 amended section generally, substituting short title provision for provisions relating to fees or kick-backs by subcontractors on negotiated contracts, recovery thereof by the United States, conclusive presumption that such payments by such subcontractors were included in the price of the subcontract or order and ultimately borne by the United States, and withholding by the prime contractor of such amounts from sums otherwise due a subcontractor.

1960—Pub. L. 86-695 inserted "negotiated" before "contract" and struck out "on a cost-plus-a-fixed-fee or other cost reimbursable basis" after "whatsoever" in cl. (1), and substituted "setoff" for "set-off" and "contract" for "cost-plus-a-fixed-fee or cost reimbursable contract," before "or by an action".

#### EFFECTIVE DATE OF 1986 AMENDMENT

Section 3 of Pub. L. 99-634 provided that:

"(a) Except as provided in subsection (b), the Anti-Kickback Act of 1986 (as set out in section 2(a)) [sections 51 to 58 of this title] shall take effect with respect to conduct described in section 3 of such Act [section 53 of this title] which occurs on or after the date of the enactment of this Act [Nov. 7, 1986].

"(b) Subsections (a) and (b) of section 7 of the Anti-Kickback Act of 1986 (as set out in section 2(a)) [section 57(a) and (b) of this title] shall take effect with respect to contract solicitations issued by an agency, department, or other establishment of the Federal Government on or after the date which is 90 days after the date of the enactment of this Act [Nov. 7, 1986]."

#### SHORT TITLE OF 1986 AMENDMENT

Section 1 of Pub. L. 99-634 provided: "That this Act [enacting sections 55 to 58 of this title, amending this section and sections 52 to 54 of this title, and enacting provisions set out as a note above] may be cited as the 'Anti-Kickback Enforcement Act of 1986.'"

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 52 of this title.

### § 52. Definitions

As used in sections 51 to 58 of this title:

(1) The term "contracting agency", when used with respect to a prime contractor, means any department, agency, or establishment of the United States which enters into a prime contract with a prime contractor.

(2) The term "kickback" means any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly, to any prime contractor, prime contractor employee, subcontractor, or subcontractor employee for the purpose of improperly obtaining or rewarding favorable treatment in connection with a prime contract or in connection with a subcontract relating to a prime contract.

(3) The term "person" means a corporation, partnership, business association of any kind, trust, joint-stock company, or individual.

(4) The term "prime contract" means a contract or contractual action entered into by the United States for the purpose of obtaining supplies, materials, equipment, or services of any kind.

(5) The term "prime contractor" means a person who has entered into a prime contract with the United States.

(6) The term "prime contractor employee" means any officer, partner, employee, or agent of a prime contractor.

(7) The term "subcontract" means a contract or contractual action entered into by a prime contractor or subcontractor for the purpose of obtaining supplies, materials, equipment, or services of any kind under a prime contract.

(8) The term "subcontractor"—

(A) means any person, other than the prime contractor, who offers to furnish or furnishes any supplies, materials, equip-

ment, or services of any kind under a prime contract or a subcontract entered into in connection with such prime contract; and

(B) includes any person who offers to furnish or furnishes general supplies to the prime contractor or a higher tier subcontractor.

(9) The term “subcontractor employee” means any officer, partner, employee, or agent of a subcontractor.

(Mar. 8, 1946, ch. 80, §2, 60 Stat. 38; Sept. 2, 1960, Pub. L. 86-695, 74 Stat. 740; Nov. 7, 1986, Pub. L. 99-634, §2(a), 100 Stat. 3523.)

#### AMENDMENTS

1986—Pub. L. 99-634 amended section generally. Prior to amendment, section read as follows: “For the purpose of sections 51 to 54 of this title, the term ‘subcontractor’ is defined as any person, including a corporation, partnership, or business association of any kind, who holds an agreement or purchase order to perform all or any part of the work or to make or to furnish any article or service required for the performance of a negotiated contract or of a subcontract entered into thereunder; the term ‘person’ shall include any subcontractor, corporation, association, trust, joint-stock company, partnership, or individual; and the term ‘negotiated contract’ means made without formal advertising.”

1960—Pub. L. 86-695 substituted “negotiated contract” for “cost-plus-a-fixed-fee or cost reimbursable contract” in definition of “subcontractor” and defined “negotiated contract”.

#### EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99-634 effective with respect to conduct described in section 53 of this title which occurs on or after Nov. 7, 1986, see section 3(a) of Pub. L. 99-634, set out as a note under section 51 of this title.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 51 of this title.

### § 53. Prohibited conduct

It is prohibited for any person—

(1) to provide, attempt to provide, or offer to provide any kickback;

(2) to solicit, accept, or attempt to accept any kickback; or

(3) to include, directly or indirectly, the amount of any kickback prohibited by clause (1) or (2) in the contract price charged by a subcontractor to a prime contractor or a higher tier subcontractor or in the contract price charged by a prime contractor to the United States.

(Mar. 8, 1946, ch. 80, §3, 60 Stat. 38; Sept. 2, 1960, Pub. L. 86-695, 74 Stat. 741; Nov. 7, 1986, Pub. L. 99-634, §2(a), 100 Stat. 3524.)

#### AMENDMENTS

1986—Pub. L. 99-634 amended section generally. Prior to amendment, section read as follows: “For the purpose of ascertaining whether such fees, commissions, compensation, gifts, or gratuities have been paid or granted by a subcontractor, the General Accounting Office shall have the power to inspect the plants and to audit the books and records of any prime contractor or subcontractor engaged in the performance of a negotiated contract.”

1960—Pub. L. 86-695 substituted “negotiated contract” for “cost-plus-a-fixed-fee or cost reimbursable contract”.

#### EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99-634 effective with respect to conduct described in this section which occurs on or after Nov. 7, 1986, see section 3(a) of Pub. L. 99-634, set out as a note under section 51 of this title.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 51, 52, 54, 55, 56, 57, 58 of this title.

### § 54. Criminal penalties

Any person who knowingly and willfully engages in conduct prohibited by section 53 of this title shall be imprisoned for not more than 10 years or shall be subject to a fine in accordance with title 18, or both.

(Mar. 8, 1946, ch. 80, §4, 60 Stat. 38; Sept. 2, 1960, Pub. L. 86-695, 74 Stat. 741; Nov. 7, 1986, Pub. L. 99-634, §2(a), 100 Stat. 3524.)

#### AMENDMENTS

1986—Pub. L. 99-634 amended section generally. Prior to amendment, section read as follows: “Any person who shall knowingly, directly or indirectly, make or receive any such prohibited payment shall be fined not more than \$10,000 or be imprisoned for not more than two years, or both.”

1960—Pub. L. 86-695 reenacted section without change.

#### EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99-634 effective with respect to conduct described in section 53 of this title which occurs on or after Nov. 7, 1986, see section 3(a) of Pub. L. 99-634, set out as a note under section 51 of this title.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 51, 52 of this title.

### § 55. Civil actions

(a)(1) The United States may, in a civil action, recover a civil penalty from any person who knowingly engages in conduct prohibited by section 53 of this title. The amount of such civil penalty shall be—

(A) twice the amount of each kickback involved in the violation; and

(B) not more than \$10,000 for each occurrence of prohibited conduct.

(2) The United States may, in a civil action, recover a civil penalty from any person whose employee, subcontractor or subcontractor employee violates section 53 of this title by providing, accepting, or charging a kickback. The amount of such civil penalty shall be the amount of that kickback.

(b) A civil action under this section shall be barred unless the action is commenced within 6 years after the later of (1) the date on which the prohibited conduct establishing the cause of action occurred, and (2) the date on which the United States first knew or should reasonably have known that the prohibited conduct had occurred.

(Mar. 8, 1946, ch. 80, §5, as added Nov. 7, 1986, Pub. L. 99-634, §2(a), 100 Stat. 3524.)

#### EFFECTIVE DATE

Section effective with respect to conduct described in section 53 of this title which occurs on or after Nov. 7,

1986, see section 3(a) of Pub. L. 99-634, set out as an Effective Date of 1986 Amendment note under section 51 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 51, 52 of this title.

**§ 56. Administrative offsets**

**(a) Offset authority**

A contracting officer of a contracting agency may offset the amount of a kickback provided, accepted, or charged in violation of section 53 of this title against any moneys owed by the United States to the prime contractor under the prime contract to which such kickback relates.

**(b) Duties of prime contractor**

(1) Upon direction of a contracting officer of a contracting agency with respect to a prime contract, the prime contractor shall withhold from any sums owed to a subcontractor under a subcontract of the prime contract the amount of any kickback which was or may be offset against that prime contractor under subsection (a) of this section.

(2) Such contracting officer may order that sums withheld under paragraph (1)—

(A) be paid over to the contracting agency;

or

(B) if the United States has already offset the amount of such sums against that prime contractor, be retained by the prime contractor.

(3) The prime contractor shall notify the contracting officer when an amount is withheld and retained under paragraph (2)(B).

**(c) Claim of Government**

An offset under subsection (a) of this section or a direction or order of a contracting officer under subsection (b) of this section is a claim by the Government for the purposes of the Contract Disputes Act of 1978 [41 U.S.C. 601 et seq.].

**(d) "Contracting officer" defined**

As used in this section, the term "contracting officer" has the meaning given that term for the purposes of the Contract Disputes Act of 1978 [41 U.S.C. 601 et seq.].

(Mar. 8, 1946, ch. 80, §6, as added Nov. 7, 1986, Pub. L. 99-634, §2(a), 100 Stat. 3524.)

REFERENCES IN TEXT

The Contract Disputes Act of 1978, referred to in subsections (c) and (d), is 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.

EFFECTIVE DATE

Section effective with respect to conduct described in section 53 of this title which occurs on or after Nov. 7, 1986, see section 3(a) of Pub. L. 99-634, set out as an Effective Date of 1986 Amendment note under section 51 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 51, 52 of this title.

**§ 57. Contractor responsibilities**

**(a) Procedural requirements for prevention and detection of violations**

Each contracting agency shall include in each prime contract awarded by such agency a requirement that the prime contractor shall have in place and follow reasonable procedures designed to prevent and detect violations of section 53 of this title in its own operations and direct business relationships.

**(b) Cooperation in investigations requirement**

Each contracting agency shall include in each prime contract awarded by such agency a requirement that the prime contractor shall cooperate fully with any Federal Government agency investigating a violation of section 53 of this title.

**(c) Reporting requirement; supplying information as favorable evidence of responsibility**

(1)(A) Whenever a prime contractor or subcontractor has reasonable grounds to believe that a violation of section 53 of this title may have occurred, the prime contractor or subcontractor shall promptly report the possible violation in writing.

(B) A contractor shall make the reports required by subparagraph (A) to the inspector general of the contracting agency, the head of the contracting agency if the agency does not have an inspector general, or the Department of Justice.

(2) In the case of an administrative or contractual action to suspend or debar any person who is eligible to enter into contracts with the Federal Government, evidence that such person has supplied information to the United States pursuant to paragraph (1) shall be favorable evidence of such person's responsibility for the purposes of Federal procurement laws and regulations.

**(d) Partial inapplicability to small contracts**

Subsections (a) and (b) of this section do not apply to a prime contract that is not greater than \$100,000 or to a prime contract for the acquisition of commercial items (as defined in section 403(12)<sup>1</sup> of this title).<sup>2</sup>

**(e) Cooperation in investigations regardless of contract amount**

Notwithstanding subsection (d) of this section, a prime contractor shall cooperate fully with any Federal Government agency investigating a violation of section 53 of this title.

(Mar. 8, 1946, ch. 80, §7, as added Nov. 7, 1986, Pub. L. 99-634, §2(a), 100 Stat. 3525; amended Oct. 13, 1994, Pub. L. 103-355, title IV, §4104(a), title VIII, §8301(c)(1), 108 Stat. 3341, 3397.)

REFERENCES IN TEXT

Section 403(12) of this title, referred to in subsec. (d), was in the original "section 4(12) of such Act (41 U.S.C. 403(12))", and was translated as meaning section 4(12) of the Office of Federal Procurement Policy Act, Pub. L. 93-400, to reflect the probable intent of Congress.

AMENDMENTS

1994—Subsec. (d). Pub. L. 103-355, §8301(c)(1), inserted before period at end "or to a prime contract for the ac-

<sup>1</sup> See References in Text note below.

<sup>2</sup> So in original.

quisition of commercial items (as defined in section 403(12) of this title).”

Pub. L. 103-355, §4104(a), added subsec. (d).  
Subsec. (e). Pub. L. 103-355, §4104(a), added subsec. (e).

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

Subsecs. (a) and (b) effective with respect to contract solicitations issued by an agency, department, or other establishment of the Federal Government on or after the date which is 90 days after Nov. 7, 1986, and subsec. (c) effective with respect to conduct described in section 53 of this title which occurs on or after Nov. 7, 1986, see section 3 of Pub. L. 99-634, set out as an Effective Date of 1986 Amendment note under section 51 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 51, 52 of this title.

**§ 58. Inspection authority**

For the purpose of ascertaining whether there has been a violation of section 53 of this title with respect to any prime contract, the General Accounting Office and the inspector general of the contracting agency, or a representative of such contracting agency designated by the head of such agency if the agency does not have an inspector general, shall have access to and may inspect the facilities and audit the books and records, including any electronic data or records, of any prime contractor or subcontractor under a prime contract awarded by such agency. This section does not apply with respect to a prime contract for the acquisition of commercial items (as defined in section 403(12) of this title).

(Mar. 8, 1946, ch. 80, §8, as added Nov. 7, 1986, Pub. L. 99-634, §2(a), 100 Stat. 3525; amended Oct. 13, 1994, Pub. L. 103-355, title VIII, §8301(c)(2), 108 Stat. 3397.)

AMENDMENTS

1994—Pub. L. 103-355 inserted at end “This section does not apply with respect to a prime contract for the acquisition of commercial items (as defined in section 403(12) 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 effective with respect to conduct described in section 53 of this title which occurs on or after Nov. 7, 1986, see section 3(a) of Pub. L. 99-634, set out as an Effective Date of 1986 Amendment note under section 51 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 51, 52 of this title.

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- Sec.  
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## CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in title 5 sections 551, 701.

**§ 101. Declaration of policy**

The Congress declares that the objectives of this chapter are—

- (a) to facilitate maximum war production during the war, and to expedite reconversion from war production to civilian production as war conditions permit;
- (b) to assure to prime contractors and subcontractors, small and large, speedy and equitable final settlement of claims under terminated war contracts, and adequate interim financing until such final settlement;
- (c) to assure uniformity among Government agencies in basic policies and administration with respect to such termination settlements and interim financing;
- (d) to facilitate the efficient use of materials, manpower, and facilities for war and civilian purposes by providing prime contractors and subcontractors with notice of termination

of their war contracts as far in advance of the cessation of work thereunder as is feasible and consistent with the national security;

(e) to assure the expeditious removal from the plants of prime contractors and subcontractors of termination inventory not to be retained or sold by the contractor;

(f) to use all practicable methods compatible with the foregoing objectives to prevent improper payments and to detect and prosecute fraud.

(July 1, 1944, ch. 358, § 1, 58 Stat. 649.)

## SHORT TITLE

Section 27 of act July 1, 1944, provided that: "This Act [enacting this chapter] may be cited as the 'Contract Settlement Act of 1944'."

## SEPARABILITY

Section 26 of act July 1, 1944, provided: "If any provision of this Act [enacting this chapter], or the application of such provision to any person or circumstance, is held invalid, the remainder of this Act or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby."

## CROSS REFERENCES

Disposal of surplus property, see sections 484 and 511 to 514 of Title 40, Public Buildings, Property, and Works.

Settlement of claims for losses on certain war contracts, see note set out under section 106 of this title.

**§ 102. Surveillance by Congress**

(a) To assist the Congress in appraising the administration of this chapter and in developing such amendments or related legislation as may further be necessary to accomplish the objectives of this chapter, the appropriate committees of the Senate and the House of Representatives shall study each report submitted to the Congress under this chapter and shall otherwise maintain continuous surveillance of the operations of the Government agencies under this chapter.

(b) Repealed. Oct. 31, 1951, ch. 654, § 1(110), 65 Stat. 705.

(July 1, 1944, ch. 358, § 2, 58 Stat. 649; Oct. 31, 1951, ch. 654, § 1(110), 65 Stat. 705.)

## AMENDMENTS

1951—Subsec. (b). Act Oct. 31, 1949, repealed subsec. (b) which related to reports to Congress.

## CROSS REFERENCES

Reports to Congress by Administrator of General Services, in connection with procurement, contracts, property management, etc., see section 492 of Title 40, Public Buildings, Property, and Works.

**§ 103. Definitions**

As used in this chapter—

(a) The term "prime contract" means any contract, agreement, or purchase order heretofore or hereafter entered into by a contracting agency and connected with or related to the prosecution of the war; and the term "prime contractor" means any holder of one or more prime contracts.

(b) The term "subcontract" means any contract, agreement, or purchase order heretofore

or hereafter entered into to perform any work, or to make or furnish any material to the extent that such work or material is required for the performance of any one or more prime contracts or of any one or more other subcontracts; and the term "subcontractor" means any holder of one or more subcontracts.

(c) The term "war contract" means a prime contract or a subcontract; and the term "war contractor" means any holder of one or more war contracts.

(d) The terms "termination", "terminate" and "terminated" refer to the termination or cancellation, in whole or in part, of work under a prime contract for the convenience or at the option of the Government (except for default of the prime contractor) or of work under a subcontract for any reason except the default of the subcontractor.

(e) The term "material" includes any article, commodity, machinery, equipment, accessory, part, component, assembly, work in process, maintenance, repair, and operating supplies, and any product of any kind.

(f) The term "Government agency" means any executive department of the Government, or any administrative unit or subdivision thereof, any independent agency or any corporation owned or controlled by the United States in the executive branch of the Government, and includes any contracting agency.

(g) The term "contracting agency" means any Government agency, which has been or hereafter may be authorized to make contracts pursuant to section 611<sup>1</sup> of Appendix to title 50, and includes the Reconstruction Finance Corporation and any corporation organized pursuant to the Reconstruction Finance Corporation Act, and the Secretary of Commerce.

(h) The term "termination claim" means any claim or demand by a war contractor for fair compensation for the termination of any war contract and any other claim under a terminated war contract, which regulations prescribed under this chapter authorize to be asserted and settled in connection with any termination settlement.

(i) The term "interim financing" includes advance payments, partial payments, loans, discounts, advances, and commitments in connection therewith, and guaranties of loans, discounts, advances, and commitments in connection therewith and any other type of financing made in contemplation of or related to termination of war contracts.

(j) The term "Administrator" means the Administrator of General Services.

(k) The term "person" means any individual, corporation, partnership, firm, association, trust, estate, or other entity.

(l) The term "termination inventory" means any materials (including a proper part of any common materials), properly allocable to the terminated portion of a war contract, except any machinery or equipment subject to a separate contract specifically governing the use or disposition thereof.

(m) The term "final and conclusive", as applied to any settlement, finding, or decision,

means that such settlement, finding, or decision shall not be reopened, annulled, modified, set aside, or disregarded by any officer, employee, or agent of the United States or in any suit, action, or proceeding except as provided in this chapter.

(July 1, 1944, ch. 358, § 3, 58 Stat. 650; Ex. Ord. No. 9638, § 1, eff. Oct. 4, 1945, 10 F.R. 12591; Ex. Ord. No. 9809, §§ 1, 8 eff. Dec. 12, 1946, 11 F.R. 14281; Ex. Ord. No. 9841, §§ 101, 203, eff. Apr. 23, 1947, 12 F.R. 2645; June 30, 1947, ch. 166, title II, § 207, 61 Stat. 209; 1947 Reorg. Plan No. 1, § 201, eff. July 1, 1947, 12 F.R. 4534, 61 Stat. 951; June 30, 1949, ch. 288, title I, § 102(b), 63 Stat. 380.)

#### REFERENCES IN TEXT

Section 611 of Appendix to title 50, referred to in subsec. (g), was repealed by Pub. L. 89-554, § 8(a), Sept. 6, 1966, 80 Stat. 651. See section 1431 et seq. of Title 50, War and National Defense.

The Reconstruction Finance Corporation Act, referred to in subsec. (g), is act Jan. 22, 1932, ch. 8, 47 Stat. 5, as amended, which was classified to chapter 14 (§ 601 et seq.) of Title 15, Commerce and Trade, and has been eliminated from the Code. For complete classification of this Act to the Code prior to its elimination from the Code, see Tables.

#### CODIFICATION

In subsec. (g), the Smaller War Plants Corporation was omitted from the definition of the term "contracting agency," in subsec. (g) on the authority of section 207 of Act June 30, 1947, which provided: "The liquidation of the affairs of the Smaller War Plants Corporation administered by the Reconstruction Finance Corporation pursuant to Executive Order 9665 shall be carried out by the Reconstruction Finance Corporation, notwithstanding the provisions of the last paragraph of section 5 of the First War Powers Act, 1941 [section 605 of Title 50, Appendix, War and National Defense]. The Smaller War Plants Corporation is hereby abolished."

#### TRANSFER OF FUNCTIONS

In subsec. (g), "Secretary of Commerce" substituted for "War Production Board" in view of transfer of War Production Board functions to Civilian Production Administration, then to Office of Temporary Controls, and then to Secretary of Commerce by Ex. Ord. Nos. 9638, 9809, and 9841.

In subsec. (j), functions of Director of Contract Settlement transferred to Secretary of the Treasury by Ex. Ord. No. 9809, § 8, and Reorg. Plan No. 1 of 1947, § 201, were retransferred to Administrator of General Services by section 102(b) of act June 30, 1949, which is classified to section 752(b) of Title 40, Public Buildings, Property, and Works.

#### EFFECTIVE DATE OF TRANSFER OF FUNCTIONS

Transfer of functions by act June 30, 1949, effective July 1, 1949, see section 605 of act June 30, 1949, set out as an Effective Date note under section 471 of Title 40, Public Buildings, Property, and Works.

#### ABOLITION OF RECONSTRUCTION FINANCE CORPORATION

Reorg. Plan No. 1 of 1957, § 6(a), eff. June 30, 1957, 22 F.R. 4633, 71 Stat. 647, set out in the Appendix to Title 5, Government Organization and Employees, abolished Reconstruction Finance Corporation.

#### CROSS REFERENCES

War contracts penal provision comprehending the definitions of terms used in this section, see section 443 of Title 18, Crimes and Criminal Procedure.

War-time suspension of limitations, applicability of definitions, see section 3287 of Title 18.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 18 sections 443, 3287.

<sup>1</sup> See References in Text note below.

**§ 104. Administration of chapter****(a) Repealed. Pub. L. 89-554, § 8(a), Sept. 6, 1966, 80 Stat. 652****(b) Rules and regulations**

In order to insure uniform and efficient administration of the provisions of this chapter, the Administrator of General Services, subject to such provisions, by general orders or general regulations—

(1) shall prescribe policies, principles, methods, procedures, and standards to govern the exercise of the authority and discretion and the performance of the duties and functions of all Government agencies under this chapter; and

(2) may require or restrict the exercise of any such authority and discretion, or the performance of any such duty or function, to such extent as he deems necessary to carry out the provisions of this chapter.

**(c) Compliance**

The exercise of any authority or discretion and the performance of any duty or function, conferred or imposed on any Government agency by this chapter, shall be subject to such orders and regulations prescribed by the Administrator of General Services pursuant to subsection (b) of this section. Each Government agency shall carry out such orders and regulations of the Administrator of General Services expeditiously, and shall issue such regulations with respect to its operations and procedures as may be necessary to carry out the policies, principles, methods, procedures, and standards prescribed by the Administrator of General Services. Any Government agency may issue such further regulations not inconsistent with the general orders or regulations of the Administrator of General Services as it deems necessary or desirable to carry out the provisions of this chapter.

**(d) Personnel; supplies, facilities, and services**

The Administrator of General Services may, within the limits of funds which may be made available, employ and fix the compensation of necessary personnel in accordance with the provisions of the civil-service laws and chapter 51 and subchapter III of chapter 53 of title 5, and make expenditures for supplies, facilities, and services necessary for the performance of his functions under this chapter. Without regard to the provisions of the civil-service laws, he may employ certified public accountants, qualified cost accountants, industrial engineers, appraisers, and other experts, and contract with certified public accounting firms and qualified firms of engineers in the discharge of the duties imposed upon him and in furtherance of the objectives and policies of this chapter. The Administrator of General Services shall perform the duties imposed upon him through the personnel and facilities of the contracting agencies and other established Government agencies, to the extent that this does not interfere with the function of the Administrator of General Services to insure uniform and efficient administration of the provisions of this chapter.

**(e) Publication in Federal Register**

All orders and regulations prescribed by the Administrator of General Services or any Gov-

ernment agency under this chapter shall be published in the Federal Register.

(July 1, 1944, ch. 358, § 4, 58 Stat. 651; Ex. Ord. No. 9809, § 8, eff. Dec. 12, 1946, 11 F.R. 14281; 1947 Reorg. Plan No. 1, § 201, eff. July 1, 1947, 12 F.R. 4534, 61 Stat. 951; June 30, 1949, ch. 288, title I, § 102(b), 63 Stat. 380; Oct. 28, 1949, ch. 782, title XI, § 1106(a), 63 Stat. 972; Sept. 6, 1966, Pub. L. 89-554, § 8(a), 80 Stat. 652.)

## REFERENCES IN TEXT

The civil-service laws, referred to in subsec. (d), are set forth in Title 5, Government Organization and Employees. See, particularly, section 3301 et seq. of Title 5.

## CODIFICATION

In subsec. (d) of this section, "chapter 51 and subchapter III of chapter 53" substituted for "the Classification Act of 1949" on authority of Pub. L. 89-554, § 7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5, Government Organization and Employees.

In the second sentence of this section, provisions that authorized the appointment of a Deputy Director and that authorized the employment of certified public accountants, qualified cost accountants, industrial engineers, appraisers, and other experts without regard to "the Classification Act of 1923", were omitted as obsolete. Sections 1202 and 1204 of the Classification Act of 1949, 63 Stat. 972, 973, repealed the 1923 Act and all laws or parts of laws inconsistent with the 1949 Act. While section 1106(a) of the 1949 Act provided that references in other laws to the 1923 Act should be held and considered to mean the 1949 Act, it did not have the effect of continuing the exceptions contained in this sentence because of section 1106(b) which provided that the application of the 1949 Act to any position, officer, or employee shall not be affected by section 1106(a). The Classification Act of 1949 was repealed by Pub. L. 89-554, Sept. 6, 1966, § 8(a), 80 Stat. 632 (of which section 1 revised and enacted Title 5 into law). Section 5102 of Title 5 contains the applicability provisions of the 1949 Act, and section 5103 of Title 5 authorizes the Office of Personnel Management to determine the applicability to specific positions and employees.

## AMENDMENTS

1966—Subsec. (a). Pub. L. 89-554 repealed subsec. (a) which provided for the appointment, pay, and term of the Director of Contract Settlement. This office was abolished previously by Reorg. Plan No. 1 of 1947.

1949—Subsec. (d). Act Oct. 28, 1949, substituted "Classification Act of 1949" for "Classification Act of 1923".

## REPEALS

Act Oct. 28, 1949, ch. 782, cited as a credit to this section, was repealed (subject to a savings clause) by Pub. L. 89-554, Sept. 6, 1966, § 8, 80 Stat. 632, 655.

## TRANSFER OF FUNCTIONS

Functions of Secretary of the Treasury transferred to Administrator of General Services by section 102(b) of act June 30, 1949, which is classified to section 752(b) of Title 40, Public Buildings, Property, and Works.

Subsec. (a), establishing the Office of Contract Settlement to be headed by the Director of Contract Settlement and providing for the appointment of the Director by the President with the advice and consent of the Senate with compensation of \$12,000 per year and a term of two years, was repealed, and references in the remainder of this section to "Director" were changed to "Secretary" by section 8 of Ex. Ord. No. 9809 and section 201 of Reorg. Plan No. 1 of 1947. Reorg. Plan No. 1 of 1947 is set out in the Appendix to Title 5, Government Organization and Employees.

## EFFECTIVE DATE OF TRANSFER OF FUNCTIONS

Transfer of functions by act June 30, 1949, effective July 1, 1949, see section 605 of act June 30, 1949, set out as an Effective Date note under section 471 of Title 40, Public Buildings, Property, and Works.

## CROSS REFERENCES

Additional duties of Administrator and delegation of authority by him, see sections 121 and 123 of this title.

**§ 105. Contract Settlement Advisory Board; composition; duties**

There is created a Contract Settlement Advisory Board, with which the Administrator of General Services shall advise and consult. The Board shall be composed of the Administrator of General Services who shall act as its Chairman, and of the Secretary of the Army, the Secretary of the Navy, the Secretary of Transportation, the Secretary of State, the chairman of the board of directors of the Reconstruction Finance Corporation, Secretary of Commerce, and the Attorney General or any alternate or representative designated by any of them. The Administrator of General Services shall request other Government agencies to participate in the deliberations of the Board whenever matters specially affecting them are under consideration.

(July 1, 1944, ch. 358, § 5, 58 Stat. 651; Ex. Ord. No. 9630, § 1, eff. Sept. 27, 1945, 10 F.R. 12245; Ex. Ord. No. 9638, § 1, eff. Oct. 4, 1945, 10 F.R. 12591; Ex. Ord. No. 9665, § 2, eff. Dec. 27, 1945, 10 F.R. 15365; Ex. Ord. No. 9730, § 1, eff. May 27, 1946, 11 F.R. 5777; Ex. Ord. No. 9809, § 8, eff. Dec. 12, 1946, 11 F.R. 14281; Ex. Ord. No. 9841, §§ 101, 203, eff. Apr. 23, 1947, 12 F.R. 2645; 1947 Reorg. Plan No. 1, § 201, eff. July 1, 1947, 12 F.R. 4534, 61 Stat. 951; July 26, 1947, ch. 343, title II, § 205(a), 61 Stat. 501; June 30, 1949, ch. 288, title I, § 102(b), 63 Stat. 380; Aug. 6, 1981, Pub. L. 97-31, § 12(17), 95 Stat. 154.)

## AMENDMENTS

1981—Pub. L. 97-31 substituted “Secretary of Transportation” for “Chairman of the Maritime Commission”.

## CHANGE OF NAME

Department of War designated Department of the Army and title of Secretary of War changed to Secretary of the Army by section 205(a) of act July 26, 1947, ch. 343, title II, 61 Stat. 501. Section 205(a) of act July 26, 1947, was repealed by section 53 of act Aug. 10, 1956, ch. 1041, 70A Stat. 641. Section 1 of act Aug. 10, 1956, enacted “Title 10, Armed Forces” which in sections 3010 to 3013 continued Department of the Army under administrative supervision of Secretary of the Army.

## TRANSFER OF FUNCTIONS

Contract Settlement Advisory Board and all its property, records, etc., transferred to General Services Administration by section 102(b) of act June 20, 1949, which is classified to section 752(b) of Title 40, Public Buildings, Property, and Works, but was to retain and perform its functions.

Functions of Secretary of the Treasury transferred to Administrator of General Services by section 102(b) of act June 30, 1949, which is classified to section 752(b) of Title 40.

Contract Settlement Advisory Board transferred to Department of the Treasury by section 8 of Ex. Ord. No. 9809 and section 201 of Reorg. Plan No. 1 of 1947. Reorg. Plan No. 1 of 1947 is set out in the Appendix to Title 5, Government Organization and Employees.

In text of this section, references to “Director” changed to “Secretary of the Treasury” and phrase

“the Secretary of the Treasury” following reference to Secretary of the Navy was omitted by section 8 of Ex. Ord. No. 9809, and section 201 of Reorg. Plan No. 1 of 1947.

Administrator of Foreign Economic Administration changed to Secretary of State in view of Ex. Ord. No. 9630, as amended by Ex. Ord. No. 9730.

“Secretary of Commerce” substituted for references to Chairman of War Production Board and chairman and board of directors of Smaller War Plants Corporation. War Production Board functions transferred to Civilian Production Administration, to Office of Temporary Controls, and then to Secretary of Commerce by Ex. Ord. Nos. 9638, 9809, and 9481, respectively. Functions of chairman and Board of Directors of Smaller War Plants Corporation transferred to Secretary of Commerce by Ex. Ord. No. 9665.

## EFFECTIVE DATE OF TRANSFER OF FUNCTIONS

Transfer of functions by act June 30, 1949, as effective July 1, 1949, see section 605 of act June 30, 1949, set out as an Effective Date note under section 471 of Title 40, Public Buildings, Property, and Works.

## SECRETARY OF THE AIR FORCE

For transfer of certain procurement and related functions and property, insofar as they pertain to the Air Force, from Secretary of the Army and Department of the Army, to Secretary of the Air Force and Department of the Air Force, see Secretary of Defense Transfer Order No. 6, eff. Jan. 15, 1948.

## ABOLITION OF RECONSTRUCTION FINANCE CORPORATION

Reorg. Plan No. 1 of 1957, § 6(a), eff. June 30, 1957, 22 F.R. 4633, 71 Stat. 647, set out in the Appendix to Title 5, Government Organization and Employees, abolished Reconstruction Finance Corporation.

## TERMINATION OF ADVISORY BOARDS

Advisory boards in existence on Jan. 5, 1973, to terminate not later than the expiration of the 2-year period following Jan. 5, 1973, unless, in the case of a board established by the President or an officer of the Federal Government, such board is renewed by appropriate action prior to the expiration of such 2-year period, or in the case of a board established by the Congress, its duration is otherwise provided by law. See sections 3(2) and 14 of Pub. L. 92-463, Oct. 6, 1972, 86 Stat. 770, 776, set out in the Appendix to Title 5, Government Organization and Employees.

## SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 40 section 752.

**§ 106. Basis for settlement of termination claims****(a) Priority to private contractors**

It is the policy of the Government, and it shall be the responsibility of the contracting agencies and the Administrator of General Services to provide war contractors with speedy and fair compensation for the termination of any war contract, in accordance with and subject to the provisions of this chapter, giving priority to contractors whose facilities are privately owned or privately operated. Such fair compensation for the termination of subcontracts shall be based on the same principles as compensation for the termination of prime contracts.

**(b) Establishment of methods and standards**

Each contracting agency shall establish methods and standards, suitable to the conditions of various war contractors, for determining fair compensation for the termination of war contracts on the basis of actual, standard, average,

or estimated costs, or of a percentage of the contract price based on the estimated percentage of completion of work under the terminated contract, or on any other equitable basis, as it deems appropriate. To the extent that such methods and standards require accounting, they shall be adapted, so far as practicable, to the accounting systems used by war contractors, if consistent with recognized commercial accounting practice.

**(c) Conclusiveness of settlement**

Any contracting agency may settle all or any part of any termination claim under any war contract by agreement with the war contractor, or by determination of the amount due on the claim or part thereof without such agreement, or by any combination of these methods. Where any such settlement is made by agreement, the settlement shall be final and conclusive, except (1) to the extent otherwise agreed in the settlement; (2) for fraud; (3) upon renegotiation to eliminate excessive profits under section 1191 of Appendix to title 50, unless exempt or exempted under such section; or (4) by mutual agreement before or after payment. Where any such settlement is made by determination without agreement, it shall likewise be final and conclusive, subject to the same exceptions as if made by agreement, unless the war contractor appeals or brings suit in accordance with section 113 of this title: *Provided*, That no settlement agreement hereunder involving payment to a war contractor of an amount in excess of \$50,000 (or such lesser amount as the Administrator of General Services may from time to time determine) shall become binding upon the Government until the agreement has been reviewed and approved by a settlement review board of three or more members established by the contracting agency in the bureau, division, regional or district office, or other unit of the contracting agency authorized to make such settlement, or in the event of disapproval by the settlement review board, unless approved by the head of such bureau, division, regional or district office, or other unit. Failure of the settlement review board to act upon any settlement within thirty days after its submission to the board shall operate as approval by the board. The sole function of settlement review boards shall be to determine the over-all reasonableness of proposed settlement agreements from the point of view of protecting the interests of the Government. In determining, for purposes of this subsection, whether review of any settlement agreement is required because of the amounts involved, no deduction shall be made on account of credits for property chargeable to the Government or for advance or partial payments, but amounts payable under such settlement agreement for completed articles or work at the contract price and for the discharge of the termination claims of subcontractors shall be deducted.

**(d) Allowable costs**

Except as hereinafter provided, the methods and standards established under subsection (b) of this section for determining fair compensation for termination claims which are not settled by agreement shall be designed to compensate the war contractor fairly for the termi-

nation of the war contract, taking into account—

(1) the direct and indirect manufacturing, selling and distribution, administrative and other costs and expenses incurred by the war contractor which are reasonably necessary for the performance of the war contract and properly allocable to the terminated portion thereof under recognized commercial accounting practices; and

(2) reasonable costs and expenses of settling termination claims of subcontractors related to the terminated portion of the war contract; and

(3) reasonable accounting, legal, clerical, and other costs and expenses incident to termination and settlement of the terminated war contract; and

(4) reasonable costs and expenses of removing, preserving, storing and disposing of termination inventories; and

(5) such allowance for profit on the preparations made and work done for the terminated portion of the war contract as is reasonable under the circumstances; and

(6) interest on the termination claim in accordance with subsection (f) of this section; and

(7) the contract price and all amounts otherwise paid or payable under the contract.

The following shall not be included as elements of cost:

(i) Losses on other contracts, or from sales or exchanges of capital assets, fees and other expenses in connection with reorganization or recapitalization, antitrust or Federal income-tax litigation, or prosecution of Federal income-tax claims or other claims against the Government (except as provided in paragraph (3) of this subsection); losses on investments; provisions for contingencies; and premiums on life insurance where the contractor is the beneficiary.

(ii) The expense of conversion of the contractor's facilities to uses other than the performance of the contract.

(iii) Expenses due to the negligence or willful failure of the contractor to discontinue with reasonable promptness the incurring of expenses after the effective date of the termination notice.

(iv) Costs incurred in respect to facilities, materials, or services purchased or work done in excess of the reasonable quantitative requirements of the entire contract.

The failure specifically to mention in this subsection any item of cost is not intended to imply that it should be allowed or disallowed. The Administrator of General Services may interpret the provisions of this subsection and may provide for the inclusion or exclusion of other costs in accordance with recognized commercial accounting practice.

Where the small size of claims or the nature of production or performance or other factors make it impracticable to apply the principles stated in this subsection to any class of settlements which are subject to this subsection, the contracting agencies may establish alternative methods and standards for determining fair

compensation for that class of termination claims. The aggregate amount of compensation allowed in accordance with this subsection (excluding amounts allowed under paragraphs (3) and (4) of this subsection) shall not exceed the total contract price reduced by the amount of payments otherwise made or to be made under the contract.

**(e) Settlement by agreement**

In order to carry out the objectives of this chapter, termination claims shall be settled by agreement to the maximum extent feasible and the methods and standards established under subsection (b) of this section shall be designed to facilitate such settlements. To the extent that he deems it practicable to do so without impeding expeditious settlements, the Administrator of General Services shall require the contracting agencies to take into account the factors enumerated in subsection (d) of this section in establishing methods and standards for determining fair compensation in the settlement of termination claims by agreement.

**(f) Interest**

Each contracting agency shall allow and pay interest on the amount due and unpaid from time to time on any termination claim under a prime contract at the rate of 2½ per centum per annum for the period beginning thirty days after the date fixed for termination and ending with the date of final payment, except that (1) if the prime contractor unreasonably delays the settlement of his claim, interest shall not accrue for the period of such delay, (2) if interest for the period after termination on any advance payment or loan, made or guaranteed by the Government, has been waived for the benefit of the contractor, the amount of the interest so waived allocable to the terminated contract or the terminated part of the contract shall be deducted from the interest otherwise payable hereunder, and (3) if after delivery of findings by a contracting agency, the contractor appeals or sues as provided in section 113 of this title, interest shall not accrue after the thirtieth day following the delivery of the findings on any amount allowed by such findings, unless such amount is increased upon such appeal or suit. In approving, ratifying, authorizing, or making termination settlements with subcontractors, each contracting agency shall allow interest on the termination claim of the subcontractor on the same basis and subject to the same conditions as are applicable to a prime contractor.

**(g) Amendment of contracts**

Where any war contract does not provide for or provides against such fair compensation for its termination, the contracting agency, either before or after its termination, shall amend such war contract by agreement with the war contractor, or shall authorize, approve, or ratify an amendment of such war contract by the parties thereto, to provide for such fair compensation.

(July 1, 1944, ch. 358, §6, 58 Stat. 652; Ex. Ord. No. 9809, §8, eff. Dec. 12, 1946, 11 F.R. 14281; 1947 Reorg. Plan No. 1, §201, eff. July 1, 1947, 12 F.R. 4534, 61 Stat. 951; June 30, 1949, ch. 288, title I, §102(b), 63 Stat. 380.)

REFERENCES IN TEXT

Section 1191 of the Appendix to title 50, referred to in subsec. (c), was omitted from the Code. See note set out under section 1191 of Title 50, Appendix, War and National Defense.

TRANSFER OF FUNCTIONS

Functions of Secretary of the Treasury transferred to Administrator of General Services by section 102(b) of act June 30, 1949, which is classified to section 752(b) of Title 40, Public Buildings, Property, and Works.

“Secretary” substituted for “Director” by section 8 of Ex. Ord. No. 9809 and section 201 of Reorg. Plan No. 1 of 1947. Reorg. Plan No. 1 of 1947 is set out in the Appendix to Title 5, Government Organization and Employees.

EFFECTIVE DATE OF TRANSFER OF FUNCTIONS

Transfer of functions by act June 30, 1949, effective July 1, 1949, see section 605 of act June 30, 1949, set out as an Effective Date note under section 471 of Title 40, Public Buildings, Property, and Works.

APPLICATION TO TERMINATED WAR CONTRACTS

For application of this section to war contracts terminated at or before July 21, 1944, see section 124 of this title.

SETTLEMENT OF CLAIMS FOR WAR CONTRACT LOSSES INCURRED BETWEEN SEPTEMBER 16, 1940, AND AUGUST 14, 1945

Act Aug. 7, 1946, ch. 864, 60 Stat. 902, as amended by June 25, 1948, ch. 646, §37, 62 Stat. 992; Aug. 30, 1954, ch. 1076, §1(2), 68 Stat. 966, provided that if work, supplies, or services were provided for any department or agency of the Government, under a contract or subcontract, between Sept. 16, 1940, and Aug. 14, 1945, and a loss was incurred by the contractors or subcontractors without fault or negligence on their part, then those departments or agencies were authorized to adjust and settle these losses on a fair and equitable basis, if claims were filed within six months after Aug. 7, 1946, and granted claimants dissatisfied with the settlement the right of judicial review.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 107, 113, 124 of this title.

**§ 107. Settlement of subcontractors' claims**

**(a) Conclusiveness of settlement**

Where, in connection with the settlement of any termination claim by a contracting agency, any war contractor makes settlements of the termination claims of his subcontractors, the contracting agency shall limit or omit its review of such settlements with subcontractors to the maximum extent compatible with the public interest. Any contracting agency (1) may approve, ratify, or authorize such settlements with subcontractors upon such evidence, terms, and conditions as it deems proper; (2) shall vary the scope and intensity of its review of such settlements according to the reliability of the war contractor, the size, number, and complexity of such claims, and other relevant factors; and (3) shall authorize war contractors to make such settlements with subcontractors without review by the contracting agency, whenever the reliability of the war contractor, the amount or nature of the claims, or other reasons appear to the contracting agency to justify such action. Any such settlement of a subcontract approved, ratified, or authorized by a contracting agency

shall be final and conclusive as to the amount due to the same extent as a settlement under subsection (c) of section 106 of this title, and no war contractor shall be liable to the United States on account of any amounts paid thereon except for his own fraud.

**(b) Supervision of payments to war contractors**

Whenever any contracting agency is satisfied of the inability of a war contractor to meet his obligations it shall exercise supervision or control over payments to the war contractor on account of termination claims of subcontractors of such war contractor to such extent and in such manner as it deems necessary or desirable for the purpose of assuring the receipt of the benefit of such payments by the subcontractors.

**(c) Group settlements**

The Administrator of General Services shall prescribe policies and methods for the settlement as a group, or otherwise, by any contracting agency of some or all of the termination claims of a war contractor under war contracts with one or more (1) bureaus or divisions within a contracting agency, (2) contracting agencies, or (3) prime contractors and subcontractors, to the extent he deems such action necessary or desirable for expeditious and equitable settlement of such claims. After consulting with the contracting agencies concerned, the Administrator of General Services may provide for assigning any war contractor to a contracting agency for such settlement, and such agency shall have authority to settle, on behalf of any other contracting agency, some or all of the termination claims of such war contractor.

**(d) Direct settlement by contracting agency**

Any contracting agency may settle directly termination claims of subcontractors to the extent that it deems such action necessary or desirable for the expeditious and equitable settlement of such claims. In making such termination settlements any contracting agency may discharge the claim of the subcontractor by payment or may purchase such claim, and may agree to assume, or indemnify the subcontractor against, any claims by any person in connection with such claim or the termination settlement. Any contracting agency undertaking to settle the termination claim of any subcontractor shall deliver to the subcontractor and the war contractor liable to him written notice stating its acceptance of responsibility for settling his claim and the conditions applicable thereto, which may include the release, or assignment to the contracting agency, of his claim against the war contractor liable to him; upon consent thereto by the subcontractor, the Government shall become liable for the settlement of his claims upon the conditions specified in the notice.

**(e) Amount of settlement**

Any contracting agency may make settlements with subcontractors in accordance with any of the provisions of this chapter without regard to any limitation on the amount payable by the Government to the prime contractor.

**(f) Equitable payments**

If any contracting agency determines that in the circumstances of a particular case equity

and good conscience require fair compensation for the termination of a war contract to be paid to a subcontractor who has been deprived of and cannot otherwise reasonably secure such fair compensation, the contracting agency concerned may pay such compensation to him although such compensation already has been included and paid as part of a settlement with another war contractor.

(July 1, 1944, ch. 358, §7, 58 Stat. 654; Ex. Ord. No. 9809, §8, eff. Dec. 12, 1946, 11 F.R. 14281; 1947 Reorg. Plan No. 1, §201, eff. July 1, 1947, 12 F.R. 4534, 61 Stat. 951; June 30, 1949, ch. 288, title I, §102(b), 63 Stat. 380.)

TRANSFER OF FUNCTIONS

Functions of Secretary of the Treasury transferred to Administrator of General Services by section 102(b) of act June 30, 1949, which is classified to section 752(b) of Title 40, Public Buildings, Property, and Works.

“Secretary” substituted for “Director” by section 8 of Ex. Ord. No. 9809 and section 201 of Reorg. Plan No. 1 of 1947. Reorg. Plan No. 1 of 1947 is set out in the Appendix to Title 5, Government Organization and Employees.

EFFECTIVE DATE OF TRANSFER OF FUNCTIONS

Transfer of functions by act June 30, 1949, effective July 1, 1949, see section 605 of act June 30, 1949, set out as an Effective Date note under section 471 of Title 40, Public Buildings, Property, and Works.

APPLICATION TO TERMINATED WAR CONTRACTS

For application of this section to war contracts terminated at or before July 21, 1944, see section 124 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 124 of this title.

**§ 108. Interim financing**

**(a) Prime contractors**

It is the policy of the Government, and it shall be the responsibility of the contracting agencies and the Administrator of General Services, in accordance with and subject to the provisions of this chapter, to provide war contractors having any termination claim or claims, pending their settlement, with adequate interim financing, within thirty days after proper application therefor.

**(b) Method of financing; amounts payable**

Each contracting agency shall, to the greatest extent it deems practicable, make available interim financing through loans and discounts, and commitments and guaranties in connection therewith, in contemplation of or related to termination of war contracts. Where interim financing is made by advance payments or partial payments, it shall, insofar as practicable, consist of the following:

(1) An amount equal to 100 per centum of the amount payable, at the contract price, on account of acceptable items completed prior to the termination date under the terms of the contract, or completed thereafter with the approval of the contracting agency; plus

(2) An amount equal to 90 per centum of the cost of raw materials, purchased parts, supplies, direct labor, and manufacturing overhead allocable to the terminated portion of the war contract; plus

(3) A reasonable percentage of other allowable costs, including administrative overhead, allocable to the terminated portion of the war contract not included in the foregoing; plus

(4) Such additional amounts, if any, as the contracting agency deems necessary to provide the war contractor with adequate interim financing.

(5) In lieu of the costs referred to in clauses (2) and (3) of this subsection, where a detailed ascertainment of such costs is not suitable to the conditions of any war contractor and is apt to cause delay in the obtaining of interim financing by him, that portion of such interim financing shall be equal to an amount not greater than 90 per centum of the estimated costs which are allocable to the terminated part or parts of the war contract or group of war contracts, and are ascertained in accordance with such methods and standards as the Administrator of General Services shall prescribe.

(6) There shall be deducted from the amount of such interim financing any unliquidated balances of advance and partial payments theretofore made to such war contractor, which are allocable to the terminated war contract or the terminated part of the war contract.

**(c) Evidence to support financing**

The Administrator of General Services shall prescribe (1) the types of estimates, certificates, or other evidence to be required to support such interim financing; (2) the terms and conditions upon which such interim financing shall be made including the use of standard forms for agreements with respect to such interim financing to the extent practicable; (3) the classes of cases in which such interim financing shall be refused; and (4) such methods of supervision and control over such interim financing as he deems necessary or desirable to assure adequate and speedy interim financing to subcontractors of the war contractor.

**(d) Penalty for overstatement of claims**

In case of an overstatement by any war contractor of the amount due on his termination claim or claims in connection with any interim financing under this chapter, such contractor shall pay to the United States, as a penalty, an amount equal to 6 per centum of the amount of the overstatement, but the Administrator of General Services may suspend or modify any such penalty if in his opinion the imposition thereof would be inequitable. Any penalty may be deducted from any amounts due the war contractor upon such termination claim or claims, or otherwise, or may be collected from the war contractor by suit. The obligation to pay any penalty imposed and to repay any interim financing made or assumed by the United States under this chapter shall constitute a debt due to the United States within the meaning of section 3713(a) of title 31.

**(e) Advance payments as part of termination settlement**

Any contracting agency may allow any advance payments, previously made or authorized by it in connection with the performance of a

war contract, to be used for payments and expenses related to the termination settlement of such contract, upon such terms and conditions as it deems necessary or appropriate to protect the interest of the Government.

**(f) Liquidation of loans, etc., prior to final settlement**

No interim financing shall be made by any contracting agency under this chapter unless the terms of such financing provide for the liquidation by the war contractor of all loans, discounts, advance payments, or partial payments thereunder not later than the time of final payment of the amount due on the settlement of the termination claim or claims of the war contractor involved or such time thereafter as the contracting agency deems necessary for the liquidation of such interim financing in an orderly manner.

**(g) Settlement of claims; validation of prior financing**

Any contracting agency may settle, upon such terms and conditions as it deems proper, any claim or obligation due by or to the Government arising from or related to any interim financing made, acquired, or authorized by it. Any interim financing made, acquired, or authorized by any contracting agency before July 21, 1944, shall be valid to the extent it would be authorized under the provisions of this chapter if made after its effective date.

(July 1, 1944, ch. 358, §8, 58 Stat. 655; Ex. Ord. No. 9809, §8, eff. Dec. 12, 1946, 11 F.R. 14281; 1947 Reorg. Plan No. 1, §201, eff. July 1, 1947, 12 F.R. 4534, 61 Stat. 951; June 30, 1949, ch. 288, title I, §102(b), 63 Stat. 380.)

CODIFICATION

In subsec. (d), "section 3713(a) of title 31" substituted for "Revised Statutes, section 3466 (31 U.S.C., sec. 191)" on authority of Pub. L. 97-258, §4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

TRANSFER OF FUNCTIONS

Functions of Secretary of the Treasury transferred to Administrator of General Services by section 102(b) of act June 30, 1949, which is classified to section 752(b) of Title 40, Public Buildings, Property, and Works.

"Secretary" substituted for "Director" by section 8 of Ex. Ord. No. 9809 and section 201 of Reorg. Plan No. 1 of 1947, set out in the Appendix to Title 5, Government Organization and Employees.

EFFECTIVE DATE OF TRANSFER OF FUNCTIONS

Transfer of functions by act June 30, 1949, effective July 1, 1949, see section 605 of act June 30, 1949, set out as an Effective Date note under section 471 of Title 40, Public Buildings, Property, and Works.

APPLICATION TO TERMINATED WAR CONTRACTS

For application of this section to war contracts terminated at or before July 21, 1944, see section 124 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 124 of this title.

**§ 109. Advance or partial payments to subcontractors; excessive payments, interest, liability of war contractor**

(a) Any contracting agency may make advance or partial payments to any war contractor



on account of any termination claim or claims, and may authorize, approve, or ratify any such advance or partial payments by any war contractor to his subcontractors, upon such conditions as it deems necessary to insure compliance with the provisions of subsection (b) of this section. Each contracting agency shall make final payments from time to time on partial settlements or on settlements fixing a minimum amount due before complete settlement, or as tentative payments before any settlement of the claim or claims.

(b) Where any such advance or partial payment is made to any war contractor by any contracting agency or by another war contractor under this section, except a final payment on a partial settlement, any amount in excess of the amount finally determined to be due on the termination claim shall be treated as a loan from the Government to the war contractor receiving it, and shall be payable upon demand together with a penalty computed at the rate of 6 per centum per annum, for the period from the date such excess advance or partial payment is received to the date on which such excess is repaid or extinguished. Where the advance or partial payment was made by a war contractor and authorized, approved, or ratified by any contracting agency, the war contractor making it shall not be liable for any such excess payment in the absence of fraud on his part and shall receive payment or credit from the Government for the amount of such excess payment.

(July 1, 1944, ch. 358, § 9, 58 Stat. 657.)

#### APPLICATION TO TERMINATED WAR CONTRACTS

For application of this section to war contracts terminated at or before July 21, 1944, see section 124 of this title.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 124 of this title.

### § 110. Guarantee of loans, advances, etc.

#### (a) By contract

Any contracting agency is authorized—

(1) to enter into contracts with any Federal Reserve bank, or other public or private financing institution, guaranteeing such financing institution against loss of principal or interest on loans, discounts, or advances or on commitments in connection therewith, which such financing institution may make to any war contractor or to any person who is or has been engaged in performing any operation deemed by such contracting agency to be connected with or related to war production, for the purpose of financing such war contractor or other person in connection with or in contemplation of the termination of one or more such war contracts or operations; and

(2) to make, enter into contracts to make, or to participate with any Government agency, any Federal Reserve bank or public or private financing institution in making loans, discounts, or advances, or commitments in connection therewith, for the purpose of financing any such war contractor or other person in connection with or in contemplation of the termination of such war contracts or operations.

#### (b) By assignment

Any such loan, discount, advance, guaranty, or commitment in connection therewith may be secured by assignment of, or covenants to assign, some or all of the rights of such war contractor or other person in connection with the termination of such war contracts or operations, or in such other manner as the contracting agency may prescribe.

#### (c) Federal Reserve bank as fiscal agent

Subject to such regulations as the Board of Governors of the Federal Reserve System may prescribe with the approval of the Administrator of General Services, any Federal Reserve bank is authorized to act, on behalf of the contracting agencies, as fiscal agent of the United States in carrying out the purposes of this chapter.

#### (d) Application of other laws

This section shall not limit or affect any authority of any contracting agency, under any other statute, to make loans, discounts, or advances, or commitments in connection therewith or guaranties thereof.

(July 1, 1944, ch. 358, § 10, 58 Stat. 657; Ex. Ord. No. 9809, § 8, eff. Dec. 12, 1946, 11 F.R. 14281; 1947 Reorg. Plan No. 1, § 201, eff. July 1, 1947, 12 F.R. 4534, 61 Stat. 951; June 30, 1949, ch. 288, title I, § 102(b), 63 Stat. 380.)

#### TRANSFER OF FUNCTIONS

Functions of Secretary of the Treasury transferred to Administrator of General Services by section 102(b) of act June 30, 1949, which is classified to section 752(b) of Title 40, Public Buildings, Property, and Works.

“Secretary” substituted for “Director” by section 8 of 1946 Ex. Ord. No. 9809 and section 201 of Reorg. Plan No. 1 of 1947, set out in the Appendix to Title 5, Government Organization and Employees.

#### EFFECTIVE DATE OF TRANSFER OF FUNCTIONS

Transfer of functions by act June 30, 1949, effective July 1, 1949, see section 605 of act June 30, 1949, set out as an Effective Date note under section 471 of Title 40, Public Buildings, Property, and Works.

#### APPLICATION TO TERMINATED WAR CONTRACTS

For application of this section to war contracts terminated at or before July 21, 1944, see section 124 of this title.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 124 of this title.

### § 111. Termination of contracts

#### (a) Advance notice; prime contracts

In order to facilitate the efficient use of materials, manpower, and facilities for war and civilian purposes, each contracting agency—

(1) shall provide its prime contractors with notice of termination of their prime contracts as far in advance of the cessation of work thereunder as is feasible and consistent with the national security without permitting unneeded production or performance;

(2) shall establish procedures whereby prime contractors shall provide affected subcontractors with immediate notice of termination; and

(3) shall permit the continuation of some or all of the work under a terminated prime con-

tract whenever the agency deems that such continuation will benefit the Government or is necessary to avoid substantial injury to the plant or property.

**(b) Cessation of work without termination**

Whenever a contracting agency hereafter directs a prime contractor to cease or suspend all or a substantial part of the work under a prime contract, without terminating the contract, then, unless the contract provides otherwise, (1) the contracting agency shall compensate the contractor for reasonable costs and expenses resulting from such cessation or suspension, and (2) if the cessation or suspension extends for thirty days or more, the contractor may elect to treat it as a termination by delivering written notice of his election so to do to the contracting agency, at any time before the contracting agency directs the prime contractor to resume work under the contract.

**(c) Authority of Administrator of General Services; classes of contracts**

The Administrator of General Services shall have no authority under this chapter to regulate or control the classes of contracts to be terminated by the contracting agencies.

(July 1, 1944, ch. 358, §11, 58 Stat. 658; Ex. Ord. No. 9809, §8, eff. Dec. 12, 1946, 11 F.R. 14281; 1947 Reorg. Plan No. 1, §201, eff. July 1, 1947, 12 F.R. 4534, 61 Stat. 951; June 30, 1949, ch. 288, title I, §102(b), 63 Stat. 380.)

TRANSFER OF FUNCTIONS

Functions of Secretary of the Treasury transferred to Administrator of General Services by section 102(b) of act June 30, 1949, which is classified to section 752(b) of Title 40, Public Buildings, Property, and Works.

“Secretary” substituted for “Director” by section 8 of Ex. Ord. No. 9809 and section 201 of Reorg. Plan No. 1 of 1947, set out in the Appendix to Title 5, Government Organization and Employees.

EFFECTIVE DATE OF TRANSFER OF FUNCTIONS

Transfer of functions by act June 30, 1949, effective July 1, 1949, see section 605 of act June 30, 1949, set out as an Effective Date note under section 471 of Title 40, Public Buildings, Property, and Works.

**§ 112. Removal and storage of materials**

**(a) Termination inventory**

It is the policy of the Government, upon the termination of any war contract, to assure the expeditious removal from the plant of the war contractor of the termination inventory not to be retained or sold by the war contractor.

**(b) Statement on material of inventory**

Any war contractor may submit to the contracting agency concerned or to any other Government agency designated by the Administrator of General Services, one or more statements showing the materials which such war contractor claims to be termination inventory under one or more war contracts and desires to have removed by the Government. Such statements shall be prepared in such form and detail, shall be submitted in such manner, through the prime contractor or otherwise, and shall be supported by such certificates or other data, as may be prescribed under this chapter.

**(c) Removal and storage by Government agency**

Within sixty days after the submission of any such statement by a war contractor, or such shorter period as may be prescribed under this chapter, or within such longer period as the war contractor may agree, the Government agency concerned (1) shall arrange, upon such terms and conditions as may be agreed, for the storage by the war contractor on his own premises or elsewhere of all such claimed termination inventory which the war contractor does not retain or dispose of, except any part which may be determined not to be allocable to the terminated war contract or contracts, or (2) shall remove from the plant or plants of the war contractor all of such claimed termination inventory not retained, disposed of, or stored by the war contractor or determined not to be allocable to the terminated war contract or contracts.

**(d) Removal and storage by war contractor**

Upon the failure of the Government so to arrange for storage by the war contractor or to remove any termination inventory within the period specified under subsection (c) of this section, the war contractor, subject to regulations prescribed under this chapter, may remove some or all of such termination inventory from his plant or plants and may store it on his own premises or elsewhere for the account and at the risk and expense of the Government, using reasonable care for its transportation and preservation. If any war contractor intends so to remove any claimed termination inventory, he shall deliver to the Government agency concerned written notice of the date fixed for removal and a statement showing the quantities and condition of the materials so to be removed, certified on behalf of the war contractor to have been prepared in accordance with a concurrent physical inventory of such materials. Such notice and statement shall be delivered at least twenty days in advance of the date fixed for removal and may be delivered before or after the expiration of the period specified under subsection (c) of this section. If the Government agency fails to check such materials, at or before the time of their removal by the war contractor, a certificate of the war contractor specifying the materials shown on such statement which were so removed, and filed with the Government agency concerned within thirty days after the date fixed for removal, shall constitute prima facie evidence against the United States as to the quantities and condition of the materials so removed, and the fact of their removal.

**(e) Acquisition by Government agency of inventory material; liability**

Notwithstanding any other provisions of law, but subject to subsection (h) of this section, the contracting agency concerned or the Administrator of General Services, or any Government agency designated by him, on behalf of the United States, may, by the exercise of any contract rights or otherwise, acquire and take possession of any termination inventory of any war contractor, and any materials removed by the Government or stored for its account under subsections (c) and (d) of this section, whether or not such materials are finally determined not to

constitute termination inventory. With respect to any such materials, the Government shall be liable to any war contractor concerned only for their return to such war contractor or for their disposal value at the time of their removal or for the proceeds realized by the Government from their disposal, at the election of the Government agency concerned, unless the Government agency and the war contractor agree or have agreed on a different basis. Any amount so paid or layable to a war contractor for materials allocable to a terminated war contract shall be credited against the termination claim under such contract but shall not otherwise affect the amount due on the claim, unless the Government agency concerned and the war contractor agree or have agreed otherwise. Any materials to which the Administrator of General Services takes title under this section shall be delivered for disposal to any appropriate Government agency authorized to make such disposal.

**(f) Postponement or delay of termination settlement**

No contracting agency shall postpone or delay any termination settlement beyond the period specified in subsection (c) of this section for the purpose of awaiting disposal by the war contractor or the Government of any termination inventory reported in accordance with subsection (b) of this section.

**(g) Government-owned machinery**

Whenever any war contractor no longer requires, for the performance of any war contract, any Government-owned machinery, tools, or equipment installed in his plant for the performance of one or more war contracts, the Government agency concerned, upon written demand by the war contractor, and within sixty days after such demand or such other period as may be prescribed under this chapter, and upon such conditions as may be so prescribed, shall remove or provide for the removal of such machinery, tools, or equipment from such plant, unless the Government agency concerned and the war contractor, by facilities contract or otherwise, have made or make other provisions for the retention, storage, maintenance, or disposition of such machinery, tools or equipment. The Government agency concerned may waive or release on behalf of the United States any obligation of the war contractor with respect to such machinery, tools, or equipment upon such terms and conditions as the agency deems appropriate. Upon the failure of the Government so to remove or provide for removal of any such machinery, tools, or equipment, the war contractor, subject to regulations prescribed under this chapter, may remove all or part of such machinery, tools, or equipment from his plant and may store it on his own premises or elsewhere, for the account and at the risk and expense of the Government, using reasonable care for its transportation and preservation.

**(h) Limitation on Government acquisition of inventories**

Nothing in this chapter shall limit or affect the authority of the Department of the Army, Department of the Air Force, Navy Department, or the Department of Transportation, respec-

tively, to take over any termination inventories and to retain them for their use for any purpose or to dispose of such termination inventories for the purpose of war production, or to authorize any war contractor to retain or dispose of such termination inventories for the purpose of war production.

**(i) Removal and storage by war contractor at own risk**

Nothing in this section shall be construed to prevent the removal and storage of any termination inventory by any war contractor, at his own risk, at any time after termination of any war contract to which it is allocable.

(July 1, 1944, ch. 358, §12, 58 Stat. 658; Ex. Ord. No. 9809, §8, eff. Dec. 12, 1946, 11 F.R. 14281; 1947 Reorg. Plan No. 1, §201, eff. July 1, 1947, 12 F.R. 4534, 61 Stat. 951; July 26, 1947, ch. 343, title II, §§205(a), 207(a), (f), 61 Stat. 501-503; June 30, 1949, ch. 288, title I, §102(b), 63 Stat. 380; Aug. 6, 1981, Pub. L. 97-31, §12(18), 95 Stat. 154.)

AMENDMENTS

1981—Subsec. (h). Pub. L. 97-31 substituted “the Department of Transportation” for “Maritime Commission”.

CHANGE OF NAME

Department of the Air Force inserted under the authority of section 207(a), (f) of act July 26, 1947, ch. 343, title II, 61 Stat. 502, 503, and Secretary of Defense Transfer Order No. 6, eff. Jan. 15, 1948. Department of War designated Department of the Army and title of Secretary of War changed to Secretary of the Army by section 205(a) of such act July 26, 1947. Sections 205(a) and 207(a), (f) of act July 26, 1947, were repealed by section 53 of act Aug. 10, 1956, ch. 1041, 70A Stat. 641. Section 1 of act Aug. 10, 1956, enacted “Title 10, Armed Forces”, which in sections 3010 to 3013 and 8010 to 8013 continued Departments of the Army and Air Force under administrative supervision of Secretary of the Army and Secretary of the Air Force, respectively.

TRANSFER OF FUNCTIONS

Functions of Secretary of the Treasury transferred to Administrator of General Services by section 102(b) of act June 30, 1949, which is classified to section 752(b) of Title 40, Public Buildings, Property, and Works.

“Secretary” substituted for “Director” by section 8 of Ex. Ord. No. 9809 and section 201 of Reorg. Plan No. 1 of 1947, set out in the Appendix to Title 5, Government Organization and Employees.

EFFECTIVE DATE OF TRANSFER OF FUNCTIONS

Transfer of functions by act June 30, 1949, effective July 1, 1949, see section 605 of act June 30, 1949, set out as an Effective Date note under section 471 of Title 40, Public Buildings, Property, and Works.

APPLICATION TO TERMINATED WAR CONTRACTS

For application of subssecs. (b) to (e) of this section to war contracts terminated at or before July 21, 1944, see section 124 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 124 of this title.

**§ 113. Appeals**

**(a) Failure to settle claims by agreement; preparation of findings; notice to war contractor**

Whenever the contracting agency responsible for settling any termination claim has not settled the claim by agreement or has so settled

only a part of the claim, (1) the contracting agency at any time may determine the amount due on such claim or such unsettled part, and prepare written findings indicating the basis of the determination, and deliver a copy of such findings to the war contractor, or (2) if the termination claim has been submitted in the manner and substantially the form prescribed under this chapter, the contracting agency, upon written demand by the war contractor for such findings, shall determine the amount due on the claim or unsettled part and prepare and deliver such findings to the war contractor within ninety days after the receipt by the agency of such demand. In preparing such findings, the contracting agency may require the war contractor to furnish such information and to submit to such audits as may be reasonably necessary for that purpose. Within thirty days after the delivery of any such findings, the contracting agency shall pay to the war contractor at least 90 per centum of the amount thereby determined to be due, after deducting the amount of any outstanding interim financing applicable thereto.

**(b) Rights of war contractor**

Whenever any war contractor is aggrieved by the findings of a contracting agency on his claim or part thereof or by its failure to make such findings in accordance with subsection (a) of this section, he may bring suit against the United States for such claim or such part thereof, in the United States Court of Federal Claims or in a United States district court, in accordance with sections 1346, 2401, and 2402 of title 28, except that, if the contracting agency is the Reconstruction Finance Corporation, or any corporation organized pursuant to the Reconstruction Finance Corporation Act, or any corporation owned or controlled by the United States, the suit shall be brought against such corporation in any court of competent jurisdiction in accordance with existing law.

**(c) Procedure**

Any proceeding under subsection (b) of this section shall be governed by the following conditions:

(1) When any contracting agency provides a procedure within the agency for protest against such findings or for other appeal therefrom by the war contractor, the war contractor, before proceeding under subsection (b) of this section, (i) in his discretion may resort to such procedure within the time specified in his contract or, if no time is specified, within thirty days after the delivery to him of the findings; and (ii) shall resort to such procedure for protest or other appeal to the extent required by the Administrator of General Services, but failure of the contracting agency to act on any such required protest or appeal within thirty days shall operate as a refusal by the agency to modify its findings. Any revision of the findings by the contracting agency, upon protest or appeal within the agency, shall be treated as the findings of the agency for the purpose of appeal or suit under subsection (b) of this section. Notwithstanding any contrary provision in any war contract, no war contractor shall be required to protest or appeal from such findings within the con-

tracting agency except in accordance with this paragraph.

(2) A war contractor may initiate proceedings in accordance with subsection (b) of this section (i) within ninety days after delivery to him of the findings by the contracting agency, or (ii) in case of protests or appeal within the agency, within ninety days after the determination of such protest or appeal, or (iii) in case of failure to deliver such findings, within one year after his demand therefor. If he does not initiate such proceedings within the time specified, he shall be precluded thereafter from initiating any proceedings in accordance with subsection (b) of this section, and the findings of the contracting agency shall be final and conclusive, or if no findings were made, he shall be deemed to have waived such termination claim.

(3) Notwithstanding any contrary provision in any war contract, the court shall not be bound by the findings of the contracting agency, but shall treat such findings as prima facie correct, and the burden shall be on the war contractor to establish that the amount due on his claim or part thereof exceeds the amount allowed by the findings of the contracting agency. Whenever the court finds that the war contractor failed to negotiate in good faith with the contracting agency for the settlement of his claim or part thereof before appeal or suit thereon, or failed to furnish to the agency any information reasonably requested by it regarding his termination claim or part thereof, or failed to prosecute diligently any protest or appeal required to be taken under subsection (c)(1)(ii) of this section, the court (i) may refuse to receive in evidence any information not submitted to the contracting agency; (ii) may deny interest on the claim or part thereof for such period as it deems proper; or (iii) may remand the case to the contracting agency for further proceedings upon such terms as the court may prescribe. Unless the case is remanded, the court shall enter the appropriate award or judgment on the basis of the law and facts, and may increase or decrease the amount allowed by the findings of the contracting agency.

(4) Any such proceedings shall not affect the authority of the contracting agency concerned to make a settlement of the termination claim, or any part thereof, by agreement with the war contractor at any time before such proceedings are concluded.

**(d) Omitted**

**(e) Arbitration**

The contracting agency responsible for settling any claim and the war contractor asserting the claim, by agreement, may submit all or any part of the termination claim to arbitration, without regard to the amount in dispute. Such arbitration proceedings shall be governed by the provisions of United States Arbitration Act to the same extent as if authorized by an effective agreement in writing between the Government and the war contractor. Any such arbitration award shall be final and conclusive upon the United States to the same extent as a settlement under subsection (c) of section 106 of this

title, but shall not be subject to approval by any settlement review board.

**(f) Conclusiveness of decisions**

Whenever any dispute exists between any war contractor and a subcontractor regarding any termination claim, either of them, by agreement with the other, may submit the dispute to a contracting agency for mediation or arbitration whenever authorized by the agency or required by the Administrator of General Services.

Any award or decision in such proceedings shall be final and conclusive as to the parties so submitting any such dispute and shall not be questioned by the United States in settling any related claim, in the absence of fraud or collusion.

(July 1, 1944, ch. 358, §13, 58 Stat. 660; Ex. Ord. No. 9809, §8, eff. Dec. 12, 1946, 11 F.R. 14281; 1947 Reorg. Plan No. 1, §201, eff. July 1, 1947, 12 F.R. 4534, 61 Stat. 951; June 30, 1949, ch. 288, title I, §102(b), 63 Stat. 380; July 14, 1952, ch. 739, 66 Stat. 627; Apr. 2, 1982, Pub. L. 97-164, title I, §160(a)(14), 96 Stat. 48; Oct. 29, 1992, Pub. L. 102-572, title IX, §902(b)(1), 106 Stat. 4516.)

REFERENCES IN TEXT

The Reconstruction Finance Corporation Act, referred to in subsec. (b), is act Jan. 22, 1932, ch. 8, 47 Stat. 5, as amended, which was classified to chapter 14 (§601 et seq.) of Title 15, Commerce and Trade, and has been eliminated from the Code. For complete classification of this Act prior to its elimination from the Code, see Tables.

United States Arbitration Act, referred to in subsec. (e), is classified generally to Title 9, Arbitration.

CODIFICATION

In subsec. (b), "sections 1346, 2401, and 2402 of title 28" substituted for "subsection (20) of section 41 of title 28" on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

Subsec. (d), which provided for appointment and duties of an Appeal Board, was omitted on authority of act July 14, 1952, ch. 739, 66 Stat. 627, set out as a note below, which abolished the Appeal Board and terminated all appeals, effective nine months after July 14, 1952. References in other subsections of this section to the Appeal Board were omitted in view of act July 14, 1952. As a result of these omissions, cl. (1) of subsec. (b), which authorized a war contractor to appeal to the Appeal Board, was deleted, and cl. (2), which permitted suits against the United States, became a part of subsec. (b) without numerical designation.

AMENDMENTS

1992—Subsec. (b). Pub. L. 102-572 substituted "United States Court of Federal Claims" for "United States Claims Court".

1982—Subsec. (b). Pub. L. 97-164 substituted "United States Claims Court" for "Court of Claims".

EFFECTIVE DATE OF 1992 AMENDMENT

Amendment by Pub. L. 102-572 effective Oct. 29, 1992, see section 911 of Pub. L. 102-572, set out as a note under section 171 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97-164 effective Oct. 1, 1982, see section 402 of Pub. L. 97-164, set out as a note under section 171 of Title 28, Judiciary and Judicial Procedure.

TRANSFER OF FUNCTIONS

Functions of Secretary of the Treasury transferred to Administrator of General Services by section 102(b) of

act June 30, 1949, which is classified to section 752(b) of Title 40, Public Buildings, Property, and Works.

"Secretary" substituted for "Director" by section 8 of Ex. Ord. No. 9809 and section 201 of Reorg. Plan No. 1 of 1947, set out in the Appendix to Title 5, Government Organization and Employees.

EFFECTIVE DATE OF TRANSFER OF FUNCTIONS

Transfer of functions by act June 30, 1949, effective July 1, 1949, see section 605 of act June 30, 1949, set out as an Effective Date note under section 471 of Title 40, Public Buildings, Property, and Works.

ABOLITION OF RECONSTRUCTION FINANCE CORPORATION

Reorg. Plan No. 1 of 1957, §6(a), eff. June 30, 1957, 22 F.R. 4633, 71 Stat. 647, set out in the Appendix to Title 5, Government Organization and Employees, abolished Reconstruction Finance Corporation.

ABOLITION OF APPEALS BOARD; TERMINATION OF APPEALS; NO FURTHER APPEALS ACCEPTED; RETURN OF ERRONEOUS FILED APPEALS

Act July 14, 1952, ch. 739, 66 Stat. 627, provided: "That the Appeal Board established under section 13(d) of the Contract Settlement Act of 1944 [41 U.S.C. 113(d)] is hereby abolished: *Provided, however,* That said abolition shall not become effective until six months after the enactment of this Act [July 14, 1952] or such later date, nor more than nine months after the enactment of this Act, as may be fixed by written order of the Director of Contract Settlement published in the Federal Register. Such an order shall be made only in case the Director finds that it is impracticable for the Appeal Board to dispose of its pending business before the date fixed for abolition of the Board by this Act or a previous order of the Director. No such order shall be made less than thirty days prior to the date theretofore fixed for abolition of the Appeal Board.

"SEC. 2. (a) Upon the effective date of the abolition of the Appeal Board all appeals and disputes pending therein shall be terminated without prejudice and the right of the parties to pursue such other remedies as are provided by law shall not be affected thereby.

"(b) In any such terminated appeal, timely initiated in the Appeal Board, where the period for pursuit of any other remedy pursuant to section 13(b)(2) of the Contract Settlement Act of 1944 [41 U.S.C. 113(b)(2)] shall have expired or would expire within sixty days after the effective date of the abolition of the Appeal Board, the period within which proceedings may be initiated in accordance with the said section shall be extended to sixty days after said effective date.

"(c) Effective thirty days after the enactment of this Act [July 14, 1952] no further appeals or submitted disputes shall be accepted for determination by said Appeal Board.

"(d) Where an attempt is erroneously made to file an appeal with the Appeal Board after the time limited therefor by section 1(c) of this Act but prior to the effective date of the abolition of the Appeal Board, said Board shall forthwith return the papers to the person therein named as appellant together with a notice in writing that, pursuant to the terms of section 1(c) of this Act, it can no longer accept such an appeal. Where such an attempt is made in good faith and the appeal would, except for the provisions of section 1(c) of this Act, have been timely and the period for pursuit of any other remedy pursuant to section 13(b)(2) of the Contract Settlement Act of 1944 [41 U.S.C. 113(b)(2)] expires or would expire prior to the expiration of sixty days after the receipt of such notice, the period within which proper proceedings may be initiated in accordance with said section 13(b)(2) shall be extended to sixty days after the receipt of such notice."

APPLICATION TO TERMINATED WAR CONTRACTS

For application of this section to war contracts terminated at or before July 21, 1944, see section 124 of this title.

## SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 106, 117, 124 of this title; title 40 section 752.

**§ 114. Court of Federal Claims****(a) Appointment of auditors**

For the purpose of expediting the adjudication of termination claims, the United States Court of Federal Claims is authorized to appoint not more than ten auditors.

**(b) Procedure**

The United States Court of Federal Claims, on motion of either of the parties, or on its own motion, may summon any and all persons with legal capacity to be sued to appear as a party or parties in any suit or proceeding of any nature whatsoever pending in said court to assert and defend their interests, if any, in such suits or proceedings, within such period of time prior to judgment as the United States Court of Federal Claims shall prescribe. If the name and address of any such person is known or can be ascertained by reasonable diligence, and if he resides within the jurisdiction of the United States, he shall be summoned to appear by personal service; but if any such person resides outside of the jurisdiction of the United States, or is unknown, or if for any other good and sufficient reason appearing to the court personal service cannot be had, he may be summoned by publication, under such rules as the court may adopt, together with a copy of the summons mailed by registered mail to such person's last known address. The United States Court of Federal Claims may, upon motion of the Attorney General, in any suit or proceeding where there may be any number of persons having possible interests therein, notify such persons to appear to assert and defend such interests. Upon failure so to appear, any and all claims or interests in claims of any such person against the United States, in respect of the subject matter of such suit or proceeding, shall forever be barred and the court shall have jurisdiction to enter judgment pro confesso upon any claim or contingent claim asserted on behalf of the United States against any person who, having been duly served with summons, fails to respond thereto, to the same extent and with like effect as if such person had appeared and had admitted the truth of all allegations made on behalf of the United States. Upon appearance by any person pursuant to any such summons or notice, the case as to such person shall, for all purposes, be treated as if an independent proceeding has been instituted by such person pursuant to sections 1491, 1496, 1501, 1503, and 2501 of title 28, and as if such independent proceeding had then been consolidated, for purposes of trial and determination, with the case in respect of which the summons or notice was issued, except that the United States shall not be heard upon any counterclaims, claims for damages or other demands whatsoever against such person, other than claims and contingent claims for the recovery of money hereafter paid by the United States in respect of the transaction or matter which constitutes the subject matter of such case, unless and until such person shall assert therein a claim, or an interest in a claim, against the United States, and the

United States Court of Federal Claims shall have jurisdiction to adjudicate, as between any and all adverse claimants, their respective several interests in any matter in suit and to award several judgments in accordance therewith.

**(c) Jurisdiction**

The jurisdiction of the United States Court of Federal Claims shall not be affected by this chapter except to the extent necessary to give effect to this chapter, and no person shall recover judgment on any claim, or on any interest in any claim, in said court which such person would not have had a right to assert in said court if this section had not been enacted.

(July 1, 1944, ch. 358, §14, 58 Stat. 663; July 28, 1953, ch. 253, §5, 67 Stat. 226; Apr. 2, 1982, Pub. L. 97-164, title I, §160(a)(14), 96 Stat. 48; Oct. 29, 1992, Pub. L. 102-572, title IX, §902(b)(1), 106 Stat. 4516.)

## CODIFICATION

In subsec. (b), "sections 1491, 1496, 1501, 1503, and 2501 of title 28" substituted for "section 250 of title 28" on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

## AMENDMENTS

1992—Pub. L. 102-572 substituted "United States Court of Federal Claims" for "United States Claims Court" wherever appearing.

1982—Pub. L. 97-164 substituted "United States Claims Court" for "Court of Claims" wherever appearing.

1953—Subsec. (a). Act July 28, 1953, struck out provisions relating to the appointment of a maximum of twenty commissioners for the purpose of expediting the adjudication of termination claims.

## EFFECTIVE DATE OF 1992 AMENDMENT

Amendment by Pub. L. 102-572 effective Oct. 29, 1992, see section 911 of Pub. L. 102-572, set out as a note under section 171 of Title 28, Judiciary and Judicial Procedure.

## EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97-164 effective Oct. 1, 1982, see section 402 of Pub. L. 97-164, set out as a note under section 171 of Title 28, Judiciary and Judicial Procedure.

## COMMISSIONERS; TERMINATION OF APPOINTING AUTHORITY

Section 4(b) of act July 28, 1953, provided that the authority contained in subsec. (a) of this section respecting the appointment of commissioners "is hereby terminated".

## SECTION UNAFFECTED BY REVISED TITLE 28

Act June 25, 1948, ch. 646, §2(d), 62 Stat. 985, provided that nothing in Title 28, Judiciary and Judicial Procedure, should be construed as repealing any of the provisions of this section.

**§ 115. Personal financial liability of contracting officers**

(a) Whenever any payment is made from Government funds to any war contractor or other person as an advance, partial or final payment on any termination claim, or pursuant to any loan, guaranty, or agreement for the purchase of any loan, or any commitment in connection therewith, entered into by the Government, no

officer or other Government agent authorizing or approving such payment or settlement, or certifying the voucher for such payment, or making the payment in accordance with a duly certified voucher, shall be personally liable for such payment, in the absence of fraud on his part. In settling the accounts of any disbursing officer the General Accounting Office shall allow any such disbursements made by him notwithstanding any other provisions of law.

(b) For the purpose of making termination settlements or interim financing any Government agency is authorized to rely upon such certificates of war contractors as it deems proper and to permit war contractors and other persons to rely upon such certificates without financial liability in the absence of fraud on their part.

(July 1, 1944, ch. 358, §15, 58 Stat. 664.)

#### **§ 116. Functions of General Accounting Office**

##### **(a) Review of terminated settlements; limitations**

Any other provision of law notwithstanding, the function of the General Accounting Office with respect to any termination settlement made, authorized, ratified, or approved by a contracting agency shall be confined to determining, after final settlement, (1) whether the settlement payments to the war contractor were made in accordance with the settlement, and (2) whether the records transmitted to it, or other information, warrant a reasonable belief that the settlement was induced by fraud. For this purpose the General Accounting Office shall have the authority to examine any records maintained by any contracting agency or by any war contractor relating to any termination settlement.

##### **(b) Certification of fraudulent settlements to Department of Justice**

Whenever the Comptroller General is convinced that any settlement was induced by fraud, he shall so certify, together with all the facts relating thereto, to the Department of Justice, to the Administrator of General Services, and to the contracting agency concerned. Upon receipt of such certificate (1) the Department of Justice shall make an investigation to determine whether such settlement was induced by fraud, and (2) until the Department of Justice notifies the contracting agency that in its opinion the facts do not support the belief that the settlement was induced by fraud, the contracting agency, by set-off or otherwise, may withhold, from amounts owing to the war contractor by the United States under such settlement or otherwise, the amount of the settlement, or the portion thereof, which, in the opinion of the Comptroller General as stated in his certificate, was affected by the fraud. In any such case the Department of Justice shall take such action as it deems appropriate to recover payments made to such war contractor. The General Accounting Office shall not suspend credit to any disbursing officer on any disbursements made by him under such settlement in the absence of fraud on his part.

##### **(c) Reports to Congress**

The Comptroller General may investigate the settlements completed by each contracting

agency for the purpose of reporting to the Congress from time to time on—

(1) whether the settlement methods and procedures employed by such agency are of a kind and type designed to result in expeditious and fair settlements in accordance with and subject to the provisions of this chapter and the orders and regulations of the Administrator of General Services;

(2) whether such methods and procedures are followed by such agency with care and efficiency; and

(3) whether such methods and procedures adequately protect the interest of the Government.

If in any such report the Comptroller General shall find that the settlement methods and procedures fail to meet the foregoing standards, he shall make suggestions and recommendations to such agency for the improvement of such methods and procedures and to the Congress for any additional legislation needed to carry out the policies of this chapter. At least thirty days before filing any such report with the Congress, the Comptroller General shall deliver a copy thereof to the agency concerned and the Administrator of General Services, and shall forward to the Congress together with such report any comments of such agency with respect thereto.

##### **(d) Jurisdiction of Comptroller General**

The jurisdiction of the Comptroller General of the United States shall not be affected by this chapter except to the extent necessary to give effect to the specific provisions thereof.

(July 1, 1944, ch. 358, §16, 58 Stat. 664; Ex. Ord. No. 9809, §8, eff. Dec. 12, 1946, 11 F.R. 14281; 1947 Reorg. Plan No. 1, §201, eff. July 1, 1947, 12 F.R. 4534, 61 Stat. 951; June 30, 1949, ch. 288, title I, §102(b), 63 Stat. 380.)

#### TRANSFER OF FUNCTIONS

Functions of Secretary of the Treasury transferred to Administrator of General Services by section 102(b) of act June 30, 1949, which is classified to section 752(b) of Title 40, Public Buildings, Property, and Works.

“Secretary” substituted for “Director” by section 8 of Ex. Ord. No. 9809 and section 201 of Reorg. Plan No. 1 of 1947, set out in the Appendix to Title 5, Government Organization and Employees.

#### EFFECTIVE DATE OF TRANSFER OF FUNCTIONS

Transfer of functions by act June 30, 1949, effective July 1, 1949, see section 605 of act June 30, 1949, set out as an Effective Date note under section 471 of Title 40, Public Buildings, Property, and Works.

#### **§ 117. Defective, informal, and quasi contracts**

##### **(a) Lack of formalized contract**

Where any person has arranged to furnish or furnished to a contracting agency or to a war contractor any materials, services, or facilities related to the prosecution of the war, without a formal contract, relying in good faith upon the apparent authority of an officer or agent of a contracting agency, written or oral instructions, or any other request to proceed from a contracting agency, the contracting agency shall pay such person fair compensation therefor.

##### **(b) Technical defects or omissions**

Whenever any formal or technical defect or omission in any prime contract, or in any grant

of authority to an officer or agent of a contracting agency who ordered any materials, services, and facilities might invalidate the contract or commitment, the contracting agency (1) shall not take advantage of such defect or omission; (2) shall amend, confirm, or ratify such contract or commitment without consideration in order to cure such defect or omission; and (3) shall make a fair settlement of any obligation thereby created or incurred by such agency, whether expressed or implied, in fact or in law, or in the nature of an implied or quasi contract.

**(c) Failure to settle**

Where a contracting agency fails to settle by agreement any claim asserted under this section, the dispute shall be subject to the provisions of section 113 of this title.

**(d) Formalization of obligations; termination date for filing claims**

The Administrator of General Services shall require each contracting agency to formalize all such obligations and commitments within such period as the Administrator of General Services deems appropriate. No person shall be entitled to recover compensation, to receive a settlement of any alleged obligation, or to obtain the benefit of any amendment, confirmation, ratification, or formalization of any alleged contract or commitment under the provisions of subsections (a), (b), (c), or (d) of this section, unless such person shall, on or before one hundred and eighty days after June 28, 1954, have filed a claim therefor with the contracting agency.

(July 1, 1944, ch. 358, §17, 58 Stat. 665; Ex. Ord. No. 9809, §8, eff. Dec. 12, 1946, 11 F.R. 14281; 1947 Reorg. Plan. No. 1, §201, eff. July 1, 1947, 12 F.R. 4534, 61 Stat. 951; June 30, 1949, ch. 288, title I, §102(b), 63 Stat. 380; June 28, 1954, ch. 403, §1, 68 Stat. 300.)

AMENDMENTS

1954—Subsec. (d). Act June 28, 1954, inserted sentence providing a termination date for filing claims.

TRANSFER OF FUNCTIONS

Functions of Secretary of the Treasury transferred to Administrator of General Services by section 102(b) of act June 30, 1949, which is classified to section 752(b) of Title 40, Public Buildings, Property, and Works.

“Secretary” substituted for “Director” by section 8 of Ex. Ord. No. 9809 and section 201 of Reorg. Plan No. 1 of 1947, set out in the Appendix to Title 5, Government Organization and Employees.

EFFECTIVE DATE OF TRANSFER OF FUNCTIONS

Transfer of functions by act June 30, 1949, effective July 1, 1949, see section 605 of act June 30, 1949, set out as an Effective Date note under section 471 of Title 40, Public Buildings, Property, and Works.

NONACCRUAL OF LIABILITY

Section 2 of act June 28, 1954, provided that no liability should accrue by reason of the enactment of section 1 of that act [amending this section] which would not otherwise have accrued.

**§ 118. Administration**

**(a) Records and forms**

The Administrator of General Services shall establish policies for such supervision and review within the contracting agencies of termi-

nation settlements and interim financing as he deems necessary and appropriate to prevent and detect fraud and to assure uniformity in administration and to provide for expeditious settlements. For this purpose he shall prescribe (1) such records to be prepared by the contracting agencies and by war contractors as he deems necessary in connection with such settlements and interim financing; and (2) the records in connection therewith to be transmitted to the General Accounting Office. He shall seek to reduce the amount of record keeping, reporting, and accounting in connection with the settlement of termination claims and interim financing to the minimum compatible with the reasonable protection of the public interest. Each contracting agency shall prescribe forms for use by war contractors in connection with termination settlements and interim financing to the extent it deems necessary and feasible.

**(b) Repealed. Oct. 31, 1951, ch. 654, §1(111), 65 Stat. 705**

**(c) Advance notice on cut-backs**

The Administrator of General Services, by regulation, shall provide for making available to any interested Government agency such advance notice and other information on cut-backs in war production resulting from terminations or failures to renew or extend war contracts, as he deems necessary and appropriate.

**(d) Investigations**

The Administrator of General Services shall make such investigations as he deems necessary or desirable in connection with termination settlements and interim financing. For this purpose he may utilize the facilities of any existing agencies and if he determines that the facilities of existing agencies are inadequate, he may establish a unit in the General Services Administration to supplement and facilitate the work of existing agencies. He shall report to the Department of Justice any information received by him indicating any fraudulent practices, for appropriate action.

**(e) Certification of fraudulent settlements to Department of Justice**

Whenever any contracting agency or the Administrator of General Services believes that any settlement was induced by fraud, the agency or Administrator of General Services shall report the facts to the Department of Justice. Thereupon, (1) the Department of Justice shall make an investigation to determine whether such settlement was induced by fraud, and (2) until the Department of Justice notifies the contracting agency that in its opinion the facts do not support the belief that the settlement was induced by fraud, the contracting agency, by set-off or otherwise, may withhold, from amounts owing to the war contractor by the United States under such settlement or otherwise, the amount of the settlement, or the portion thereof, which, in its opinion, was affected by the fraud. In any such case the Department of Justice shall take such action as it deems appropriate to recover payments made to such war contractor.

(July 1, 1944, ch. 358, §18, 58 Stat. 666; Ex. Ord. No. 9809, §8, eff. Dec. 12, 1946, 11 F.R. 14281; 1947



Reorg. Plan No. 1, §201, eff. July 1, 1947, 12 F.R. 4534, 61 Stat. 951; June 30, 1949, ch. 288, title I, §102(b), 63 Stat. 380; Oct. 31, 1951, ch. 654, §1(111), 65 Stat. 705.)

#### AMENDMENTS

1951—Subsec. (b). Act Oct. 31, 1951, struck out provisions which related to preparation of information and reports regarding termination of war contracts, settlements of termination claims, interim financing, etc.

#### TRANSFER OF FUNCTIONS

Functions of Secretary of the Treasury transferred to Administrator of General Services by section 102(b) of act June 30, 1949, which is classified to section 752(b) of Title 40, Public Buildings, Property, and Works.

“Department of the Treasury” substituted for “Office of Contract Settlement” in subsec. (d) and references to “Director” changed to “Secretary” throughout this section by section 8 of Ex. Ord. No. 9809 and section 201 of Reorg. Plan No. 1 of 1947, set out in the Appendix to Title 5, Government Organization and Employees.

#### EFFECTIVE DATE OF TRANSFER OF FUNCTIONS

Transfer of functions by act June 30, 1949, effective July 1, 1949, see section 605 of act June 30, 1949, set out as an Effective Date note under section 471 of Title 40, Public Buildings, Property, and Works.

### § 119. Fraudulent claims, vouchers, statements, etc.; jurisdiction

Every person who makes or causes to be made, or presents or causes to be presented to any officer, agent, or employee of any Government agency any claim, bill, receipt, voucher, statement, account, certificate, affidavit, or deposition, knowing the same to be false, fraudulent, or fictitious or knowing the same to contain or to be based on any false, fraudulent, or fictitious statement or entry, or who shall cover up or conceal any material fact, or who shall use or engage in any other fraudulent trick, scheme, or device, for the purpose of securing or obtaining, or aiding to secure or obtain, for any person any benefit, payment, compensation, allowance, loan, advance, or emolument from the United States or any Government agency in connection with the termination, cancelation, settlement, payment, negotiation, renegotiation, performance, procurement, or award of a contract with the United States or with any other person, and every person who enters into an agreement, combination, or conspiracy so to do, (1) shall pay to the United States an amount equal to 25 per centum of any amount thereby sought to be wrongfully secured or obtained but not actually received, and (2) shall forfeit and refund any such benefit, payment, compensation, allowance, loan, advance, and emolument received as a result thereof and (3) shall in addition pay to the United States the sum of \$2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the costs of suit.

The several district courts of the United States, the several district courts of the Territories of the United States, within whose jurisdictional limits the person, or persons, doing or committing such act, or any one of them, resides or shall be found, shall, wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit, and such person or persons as

are not inhabitants of or found within the district in which suit is brought may be brought in by order of the court to be served personally or by publication or in such other reasonable manner as the court may direct.

(July 1, 1944, ch. 358, §19(a), (c)–(e), 58 Stat. 667; June 25, 1948, ch. 645, §21, 62 Stat. 862.)

#### CODIFICATION

As originally enacted, the second undesignated paragraph of this section contained the words, “, the District of Columbia” after “The several district courts of the United States”. The words “District of Columbia” have been deleted entirely as superfluous in view of section 132(a) of Title 28, Judiciary and Judicial Procedure, which states that “There shall be in each judicial district a district court which shall be a court of record known as the United States District Court for the district”, and section 88 of Title 28 which states that “the District of Columbia constitutes one judicial district”.

Section was comprised of subsecs. (a) and (c) to (e) of section 19 of act July 1, 1944. Subsec. (b) of section 19 was classified to section 590a of Title 18, Criminal Code and Criminal Procedure, prior to the general revision and enactment of Title 18, Crimes and Criminal Procedure, by act June 25, 1948, ch. 645, 62 Stat. 683. Subsecs. (a), (d), and (e) of section 19 were repealed by act June 25, 1948, leaving only subsec. (c) of section 19, which comprises this section. Subject matter of former subsecs. (a), (d), and (e) of section 19 is covered by sections 201, 287, 443, and 1001 of Title 18.

#### AMENDMENTS

1948—Act June 25, 1948, repealed first, second, fifth, and sixth undesignated pars. See Codification note above.

#### EFFECTIVE DATE OF 1948 REPEAL

Amendment by act June 25, 1948, effective Sept. 1, 1948, see section 20 of that act.

#### CROSS REFERENCES

False, fictitious or fraudulent claims, see section 287 of Title 18, Crimes and Criminal Procedure.

False statements or entries generally, see section 1001 of Title 18.

War contracts penal provision as comprehending the definitions of terms used in this section, see section 443 of Title 18.

Wartime suspension of limitations, see section 3287 of Title 18.

### § 120. Powers and duties of contracting agencies

#### (a) Limitation

Each contracting agency shall have authority, notwithstanding any provisions of law other than contained in this chapter, (1) to make any contract necessary and appropriate to carry out the provisions of this chapter; (2) to amend by agreement any existing contract, either before or after notice of its termination, on such terms and to such extent as it deems necessary and appropriate to carry out the provisions of this chapter; and (3) in settling any termination claim, to agree to assume, or indemnify the war contractor against, any claims by any person in connection with such termination claims or settlement. This subsection shall not limit or affect in any way any authority of any contracting agency under the First War Powers Act, 1941, or under any other statute.

#### (b) Evidence required; conclusiveness of determinations

Any contracting agency may prescribe the amount and kind of evidence required to iden-

tify any person as a war contractor, or any contract, agreement, or purchase order as a war contract for any of the purposes of this chapter. Any determination so made that any person is a war contractor, or that any contract, agreement, or purchase order is a war contract, shall be final and conclusive for any of the purposes of this chapter.

**(c) Appropriations**

There are authorized to be appropriated such sums as may be necessary for administering the provisions of this chapter.

**(d) Validation of prior settlements**

All policies and procedures relating to termination of war contracts, termination settlements, and interim financing, prescribed by the Secretary of the Treasury or any contracting agency, in effect on July 21, 1944, and not inconsistent with this chapter, shall remain in full force and effect unless and until superseded by the Administrator of General Services in accordance with this chapter, or by regulations of the contracting agency not inconsistent with this chapter or the policies prescribed by the Administrator of General Services.

**(e) Impairment of contract**

Nothing in this chapter shall be deemed to impair or modify any war contract or any term or provision of any war contract or any assignment of any claim under a war contract, without the consent of the parties thereto, if the war contract, or the term, provision, or assignment thereof, is otherwise valid.

**(f) Aid to war contractors**

Any contracting agency may authorize or direct its officers and employees, as a part of their official duties, to advise, aid, and assist war contractors in preparing and presenting termination claims, in obtaining interim financing, and in related matters, to such extent as it deems desirable. Such advice, aid, or assistance shall not constitute a violation of section 205 of title 18 or of any other law, provided the officer or employee does not receive therefor benefit or compensation of any kind, directly or indirectly, from any war contractor.

(July 1, 1944, ch. 358 § 20, 58 Stat. 668; Ex. Ord. No. 9809, § 8, eff. Dec. 12, 1946, 11 F.R. 14281; June 30, 1947, ch. 166, title II, § 207, 61 Stat. 209; 1947 Reorg. Plan No. 1, § 201, eff. July 1, 1947, 12 F.R. 4534, 61 Stat. 951; June 30, 1949, ch. 288, title I, § 102(b), 63 Stat. 380.)

REFERENCES IN TEXT

The First War Powers Act, 1941, referred to in subsec. (a), is act Dec. 18, 1941, ch. 593, 55 Stat. 838, which enacted sections 32 to 37 and 601 to 605, 611, and 616 to 622 of Title 50, Appendix, War and National Defense, and amended section 95a of Title 12, Banks and Banking, and section 5 of Title 50, Appendix. The First War Powers Act, 1941, was substantially repealed, with certain exceptions, by Pub. L. 89-554, § 8(a), Sept. 6, 1966, 80 Stat. 651. For complete classification of this Act to the Code, see Tables.

CODIFICATION

In subsec. (f), "section 205 of title 18" substituted for "section 109 of the Criminal Code (18 U.S.C. 198)" on authority of act June 25, 1948, ch. 645, 62 Stat. 683, the

first section of which enacted Title 18, Crimes and Criminal Procedure, and on authority of Pub. L. 87-849, § 2, Oct. 23, 1962, 76 Stat. 1126.

Subsec. (g), relating to the duties of Smaller War Plants Corporation, omitted on authority of section 207 of act June 30, 1947, which provided: "The liquidation of the affairs of the Smaller War Plants Corporation administered by the Reconstruction Finance Corporation pursuant to Executive Order 9665 shall be carried out by the Reconstruction Finance Corporation, notwithstanding the provisions of the last paragraph of section 5 of the First War Powers Act, 1941 [section 605 of Title 50, Appendix, War and National Defense]. The Smaller War Plants Corporation is hereby abolished."

TRANSFER OF FUNCTIONS

Functions of Secretary of the Treasury transferred to Administrator of General Services by section 102(b) of act June 30, 1949, which is classified to section 752(b) of Title 40, Public Buildings, Property, and Works.

"Secretary" substituted for "Director" by section 8 of Ex. Ord. No. 9809 and section 201 of Reorg. Plan No. 1 of 1947, set out in the Appendix to Title 5, Government Organization and Employees.

EFFECTIVE DATE OF TRANSFER OF FUNCTIONS

Transfer of functions by act June 30, 1949, effective July 1, 1949, see section 605 of act June 30, 1949, set out as an Effective Date note under section 471 of Title 40, Public Buildings, Property, and Works.

**§ 121. Administrator of General Services; additional duties**

In addition to his other functions under this chapter, the Administrator of General Services shall—

(a) promote the training of personnel for termination settlement and interim financing by contracting agencies, war contractors, and financing institutions;

(b) Omitted

(c) promote decentralization of the administration of termination settlements and interim financing by fostering delegation of authority within contracting agencies and to war contractors, to the extent he deems necessary and feasible; and

(d) consult with war contractors through advisory committees or such other methods as he deems appropriate.

(July 1, 1944, ch. 358, § 21, 58 Stat. 669; Ex. Ord. No. 9809, § 8, eff. Dec. 12, 1946, 11 F.R. 14281; June 30, 1947, ch. 166, title II, § 207, 61 Stat. 209; 1947 Reorg. Plan No. 1, § 201, eff. July 1, 1947, 12 F.R. 4534, 61 Stat. 951; June 30, 1949, ch. 288, title I, § 102(b), 63 Stat. 380.)

CODIFICATION

Subsec. (b), providing for Administrators' collaboration with Smaller War Plants Corporation in protecting interests of smaller war contractors, was omitted on authority of section 207 of act June 30, 1947, which provided: "The liquidation of the affairs of the Smaller War Plants Corporation administered by the Reconstruction Finance Corporation pursuant to Executive Order 9665 shall be carried out by the Reconstruction Finance Corporation, notwithstanding the provisions of the last paragraph of section 5 of the First War Powers Act, 1941 [section 605 of Title 50, Appendix, War and National Defense]. The Smaller War Plants Corporation is hereby abolished."

TRANSFER OF FUNCTIONS

Functions of Secretary of the Treasury transferred to Administrator of General Services by section 102(b) of

act June 30, 1949, which is classified to section 752(b) of Title 40, Public Buildings, Property, and Works.

“Secretary” substituted for “Director” by section 8 of Ex. Ord. No. 9809 and section 201 of Reorg. Plan No. 1 of 1947, set out in the Appendix to Title 5, Government Organization and Employees.

#### EFFECTIVE DATE OF TRANSFER OF FUNCTIONS

Transfer of functions by act June 30, 1949, effective July 1, 1949, see section 605 of act June 30, 1949, set out as an Effective Date note under section 471 of Title 40, Public Buildings, Property, and Works.

#### TERMINATION OF ADVISORY COMMITTEES

Advisory committees in existence on Jan. 5, 1973, to terminate not later than the expiration of the 2-year period following Jan. 5, 1973, unless, in the case of a committee established by the President or an officer of the Federal Government, such committee is renewed by appropriate action prior to the expiration of such 2-year period, or in the case of a committee established by the Congress, its duration is otherwise provided by law. Advisory committees established after Jan. 5, 1973, to terminate not later than the expiration of the 2-year period beginning on the date of their establishment, unless, in the case of a committee established by the President or an officer of the Federal Government, such committee is renewed by appropriate action prior to the expiration of such 2-year period, or in the case of a committee established by the Congress, its duration is otherwise provided by law. See section 14 of Pub. L. 92-463, Oct. 6, 1972, 86 Stat. 776, set out in the Appendix to Title 5, Government Organization and Employees.

### § 122. Use of appropriated funds

Any contracting agency is authorized—

(a) to use for interim financing, the payment of claims, and for any other purposes authorized in this chapter any funds which have heretofore been appropriated or allocated or which may hereafter be appropriated or allocated to it, or which are or may become available to it, for such purposes or for the purposes of war production or war procurement;

(b) to use any such funds appropriated, allocated, or available to it for expenditures for or in behalf of any other contracting agency for the purposes authorized in this chapter; and

(c) to determine by agreement, joint estimate, or any other method authorized by the Administrator of General Services, the part of any expenditure made pursuant to subsection (b) of this section to be paid by each contracting agency concerned and to make transfers of funds between such contracting agencies accordingly. Transfers of funds between appropriations carried upon the books of the Treasury shall be made by the Administrator of General Services in accordance with joint requests of the contracting agencies involved.

(July 1, 1944, ch. 358, §22, 58 Stat. 670; Ex. Ord. No. 9809, §8, eff. Dec. 12, 1946, 11 F.R. 14281; 1947 Reorg. Plan No. 1, §201, eff. July 1, 1949, 12 F.R. 4534, 61 Stat. 951; June 30, 1949, ch. 288, title I, §102(b), 63 Stat. 380.)

#### TRANSFER OF FUNCTIONS

Functions of Secretary of the Treasury transferred to Administrator of General Services by section 102(b) of act June 30, 1949, which is classified to section 752(b) of Title 40, Public Buildings, Property, and Works.

“Secretary” substituted for “Director” by section 8 of Ex. Ord. No. 9809 and section 201 of Reorg. Plan No. 1 of 1947, set out in the Appendix to Title 5, Government Organization and Employees.

#### EFFECTIVE DATE OF TRANSFER OF FUNCTIONS

Transfer of functions by act June 30, 1949, effective July 1, 1949, see section 605 of act June 30, 1949, set out as an Effective Date note under section 471 of Title 40, Public Buildings, Property, and Works.

### § 123. Delegation of authority by Administrator of General Services

#### (a) Officers and agencies of General Service Administration and other governmental agencies

The Administrator of General Services may delegate any authority and discretion conferred upon him by this chapter to such officers and agencies of the General Services Administration as he may designate, and may delegate such authority and discretion, upon such terms and conditions as he may prescribe, to the head of any Government agency to the extent necessary to the handling and solution of problems peculiar to that agency.

#### (b) Authority delegated to other governmental agencies

The head of any Government agency may delegate any authority and discretion conferred upon him or his agency by or pursuant to this chapter to any officer, agent, or employee of such agency or to any other Government agency, and may authorize successive redelegations of such authority and discretion.

#### (c) Joint exercise of delegated authority

Any two or more Government agencies may exercise jointly any authority and discretion conferred upon each of them individually by or pursuant to this chapter.

#### (d) Application to other laws

Nothing in this chapter shall prevent the Administrator of General Services from exercising any authority conferred upon him by any other statute.

(July 1, 1944, ch. 358, §23, 58 Stat. 670; Ex. Ord. No. 9809, §8, eff. Dec. 12, 1946, 11 F.R. 14281; 1947 Reorg. Plan No. 1, §201, eff. July 1, 1949, 12 F.R. 4534, 61 Stat. 951; June 30, 1949, ch. 288, title I, §102(b), 63 Stat. 380.)

#### CODIFICATION

In subsec. (a), the phrase “such officers and agencies of the General Services Administration as he may designate” substituted for “any Deputy Director” on authority of section 102(b) of act June 30, 1949, which is classified to section 752(b) of Title 40, Public Buildings, Property, and Works.

#### TRANSFER OF FUNCTIONS

Functions of Secretary of the Treasury transferred to Administrator of General Services by section 102(b) of act June 30, 1949, which is classified to section 752(b) of Title 40, Public Buildings, Property, and Works.

“Secretary” substituted for “Director” by section 8 of Ex. Ord. No. 9809 and section 201 of Reorg. Plan No. 1 of 1947, set out in the Appendix to Title 5, Government Organization and Employees.

#### EFFECTIVE DATE OF TRANSFER OF FUNCTIONS

Transfer of functions by act June 30, 1949, effective July 1, 1949, see section 605 of act June 30, 1949, set out as an Effective Date note under section 471 of Title 40, Public Buildings, Property, and Works.

### § 124. Effective date; applicability to lend lease contracts

(a) This chapter shall become effective twenty days after July 1, 1944. With the exception of the provisions of paragraphs (b), (c), (d), and (e) of section 112 of this title, and sections 106 to 110, and 113 of this title, this chapter shall be applicable in the case of any terminated war contract which has been finally settled at or before the effective date of this chapter.

(b) Nothing in this chapter shall limit or affect any authority conferred by sections 411 to 419 of title 22, or Acts supplemental thereto.

(July 1, 1944, ch. 358, §24, 58 Stat. 670.)

#### REFERENCES IN TEXT

Sections 411 to 419 of title 22, referred to in subsec. (b), have been omitted from the Code.

### § 125. Exemption of certain contracts outside continental United States or in Alaska

Subject to policies prescribed by the Administrator of General Services, any contracting agency may exempt from some or all of the provisions of this chapter (a) any war contract made or to be performed outside the continental limits of the United States or in Alaska, or (b) any termination inventory situated outside of the continental limits of the United States or in Alaska, or (c) any modification of a war contract pursuant to its terms for the purpose of changing plans or specifications applicable to the work without substantially reducing its extent.

(July 1, 1944, ch. 358, §25, 58 Stat. 670; Ex. Ord. No. 9809, §8, eff. Dec. 12, 1946, 11 F.R. 14281; 1947 Reorg. Plan No. 1, §201, eff. July 1, 1947, 12 F.R. 4534, 61 Stat. 951; June 30, 1949, ch. 288, title I, §102(b), 63 Stat. 380.)

#### TRANSFER OF FUNCTIONS

Functions of Secretary of the Treasury transferred to Administrator of General Services by section 102(b) of act June 30, 1949, which is classified to section 752(b) of Title 40, Public Buildings, Property, and Works.

“Secretary” substituted for “Director” by section 8 of Ex. Ord. No. 9809 and section 201 of Reorg. Plan No. 1 of 1947, set out in the Appendix to Title 5, Government Organization and Employees.

#### EFFECTIVE DATE OF TRANSFER OF FUNCTIONS

Transfer of functions by act June 30, 1949, effective July 1, 1949, see section 605 of act June 30, 1949, set out as an Effective Date note under section 471 of Title 40, Public Buildings, Property, and Works.

### CHAPTER 3—PROCUREMENT OF SUPPLIES AND SERVICES BY ARMED SERVICES

#### §§ 151 to 162. Repealed. Aug. 10, 1956, ch. 1041, § 53, 70A Stat. 641

Section 151, act Feb. 19, 1948, ch. 56, §2, 62 Stat. 21, related to purchases and contracts for supplies and services for the Armed Services, stated the Congressional declaration of policy, provided for advertising requirements, excepted certain purchases and contracts, authorized reference to Attorney General where there is any evidence of violation of antitrust laws, excluded certain authorizations and contracts. See sections 2303 to 2305 of Title 10, Armed Forces.

Section 152, acts Feb. 19, 1948, ch. 65, §3, 62 Stat. 22; Aug. 9, 1955, ch. 628, §15, 69 Stat. 551, related to adver-

tisements for bids, opening of bids and award or rejection of bids. See section 2305 of Title 10. Act Aug. 9, 1955, ch. 628, §15, 69 Stat. 551, which amended section 152 of this title, was repealed by Pub. L. 85-861, §36A, Sept. 2, 1958, 72 Stat. 1569.

Section 153, acts Feb. 19, 1948, ch. 65, §4, 62 Stat. 23; Oct. 31, 1951, ch. 652, 65 Stat. 700, provided for types of contracts and examination of books, records, etc., of contractors. See sections 2306 and 2313 of Title 10.

Section 154, act Feb. 19, 1948, ch. 65, §5, 62 Stat. 24, authorized advance payments under negotiated contracts. See section 2307 of Title 10.

Section 155, act Feb. 19, 1948, ch. 65, §6, 62 Stat. 24, provided for remission of liquidated damages. See section 2312 of Title 10.

Section 156, act Feb. 19, 1948, ch. 65, §7, 62 Stat. 24, provided for determinations and decisions, powers of agency head, finality of decisions, delegations of powers, non-delegable powers, written decisions, preservation of data. See sections 2304, 2310, and 2311 of Title 10.

Section 157, act Feb. 19, 1948, ch. 65, §8, 62 Stat. 24, related to exemption of purchases or contracts from certain other provisions of law. See section 2304 of Title 10.

Section 158, act Feb. 19, 1948, ch. 65, §9, 62 Stat. 24, defined “agency head” and “supplies”. See sections 2302 and 2303 of Title 10.

Section 159, act Feb. 19, 1948, ch. 65, §10, 62 Stat. 25, related to assignment and delegation of joint procurement responsibilities by agency head, and allocation of appropriations. See sections 2308 and 2309 of Title 10.

Section 160, act Feb. 19, 1948, ch. 65, §11(b), 62 Stat. 25, provided that sections 5, 6, 6a, and 13 of this title should be inapplicable to procurement of supplies and services. See section 2314 of Title 10.

Section 161, act Feb. 19, 1948, ch. 65, §12, 62 Stat. 26, related to concurrent authority of Secretaries of Army, Navy and Air Force. See section 2381 of Title 10.

Section 162, act July 10, 1952, ch. 630, title VI, §638, 66 Stat. 537, related to obligation of funds by Department of Defense for procurement and distribution of supplies or equipment. See section 2202 of Title 10.

## CHAPTER 4—PROCUREMENT PROCEDURES

### SUBCHAPTER I—GENERAL PROVISIONS

Sec.

201 to 205. Transferred.

### SUBCHAPTER II—GENERAL SERVICES ADMINISTRATION

211 to 219. Transferred.

### SUBCHAPTER III—PROPERTY MANAGEMENT

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SUBCHAPTER V—FOREIGN EXCESS PROPERTY

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SUBCHAPTER VI—FEDERAL RECORD MANAGEMENT

281 to 291. Transferred.

SUBCHAPTER I—GENERAL PROVISIONS

§§ 201 to 205. Transferred

CODIFICATION

Section 201, act June 30, 1949, ch. 288, §2, 63 Stat. 378, which related to Congressional declaration of policy, was transferred to section 471 of Title 40, Public Buildings, Property, and Works.

Section 202, acts June 30, 1949, ch. 288, §3, 63 Stat. 378; Sept. 5, 1950, ch. 849, §§7(a), 8(a), 64 Stat. 590, which related to definitions, was transferred to section 472 of Title 40.

Section 203, act June 30, 1949, ch. 288, title VI, §601, formerly title V, §501, 63 Stat. 399; renumbered Sept. 5, 1950, ch. 849, §6(a), (b), 64 Stat. 583, which related to applicability of existing provisions, was transferred to section 473 of Title 40.

Section 204, act June 30, 1949, ch. 288, title VI, §602(c), (d), formerly title V, §502(c), (d), 63 Stat. 401; renumbered and amended Sept. 5, 1950, ch. 849, §§6(a), (b), 7(e), (f), 8(c), 64 Stat. 583, 590, which related to exemptions for Congress, departments, agencies, corporations, and persons, was transferred to section 474 of Title 40.

Section 205, act June 30, 1949, ch. 288, title VI, §603, formerly title V, §503, 63 Stat. 403; renumbered and amended Sept. 5, 1950, ch. 849, §§6(a), (b), 7(g), 64 Stat. 583, 590, which related to authorization of appropriations and fund transfer authority, was transferred to section 475 of Title 40.

SUBCHAPTER II—GENERAL SERVICES ADMINISTRATION

§§ 211 to 219. Transferred

CODIFICATION

Section 211, act June 30, 1949, ch. 288, title I, §101, 63 Stat. 379, which related to General Services Administration, was transferred to section 630 of former Title 5, Executive Departments and Government Officers and Employees, and subsequently transferred to section 751 of Title 40, Public Buildings, Property, and Works.

Section 212, act June 30, 1949, ch. 288, title I, §102, 63 Stat. 380, which related to transfer of functions, was transferred to section 630a of former Title 5, Executive Departments and Government Officers and Employees, and subsequently transferred to section 752 of Title 40.

Section 213, act June 30, 1949, ch. 288, title I, §103, 63 Stat. 380, which related to transfer of affairs of Federal Works Agency, was transferred to section 630b of former Title 5, Executive Departments and Government Officers and Employees, and subsequently transferred to section 753 of Title 40.

Section 214, act June 30, 1949, ch. 288, title I, §104, 63 Stat. 381, which related to records management, was transferred to section 391 of former Title 44, Public Printing and Documents. See sections 1506, 2102, 2301, 2501, and 2902 of Title 44, Public Printing and Documents.

Section 215, act June 30, 1949, ch. 288, title I, §105, 63 Stat. 381, which related to transfer and liquidation of War Assets Administration, was transferred to section 630c of former Title 5, Executive Departments and Government Officers and Employees, and was subsequently repealed by section 8(a) of Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 632.

Section 216, act June 30, 1949, ch. 288, title I, §106, 63 Stat. 381, which related to redistribution of Administrator's functions, was transferred to section 630d of former Title 5, Executive Departments and Government Officers and Employees, and subsequently transferred to section 754 of Title 40, Public Buildings, Property, and Works.

Section 217, act June 30, 1949, ch. 288, title I, §107, 63 Stat. 382, which related to transfer of funds, was transferred to section 630e of former Title 5, Executive Departments and Government Officers and Employees, and subsequently transferred to section 755 of Title 40.

Section 218, act June 30, 1949, ch. 288, title I, §108, 63 Stat. 382, which related to status of transferred employees, was transferred to section 630f of former Title 5, Executive Departments and Government Officers and Employees, and was subsequently repealed by section 8(a) of Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 632.

Section 219, acts June 30, 1949, ch. 288, title I, §109, 63 Stat. 382; Sept. 5, 1950, ch. 849, §§1, 2(a), (b), 3, 64 Stat. 578, which related to the General Supply Fund, was transferred to section 630g of former Title 5, Executive Departments and Government Officers and Employees, and subsequently transferred to section 756 of Title 40, Public Buildings, Property, and Works.

### SUBCHAPTER III—PROPERTY MANAGEMENT

#### §§ 231 to 240. Transferred

##### CODIFICATION

Section 231, acts June 30, 1949, ch. 288, title II, §201, 63 Stat. 383; Aug. 10, 1949, ch. 412, §12(a), 63 Stat. 591; Sept. 5, 1950, ch. 849, §8(b), 64 Stat. 591, which related to procurement, warehousing, and related activities, was transferred to section 481 of Title 40, Public Building, Property, and Works.

Section 231a, act Oct. 26, 1949, ch. 737, 63 Stat. 920, which related to clarification of status of Architect of the Capitol under this chapter, was transferred to section 482 of Title 40.

Section 232, acts June 30, 1949, ch. 288, title II, §202, 63 Stat. 384; Aug. 10, 1949, ch. 412, §12(a), 63 Stat. 591, which related to property utilization, was transferred to section 483 of Title 40.

Section 233, acts June 30, 1949, ch. 288, title II, §203, 63 Stat. 385; Aug. 10, 1949, ch. 412, §12(a), 63 Stat. 591; Sept. 5, 1950, ch. 849, §4, 64 Stat. 579, which related to disposal or surplus property, was transferred to section 484 of Title 40.

Section 234, act June 30, 1949, ch. 288, title I, §204, 63 Stat. 388, which related to proceeds from transfer, sale, etc., of property, was transferred to section 485 of Title 40.

Section 235, acts June 30, 1949, ch. 288, title II, §205, 63 Stat. 389; Sept. 5, 1950, ch. 849, §9, 64 Stat. 591, which related to policies, regulations, and delegations, was transferred to section 486 of Title 40.

Section 236, acts June 30, 1949, ch. 288, title II, §206, 63 Stat. 390; Aug. 10, 1949, ch. 412, §12(a), 63 Stat. 591, which related to surveys of government property and property management practices, was transferred to section 487 of Title 40.

Section 237, act June 30, 1949, ch. 288, title II, §207, 63 Stat. 391, which related to applicability of antitrust laws to property disposal, was transferred to section 488 of Title 40.

Section 238, acts June 30, 1949, ch. 288, title II, §208, 63 Stat. 391; Sept. 5, 1950, ch. 849, §7(b), (c), 64 Stat. 590, which related to appointment and compensation of personnel, was transferred to section 630h of former Title 5, Executive Departments and Government Officers and Employees, and was subsequently transferred to section 758 of Title 40.

Section 239, act June 30, 1949, ch. 288, title II, §209, 63 Stat. 392, which related to civil remedies and penalties, was transferred to section 489 of Title 40.

Section 239a, act June 30, 1949, ch. 288, title II, §210, as added Sept. 5, 1950, ch. 849, §5(c), 64 Stat. 580, which related to operation of buildings and related activities by the Administrator, was transferred to section 490 of Title 40.

Section 239b, act June 30, 1949, ch. 288, title II, §211, as added Sept. 5, 1950, ch. 849, §5(c), 64 Stat. 580, which related to motor vehicle identification, was transferred to section 491 of Title 40.

Section 240, act June 30, 1949, ch. 288, title II, §212, formerly §210, 63 Stat. 393; renumbered Sept. 5, 1950, ch. 849, §5(a), 64 Stat. 580, which related to reports to Congress, was transferred to section 492 of Title 40.

### SUBCHAPTER IV—PROCUREMENT PROVISIONS

#### SUBCHAPTER REFERRED TO IN OTHER SECTIONS

This subchapter is referred to in sections 405, 414a, 418a, 421 of this title; title 5 section 595; title 7 section 1736a; title 15 sections 205f, 637; title 16 sections 670o, 793; title 25 section 450j; title 28 section 524; title 31 sections 3718, 9703; title 40 sections 356a, 474, 602a, 604, 752, 758; title 42 sections 1592d, 12651, 13556; title 43 section 1736; title 44 section 311.

#### § 251. Declaration of purpose of this subchapter

The purpose of this subchapter is to facilitate the procurement of property and services.

(June 30, 1949, ch. 288, title III, §301, 63 Stat. 393; July 12, 1952, ch. 703, §1(m), 66 Stat. 594.)

#### AMENDMENTS

1952—Act July 12, 1952, substituted “property” for “supplies”.

#### EFFECTIVE DATE OF 1994 AMENDMENT

Pub. L. 103-355, title X, §10001, Oct. 13, 1994, 108 Stat. 3404, provided that:

“(a) EFFECTIVE DATE.—Except as otherwise provided in this Act, this Act [see Short Title of 1994 Amendment note below] and the amendments made by this Act shall take effect on the date of the enactment of this Act [Oct. 13, 1994].

“(b) APPLICABILITY OF AMENDMENTS.—(1) An amendment made by this Act shall apply, in the manner prescribed in the final regulations promulgated pursuant to section 10002 to implement such amendment [set out below], with respect to any solicitation that is issued, any unsolicited proposal that is received, and any contract entered into pursuant to such a solicitation or proposal, on or after the date described in paragraph (3).

“(2) An amendment made by this Act shall also apply, to the extent and in the manner prescribed in the final regulations promulgated pursuant to section 10002 to implement such amendment, with respect to any matter related to—

“(A) a contract that is in effect on the date described in paragraph (3);

“(B) an offer under consideration on the date described in paragraph (3); or

“(C) any other proceeding or action that is ongoing on the date described in paragraph (3).

“(3) The date referred to in paragraphs (1) and (2) is the date specified in such final regulations [Oct. 1, 1995, see 60 F.R. 48231, Sept. 18, 1995]. The date so specified shall be October 1, 1995, or any earlier date that is not within 30 days after the date on which such final regulations are published.

“(c) IMMEDIATE APPLICABILITY OF CERTAIN AMENDMENTS.—Notwithstanding subsection (b), the amendments made by the following provisions of this Act apply on and after the date of the enactment of this Act [Oct. 13, 1994]: sections 1001, 1021, 1031, 1051, 1071, 1092, 1201, 1506(a), 1507, 1554, 2002(a), 2191, 3062(a), 3063, 3064, 3065(a)(1), 3065(b), 3066, 3067, 6001(a), 7101, 7103, 7205, and 7206, the provisions of subtitles A, B, and C of title III [§§3001-3025], and the provisions of title V [see Tables for classification].”

#### EFFECTIVE DATE OF 1984 AMENDMENT

Pub. L. 98-369, div. B, title VII, §2751, July 18, 1984, 98 Stat. 1203, provided that:

“(a) Except as provided in subsection (b), the amendments made by this title [see Short Title of 1984 Amendments note below] shall apply with respect to any solicitation for bids or proposals issued after March 31, 1985.

“(b) The amendments made by section 2713 [amending section 759 of Title 40, Public Buildings, Property, and

Works, and enacting provisions set out as a note under section 759 of Title 40] and subtitle D [enacting sections 3551 to 3556 of Title 31, Money and Finance] shall apply with respect to any protest filed after January 14, 1985.”

#### EFFECTIVE DATE

Section effective July 1, 1949, see section 605 of act June 30, 1949, set out as a note under section 471 of Title 40, Public Buildings, Property, and Works.

#### SHORT TITLE OF 1994 AMENDMENT

Pub. L. 103-355, §1, Oct. 13, 1994, 108 Stat. 3243, provided that: “This Act [see Tables for classification] may be cited as the ‘Federal Acquisition Streamlining Act of 1994’.”

#### SHORT TITLE OF 1984 AMENDMENTS

Pub. L. 98-577, §1, Oct. 30, 1984, 98 Stat. 3066, provided that this Act [enacting sections 253c to 253h, 414a, 418a, and 418b of this title, repealing section 2303a of Title 10, Armed Forces, amending sections 253, 253b, 259, 403, and 416 of this title, sections 2302, 2304, 2311, and 2320 of Title 10, and sections 637 and 644 of Title 15, Commerce and Trade, and enacting provisions set out as notes under this section, section 416 of this title, and sections 637 and 644 of Title 15] may be cited as the “Small Business and Federal Procurement Competition Enhancement Act of 1984”.

Pub. L. 98-369, title VII, §2701, July 18, 1984, 98 Stat. 1175, provided that: “This title [enacting sections 253a, 253b, 416 to 419 of this title and sections 3551 to 3556 of Title 31, Money and Finance, amending sections 252, 253, 254, 257, 258, 259, 260, 403, 405, and 414 of this title, sections 2301 to 2306, 2310, 2311, 2313, and 2356 of Title 10, Armed Forces, and section 759 of Title 40, Public Buildings, Property, and Works, and enacting provisions set out as notes under this section, sections 253, 403, and 407 of this title, section 2304 of Title 10, and section 759 of Title 40] may be cited as the ‘Competition in Contracting Act of 1984’.”

#### REGULATIONS

Pub. L. 103-355, title X, §10002, Oct. 13, 1994, 108 Stat. 3404, provided that:

“(a) PROPOSED REVISIONS.—Proposed revisions to the Federal Acquisition Regulation and such other proposed regulations (or revisions to existing regulations) as may be necessary to implement this Act [see Short Title of 1994 Amendment note above] shall be published in the Federal Register not later than 210 days after the date of the enactment of this Act [Oct. 13, 1994].

“(b) PUBLIC COMMENT.—The proposed regulations described in subsection (a) shall be made available for public comment for a period of not less than 60 days.

“(c) FINAL REGULATIONS.—Final regulations shall be published in the Federal Register not later than 330 days after the date of enactment of this Act.

“(d) MODIFICATIONS.—Final regulations promulgated pursuant to this section to implement an amendment made by this Act may provide for modification of an existing contract without consideration upon the request of the contractor.

“(e) REQUIREMENT FOR CLARITY.—Officers and employees of the Federal Government who prescribe regulations to implement this Act and the amendments made by this Act shall make every effort practicable to ensure that the regulations are concise and are easily understandable by potential offerors as well as by Government officials.

“(f) SAVINGS PROVISIONS.—(1) Nothing in this Act shall be construed to affect the validity of any action taken or any contract entered into before the date specified in the regulations pursuant to section 10001(b)(3) [see Effective Date of 1994 Amendment note above] except to the extent and in the manner prescribed in such regulations.

“(2) Except as specifically provided in this Act, nothing in this Act shall be construed to require the renegotiation or modification of contracts in existence on the date of the enactment of this Act [Oct. 13, 1994].

“(3) Except as otherwise provided in this Act, a law amended by this Act shall continue to be applied according to the provisions thereof as such law was in effect on the day before the date of the enactment of this Act until—

“(A) the date specified in final regulations implementing the amendment of that law (as promulgated pursuant to this section); or

“(B) if no such date is specified in regulations, October 1, 1995.”

#### EVALUATION BY COMPTROLLER GENERAL

Pub. L. 103-355, title X, §10003, Oct. 13, 1994, 108 Stat. 3405, provided that:

“(a) EVALUATION RELATING TO ISSUANCE OF REGULATIONS.—Not later than 180 days after the issuance in final form of revisions to the Federal Acquisition Regulation pursuant to section 10002 [set out above], the Comptroller General shall submit to Congress a report evaluating compliance with such section.

“(b) EVALUATION OF IMPLEMENTATION OF REGULATIONS.—Not later than 18 months after issuance in final form of revisions to the Federal Acquisition Regulation pursuant to section 10002, the Comptroller General shall submit to the committees referred to in subsection (c) a report evaluating the effectiveness of the regulations implementing this Act [see Short Title of 1994 Amendment note above] in streamlining the acquisition system and fulfilling the other purposes of this Act.

“(c) COMMITTEES DESIGNATED TO RECEIVE THE REPORTS.—The Comptroller General shall submit the reports required by this section to—

“(1) the Committees on Governmental Affairs, on Armed Services, and on Small Business of the Senate; and

“(2) the Committees on Government Operations [now Committee on Government Reform and Oversight], on Armed Services [now Committee on National Security], and on Small Business of the House of Representatives.”

#### CONGRESSIONAL STATEMENT OF PURPOSE

Pub. L. 98-577, title I, §101, Oct. 30, 1984, 98 Stat. 3066, provided that: “The purposes of this Act are to—

“(1) eliminate procurement procedures and practices that unnecessarily inhibit full and open competition for contracts;

“(2) promote the use of contracting opportunities as a means to expand the industrial base of the United States in order to ensure adequate responsive capability of the economy to the increased demands of the Government in times of national emergency; and

“(3) foster opportunities for the increased participation in the competitive procurement process of small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals.”

#### COMMISSION ON GOVERNMENT PROCUREMENT

Pub. L. 91-129, Nov. 26, 1969, 83 Stat. 269, as amended by Pub. L. 92-47, July 9, 1971, 85 Stat. 102, established the Commission on Government Procurement, which was to study and investigate statutes, rules, regulations, procedures, and practices affecting Government procurement and to submit a final report to Congress on or before Dec. 31, 1972, on the results of this study, including recommendations for changes designed to promote economy, efficiency, and effectiveness in the procurement of goods, services, and facilities by and for the executive branch of the Government. The Commission terminated 120 days after submission of the final report.

#### DEFINITIONS

The definitions in section 472 of Title 40, Public Buildings, Property, and Works, apply to this subchapter.



## § 252. Purchases and contracts for property

### (a) Applicability of subchapter; delegation of authority

Executive agencies shall make purchases and contracts for property and services in accordance with the provisions of this subchapter and implementing regulations of the Administrator; but this subchapter does not apply—

(1) to the Department of Defense, the Coast Guard, and the National Aeronautics and Space Administration; or

(2) when this subchapter is made inapplicable pursuant to section 474(d) of title 40 or any other law, but when this subchapter is made inapplicable by any such provision of law, sections 5 and 8 of this title shall be applicable in the absence of authority conferred by statute to procure without advertising or without regard to said section 5 of this title.

### (b) Small business concerns; share of business

It is the declared policy of the Congress that a fair proportion of the total purchases and contracts for property and services for the Government shall be placed with small business concerns.

### (c) Authorization of erection, repair, or furnishing of public buildings or improvements; contracts for construction or repair of buildings, roads, sidewalks, sewers, mains, etc.; Federal Highway Lands Program

(1) This subchapter does not (A) authorize the erection, repair, or furnishing of any public building or public improvement, but such authorization shall be required in the same manner as heretofore, or (B) permit any contract for the construction or repair of buildings, roads, sidewalks, sewers, mains, or similar items using procedures other than sealed-bid procedures under section 253(a)(2)(A) of this title, if the conditions set forth in section 253(a)(2)(A) of this title apply or the contract is to be performed outside the United States.

(2) Section 253(a)(2)(A) of this title does not require the use of sealed-bid procedures in cases in which section 204(e) of title 23 applies.

(June 30, 1949, ch. 288, title III, § 302, 63 Stat. 393; July 12, 1952, ch. 703, § 1(m), 66 Stat. 594; Aug. 28, 1958, Pub. L. 85-800, §§ 1-3, 72 Stat. 966; Nov. 8, 1965, Pub. L. 89-343, §§ 1, 2, 79 Stat. 1303; Nov. 8, 1965, Pub. L. 89-348, § 1(2), 79 Stat. 1310; Mar. 16, 1968, Pub. L. 90-268, § 4, 82 Stat. 50; July 25, 1974, Pub. L. 93-356, § 3, 88 Stat. 390; Dec. 1, 1983, Pub. L. 98-191, § 9(a)(1), 97 Stat. 1331; July 18, 1984, Pub. L. 98-369, div. B, title VII, § 2714(a)(1), 98 Stat. 1184.)

#### AMENDMENTS

1984—Subsec. (b). Pub. L. 98-369, § 2714(a)(1)(A), struck out provisions that whenever it was proposed to make a contract or purchase in excess of \$10,000 by negotiation and without advertising, pursuant to the authority of subsec. (c)(7) of this section, suitable advance publicity, as determined by the agency head with due regard to the type of property involved and other relevant considerations, had to be given for a period of at least fifteen days, wherever practicable, as determined by the agency head.

Subsec. (c)(1). Pub. L. 98-369, § 2714(a)(1)(B), redesignated subsec. (e) as (c)(1), substituted reference to this subchapter for reference to this section in provisions

preceding subpar. (A), in subpar. (B), substituted provisions relating to contracts using procedures other than sealed-bid procedures under section 253(a)(2)(A) of this title for provisions relating to contracts negotiated without advertising as required by section 253 of this title. Former subsec. (c), which related to conditions for negotiated purchases and contracts for property, was struck out.

Subsec. (c)(2). Pub. L. 98-369, § 2714(a)(1)(B), added par. (2).

Subsec. (d). Pub. L. 98-369, § 2714(a)(1)(B), struck out subsec. (d) which related to bids in violation of the antitrust laws.

Subsec. (e). Pub. L. 98-369, § 2714(a)(1)(B), redesignated subsec. (e) as (c)(1).

Subsec. (f). Pub. L. 98-369, § 2714(a)(1)(B), struck out subsec. (f) which related to specification of container size in contracts for the carriage of Government property in other than Government-owned cargo containers.

1983—Subsec. (c)(3). Pub. L. 98-191 substituted “\$25,000” for “\$10,000”.

1974—Subsec. (c)(3). Pub. L. 93-356 substituted “\$10,000” for “\$2,500”.

1968—Subsec. (f). Pub. L. 90-268 added subsec. (f).

1965—Subsec. (a). Pub. L. 89-343, § 1, substituted provisions requiring executive agencies to make purchases and contracts for property and services in accordance with the provisions of this subchapter and implementing regulations of the Administrator, exempting the Department of Defense, the Coast Guard, and the National Aeronautics and Space Administration from the application of this subchapter, and making this subchapter inapplicable when it is so made by law, for provisions which made this subchapter applicable to purchases and contracts for property or services made by the General Services Administration for the use of such agency or otherwise, or by any other executive agency (except the departments and activities specified in section 2303(a) of Title 10) in conformity with authority to apply such provisions delegated by the Administrator in his discretion.

Subsec. (c)(11). Pub. L. 89-348 struck out proviso which required a semiannual report to be furnished to the Congress setting forth the name of each contractor with whom a contract has been entered into pursuant to this paragraph, the amount of the contract, and, with due consideration given to the national security, a description of the work required to be performed thereunder.

Subsec. (c)(15). Pub. L. 89-343, § 2, inserted “except that section 254 of this title shall apply to purchases and contracts made without advertising under this paragraph”.

1958—Subsec. (a). Pub. L. 85-800, § 1, among other changes, substituted “or” for “and” in par. (1), substituted provisions excepting application of subchapter to departments and activities in section 2303(a) of title 10 for provisions which excepted agencies named in section 151(a) of this title, substituted provisions applying subchapter to agencies in conformity with authority delegated by Administrator in his discretion for provisions which applied chapter in conformity with authority delegated him pursuant to this subsection, and eliminated provisions authorizing Administrator to delegate authority for use of two or more agencies, and other cases where delegation is advantageous to Government in par. (2).

Subsec. (c). Pub. L. 85-800, § 2, substituted in par. (3) “\$2,500” for “\$1,000”, struck out proviso barring agencies other than General Services Administration from making purchases in excess of \$500 except under authority to procure for two or more agencies, added par. (9), and renumbered former pars. (9) to (14) as pars. (10) to (15).

Subsec. (e). Pub. L. 85-800, § 3, substituted “(10) to (12), or (14)” for “(9) to (11), or (13)”.

1952—Subsecs. (a) to (c). Act July 12, 1952, substituted “property” for “supplies” wherever appearing.

## EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98-369 applicable with respect to any solicitation for bids or proposals issued after Mar. 31, 1985, see section 2751 of Pub. L. 98-369, set out as a note under section 251 of this title.

## EFFECTIVE DATE

Section effective July 1, 1949, see section 605 of act June 30, 1949, set out as a note under section 471 of Title 40, Public Buildings, Property, and Works.

EMERGENCY RELIEF FOR SMALL BUSINESS CONCERNS  
WITH GOVERNMENT CONTRACTS

Pub. L. 94-190, Dec. 31, 1975, 89 Stat. 1095, provided:

## "SHORT TITLE

"SECTION 1. This Act may be cited as the 'Small Business Emergency Relief Act'.

## "POLICY

"SEC. 2. It is the policy of Congress to provide relief to small business concerns which have fixed-price Government contracts in cases where such concerns have suffered or can be expected to suffer serious financial loss because of significant and unavoidable difficulties during performance because of the energy crisis or rapid and unexpected escalations of contract costs.

## "DEFINITIONS

"SEC. 3. As used in this Act—

"(1) the term 'executive agency' means an executive department, a military department, and an independent establishment within the meaning of sections 101, 102, and 104(1) respectively, of title 5, United States Code, and also a wholly owned Government corporation within the meaning of section 101 of the Government Corporation Control Act [section 9101(3) of Title 31, Money and Finance]; and

"(2) the term 'small business concern' means any concern which falls under the size limitations of the 'Small Business Administrator's Definitions of Small Business for Government Procurement'.

## "AUTHORITY

"SEC. 4. (a) Pursuant to an application by a small business concern, the head of any executive agency may terminate for the convenience of the Government any fixed-price contract between that agency and such small business concern, upon a finding that—

"(1) during the performance of the contract, the concern has suffered or can be expected to suffer serious financial loss due to significant unanticipated cost increases directly affecting the cost of contract compliance; and

"(2) the conditions which have caused or are causing such cost increases were, or are being, experienced generally by other small business concerns in the market at the same time and are not caused by negligence, underbidding, or other special management factors peculiar to that small business concern.

"(b) Upon application under subsection (a) by a small business concern to terminate a fixed-price contract between an executive agency and such small business concern, the head of the executive agency may modify the terms of the contract in lieu of termination for the convenience of the Government only if he finds after review of the application that—

"(1)(a) the agency would reprocure the supplies or services in the event that the contract was terminated for the convenience of the Government; and

"(b) the cost of terminating the contract for the convenience of the Government plus the cost of reprocurement would exceed the amount of the contract as modified; and

"(2) Any such modification shall be made in compliance with cost comparison and compensation guidelines to be issued by the Administrator of the Office of Federal Procurement Policy. Such cost compari-

son and compensation guidelines shall be promulgated by the Administrator not later than 10 days after enactment of this Act [Dec. 31, 1975].

"(c) If a small business concern in performance of a fixed-price Government contract experiences or has experienced shortages of energy, petroleum products, or products or components manufactured or derived therefrom or impacted thereby, and such shortages result in a delay in the performance of a contract, the head of the agency, or his designee, shall provide by modification to the contract for an appropriate extension of the contract delivery date or period of performance.

"(d) A small business concern requesting relief under subsection (a) shall support that request with the following documentation and certification:

"(1) a brief description of the contract, indicating the date of execution and of any amendment thereto, the items being procured, the price and delivery schedule, and any revision thereof, and any other special contractual provision as may be relevant to the request;

"(2) a history of performance indicating when work under the contract or commitment was begun, the progress made as of the date of the application, an exact statement of the contractor's remaining obligations, and the contractor's expectations regarding completion thereof;

"(3) a statement of the factors which have caused the loss under the contract;

"(4) a statement as to the course of events anticipated if the request is denied;

"(5) a statement of payments received, payments due and payments yet to be received or to become due, including advance and progress payments, and amounts withheld by the Government, and information as to other obligations of the Government, if any, which are yet to be performed under the contract;

"(6) a statement and evidence of the contractor's original breakdown of estimated costs, including contingency allowances and profit;

"(7) a statement and evidence of the contractor's present estimate of total costs under the contract if enabled to complete, broken down between costs accrued to date of request, and runout costs, and as between costs for which the contractor has made payment and those for which he is indebted at the time of the request;

"(8) a statement and evidence of the contractor's estimate of the final price of the contract, giving effect to all escalation, changes, extras, and other comparable factors known or contemplated by the contractor;

"(9) a statement of any claims known or contemplated by the contractor against the Government involving the contract in question, other than those referred to under (8) above;

"(10) an estimate of the contractor's total profit or loss under the contract if required to complete at the original contract price;

"(11) an estimate of the total profits from other Government business, and all other sources, during the period from the date of the first contract involved to the latest estimated date of completion of any other contracts involved;

"(12) balance sheets, certified by a certified public accountant, as of the end of the contractor's fiscal year first preceding the date of the first contract, as of the end of each subsequent fiscal year, and as of the date of the request together with income statements for annual periods subsequent to the date of the first balance sheet; and

"(13) a list of all salaries, bonuses, and all other forms of compensation of the principal officers or partners and of all dividends and other withdrawals, and all payments to stockholders in any form since the date of the first contract involved.

## "DELEGATION

"SEC. 5. The head of each executive agency shall delegate authority conferred by this Act, to the extent

practicable, to an appropriate level that will permit the expeditious processing of applications under this Act and to insure the uniformity of its application.

#### “LIMITATIONS

“SEC. 6. (a) The authority prescribed in section 4(a) shall apply only to contracts which have not been completely performed or otherwise terminated and which were entered into during the period from August 15, 1971, through October 31, 1974.

“(b) The authority conferred by section 4(a) of this Act shall terminate September 30, 1976.”

#### NON-APPLICABILITY OF NATIONAL EMERGENCIES ACT

The provisions of the National Emergencies Act (Pub. L. 94-412, Sept. 14, 1976, 90 Stat. 1255) not applicable to the powers and authorities conferred by this section and actions taken hereunder, see section 1651 of Title 50, War and National Defense.

#### EXECUTIVE ORDER No. 10936

Ex. Ord. No. 10936, Apr. 24, 1961, 26 F.R. 3555, which provided for the reporting and investigation of identical bids in connection with the procurement of goods or services, was revoked by Ex. Ord. No. 12430, July 6, 1983, 48 F.R. 31371.

#### DEFINITIONS

The definitions in section 472 of Title 40, Public Buildings, Property, and Works, apply to this subchapter.

#### CROSS REFERENCES

Advertising provisions as applicable to lease-purchase agreements, see section 356 of Title 40, Public Buildings, Property, and Works.

Agency head, definition of, see section 259 of this title.

Armed services procurement generally, see section 2301 et seq. of Title 10, Armed Forces.

Bonneville Dam Project, purchase of supplies and services for, see section 832g of Title 16, Conservation.

General Services Administration generally, see section 751 et seq. of Title 40, Public Buildings, Property, and Works.

National defense contract provisions not authorizing increase in price of subsec. (c)(13) contracts to amount higher than lowest reject bid of responsible bidder, see section 1432 of Title 50, War and National Defense.

Purchases for public institutions of Guam through General Services Administration, see section 1423f of Title 48, Territories and Insular Possessions.

References in any Act to section 5 of this title deemed references to subsection (c) of this section, see section 260 of this title.

Small business concerns, availability of information, see section 637b of Title 15, Commerce and Trade.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 260 of this title; title 22 sections 2509, 4024; title 23 section 140; title 30 section 1711; title 38 section 8122; title 40 sections 356, 356a; title 50 sections 1432, 1651.

### § 252a. Simplified acquisition threshold

#### (a) Simplified acquisition threshold

For purposes of acquisitions by executive agencies, the simplified acquisition threshold is as specified in section 403(11) of this title.

#### (b) Inapplicable laws

No law properly listed in the Federal Acquisition Regulation pursuant to section 429 of this title shall apply to or with respect to a contract or subcontract that is not greater than the simplified acquisition threshold.

(June 30, 1949, ch. 288, title III, §302A, as added and amended Oct. 13, 1994, Pub. L. 103-355, title IV, §§ 4003, 4103(a), 108 Stat. 3338, 3341.)

#### AMENDMENTS

1994—Subsec. (b). Pub. L. 103-355, §4103(a), added subsec. (b).

#### 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.

### § 252b. Implementation of simplified acquisition procedures

The simplified acquisition procedures contained in the Federal Acquisition Regulation pursuant to section 427 of this title shall apply in executive agencies as provided in such section.

(June 30, 1949, ch. 288, title III, §302B, as added Oct. 13, 1994, Pub. L. 103-355, title IV, §4203(b), 108 Stat. 3346.)

#### 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.

### § 252c. Implementation of FACNET capability

#### (a) Implementation of FACNET capability

(1) The head of each executive agency shall implement the Federal acquisition computer network (“FACNET”) capability required by section 426 of this title.

(2) In implementing the FACNET capability pursuant to paragraph (1), the head of an executive agency shall consult with the Administrator for Federal Procurement Policy.

#### (b) Designation of agency official

The head of each executive agency shall designate a program manager to have responsibility for implementation of FACNET capability for that agency and otherwise to implement this section. Such program manager shall report directly to the senior procurement executive designated for the executive agency under section 414(3) of this title.

(June 30, 1949, ch. 288, title III, §302C, as added Oct. 13, 1994, Pub. L. 103-355, title IX, §9003, 108 Stat. 3403.)

#### 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.

### § 253. Competition requirements

#### (a) Procurement through full and open competition; competitive procedures

(1) Except as provided in subsections (b), (c), and (g) of this section and except in the case of procurement procedures otherwise expressly authorized by statute, an executive agency in conducting a procurement for property or services—

(A) shall obtain full and open competition through the use of competitive procedures in

accordance with the requirements of this title and the Federal Acquisition Regulation; and

(B) shall use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement.

(2) In determining the competitive procedures appropriate under the circumstance, an executive agency—

(A) shall solicit sealed bids if—

(i) time permits the solicitation, submission, and evaluation of sealed bids;

(ii) the award will be made on the basis of price and other price-related factors;

(iii) it is not necessary to conduct discussions with the responding sources about their bids; and

(iv) there is a reasonable expectation of receiving more than one sealed bid; and

(B) shall request competitive proposals if sealed bids are not appropriate under clause (A).

**(b) Exclusion of particular source; restriction of solicitation to small business concerns**

(1) An executive agency may provide for the procurement of property or services covered by this section using competitive procedures but excluding a particular source in order to establish or maintain any alternative source or sources of supply for that property or service if the agency head determines that to do so—

(A) would increase or maintain competition and would likely result in reduced overall costs for such procurement, or for any anticipated procurement, of such property or services;

(B) would be in the interest of national defense in having a facility (or a producer, manufacturer, or other supplier) available for furnishing the property or service in case of a national emergency or industrial mobilization;

(C) would be in the interest of national defense in establishing or maintaining an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center;

(D) would ensure the continuous availability of a reliable source of supply of such property or service;

(E) would satisfy projected needs for such property or service determined on the basis of a history of high demand for the property or service; or

(F) in the case of medical supplies, safety supplies, or emergency supplies, would satisfy a critical need for such supplies.

(2) An executive agency may provide for the procurement of property or services covered by this section using competitive procedures, but excluding other than small business concerns in furtherance of sections 638 and 644 of title 15;

(3) A contract awarded pursuant to the competitive procedures referred to in paragraphs (1) and (2) shall not be subject to the justification and approval required by subsection (f)(1) of this section.

(4) A determination under paragraph (1) may not be made for a class of purchases or contracts.

**(c) Use of noncompetitive procedures**

An executive agency may use procedures other than competitive procedures only when—

(1) the property or services needed by the executive agency are available from only one responsible source and no other type of property or services will satisfy the needs of the executive agency;

(2) the executive agency's need for the property or services is of such an unusual and compelling urgency that the Government would be seriously injured unless the executive agency is permitted to limit the number of sources from which it solicits bids or proposals;

(3) it is necessary to award the contract to a particular source or sources in order (A) to maintain a facility, producer, manufacturer, or other supplier available for furnishing property or services in case of a national emergency or to achieve industrial mobilization, (B) to establish or maintain an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center, or (C) to procure 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;

(4) the terms of an international agreement or treaty between the United States Government and a foreign government or international organization, or the written directions of a foreign government reimbursing the executive agency for the cost of the procurement of the property or services for such government, have the effect of requiring the use of procedures other than competitive procedures;

(5) subject to subsection (h) of this section, a statute expressly authorizes or requires that the procurement be made through another executive agency or from a specified source, or the agency's need is for a brand-name commercial item for authorized resale;

(6) the disclosure of the executive agency's needs would compromise the national security unless the agency is permitted to limit the number of sources from which it solicits bids or proposals; or

(7) the head of the executive agency—

(A) determines that it is necessary in the public interest to use procedures other than competitive procedures in the particular procurement concerned, and

(B) notifies the Congress in writing of such determination not less than 30 days before the award of the contract.

**(d) Property or services deemed available from only one source; nondelegable authority**

(1) For the purposes of applying subsection (c)(1) of this section—

(A) in the case of a contract for property or services to be awarded on the basis of acceptance of an unsolicited research proposal, the property or services shall be considered to be

available from only one source if the source has submitted an unsolicited research proposal that demonstrates a unique and innovative concept the substance of which is not otherwise available to the United States and does not resemble the substance of a pending competitive procurement; and

(B) in the case of a follow-on contract for the continued development or production of a major system or highly specialized equipment when it is likely that award to a source other than the original source would result in (i) substantial duplication of cost to the Government which is not expected to be recovered through competition, or (ii) unacceptable delays in fulfilling the executive agency's needs, such property may be deemed to be available only from the original source and may be procured through procedures other than competitive procedures.

(2) The authority of the head of an executive agency under subsection (c)(7) of this section may not be delegated.

**(e) Offer requests to potential sources**

An executive agency using procedures other than competitive procedures to procure property or services by reason of the application of subsection (c)(2) or (c)(6) of this section shall request offers from as many potential sources as is practicable under the circumstances.

**(f) Justification for use of noncompetitive procedures**

(1) Except as provided in paragraph (2), an executive agency may not award a contract using procedures other than competitive procedures unless—

(A) the contracting officer for the contract justifies the use of such procedures in writing and certifies the accuracy and completeness of the justification;

(B) the justification is approved—

(i) in the case of a contract for an amount exceeding \$100,000 (but equal to or less than \$1,000,000), by the competition advocate for the procuring activity (without further delegation) or by an official referred to in clause (ii), (iii), or (iv);

(ii) in the case of a contract for an amount exceeding \$1,000,000 (but equal to or less than \$10,000,000), by the head of the procuring activity or a delegate who, if a member of the armed forces, is a general or flag officer or, if a civilian;<sup>1</sup> is serving in a position in grade GS-16 or above under the General Schedule (or in a comparable or higher position under another schedule); or

(iii) in the case of a contract for an amount exceeding \$10,000,000, by the senior procurement executive of the agency designated pursuant to section 414(3) of this title (without further delegation); and

(C) any required notice has been published with respect to such contract pursuant to section 416 of this title and all bids or proposals received in response to such notice have been considered by such executive agency.

(2) In the case of a procurement permitted by subsection (c)(2), the justification and approval

required by paragraph (1) may be made after the contract is awarded. The justification and approval required by paragraph (1) is not required—

(A) when a statute expressly requires that the procurement be made from a specified source;

(B) when the agency's need is for a brand-name commercial item for authorized resale;

(C) in the case of a procurement permitted by subsection (c)(7) of this section; or

(D) in the case of a procurement conducted under (i) the Act of June 25, 1938 (41 U.S.C. 46 et seq.), popularly referred to as the Wagner-O'Day Act, or (ii) section 637(a) of title 15.

(3) The justification required by paragraph (1)(A) shall include—

(A) a description of the agency's needs;

(B) an identification of the statutory exception from the requirement to use competitive procedures and a demonstration, based on the proposed contractor's qualifications or the nature of the procurement, of the reasons for using that exception;

(C) a determination that the anticipated cost will be fair and reasonable;

(D) a description of the market survey conducted or a statement of the reasons a market survey was not conducted;

(E) a listing of the sources, if any, that expressed in writing an interest in the procurement; and

(F) a statement of the actions, if any, the agency may take to remove or overcome a barrier to competition before a subsequent procurement for such needs.

(4) The justification required by paragraph (1)(A) and any related information shall be made available for inspection by the public consistent with the provisions of section 552 of title 5.

(5) In no case may an executive agency—

(A) enter into a contract for property or services using procedures other than competitive procedures on the basis of the lack of advance planning or concerns related to the amount of funds available to the agency for procurement functions; or

(B) procure property or services from another executive agency unless such other executive agency complies fully with the requirements of this subchapter in its procurement of such property or services.

The restriction set out in clause (B) is in addition to, and not in lieu of, any other restriction provided by law.

**(g) Simplified procedures for small purchases**

(1) 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 special simplified procedures for purchases of property and services for amounts not greater than the simplified acquisition threshold.

(2)(A) The Administrator of General Services shall prescribe regulations that provide special simplified procedures for acquisitions of leasehold interests in real property at rental rates that do not exceed the simplified acquisition threshold.

<sup>1</sup> So in original. The semicolon probably should be a comma.

(B) For purposes of subparagraph (A), the rental rate or rates under a multiyear lease do not exceed the simplified acquisition threshold if the average annual amount of the rent payable for the period of the lease does not exceed the simplified acquisition threshold.

(3) 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 procedures required by paragraph (1).

(4) In using the simplified procedures, an executive agency shall promote competition to the maximum extent practicable.

**(h) Merit-based award of contracts**

(1) It is the policy of Congress that an executive agency should not be required by legislation to award a new contract to a specific non-Federal Government entity. It is further the policy of Congress that any program, project, or technology identified in legislation be procured through merit-based selection procedures.

(2) A provision of law may not be construed as requiring a new contract to be awarded to a specified non-Federal Government entity unless that provision of law—

(A) specifically refers to this subsection;

(B) specifically identifies the particular non-Federal Government entity involved; and

(C) specifically states that the award to that entity is required by such provision of law in contravention of the policy set forth in paragraph (1).

(3) For purposes of this subsection, a contract is a new contract unless the work provided for in the contract is a continuation of the work performed by the specified entity under a preceding contract.

(4) This subsection shall not apply with respect to any contract that calls upon the National Academy of Sciences to investigate, examine, or experiment upon any subject of science or art of significance to an executive agency and to report on such matters to the Congress or any agency of the Federal Government.

(June 30, 1949, ch. 288, title III, § 303, 63 Stat. 395; July 12, 1952, ch. 703, § 1(m), 66 Stat. 594; Mar. 16, 1968, Pub. L. 90-268, § 2, 82 Stat. 49; July 18, 1984, Pub. L. 98-369, div. B, title VII, § 2711(a)(1), 98 Stat. 1175; Oct. 30, 1984, Pub. L. 98-577, title V, § 504(a)(1), (2), 98 Stat. 3086; Nov. 8, 1985, Pub. L. 99-145, title IX, § 961(a)(2), title XIII, § 1304(c)(2), (3), 99 Stat. 703, 742; Nov. 5, 1990, Pub. L. 101-510, div. A, title VIII, § 806(c), 104 Stat. 1592; Oct. 13, 1994, Pub. L. 103-355, title I, §§ 1051-1053, 1055(a), title IV, § 4402(a), title VII, § 7203(b)(1), 108 Stat. 3260, 3261, 3265, 3348, 3380.)

REFERENCES IN TEXT

Act of June 25, 1938, referred to in subsec. (f)(2)(D), is act June 25, 1938, ch. 697, 52 Stat. 1196, as amended, known as the Javits-Wagner-O'Day Act, which is classified to sections 46 to 48c of this title. For complete classification of this Act to the Code, see Tables.

AMENDMENTS

1994—Subsec. (a)(1)(A). Pub. L. 103-355, § 1051(1), substituted “Federal Acquisition Regulation” for “modifications to regulations promulgated pursuant to sec-

tion 2752 of the Competition in Contracting Act of 1984”.

Subsec. (b)(1)(D) to (F). Pub. L. 103-355, § 1052(a), added subpars. (D) to (F).

Subsec. (b)(4). Pub. L. 103-355, § 1052(b), added par. (4).

Subsec. (c)(3). Pub. L. 103-355, § 1055(a), struck out “or” before “(B)” and inserted “, or” and cl. (C) before period at end.

Subsec. (c)(5). Pub. L. 103-355, § 7203(b)(1)(A), inserted “subject to subsection (h) of this section,” before “a statute”.

Subsec. (f)(1)(B)(i). Pub. L. 103-355, § 1053, inserted before semicolon at end “or by an official referred to in clause (ii), (iii), or (iv)”.

Pub. L. 103-355, § 4402(a)(1)(A), substituted “purchases of property and services for amounts not greater than the simplified acquisition threshold” for “small purchases of property and services”.

Pub. L. 103-355, §§ 1051(2), 4402(a)(1)(B), amended par. (1) identically, substituting “Federal Acquisition Regulation” for “regulations modified, in accordance with section 2752 of the Competition in Contracting Act of 1984”.

Subsec. (g)(2). Pub. L. 103-355, § 4402(a)(2), added par. (2) and struck out former par. (2) which read as follows: “For the purposes of this subchapter, a small purchase is a purchase or contract for an amount which does not exceed the small purchase threshold.”

Subsec. (g)(3). Pub. L. 103-355, § 4402(a)(3), substituted “simplified acquisition threshold” for “small purchase threshold” and “simplified procedures” for “small purchase procedures”.

Subsec. (g)(4). Pub. L. 103-355, § 4402(a)(4), substituted “the simplified procedures” for “small purchase procedures”.

Subsec. (g)(5). Pub. L. 103-355, § 4402(a)(5), struck out par. (5) which read as follows: “In this subsection, the term ‘small purchase threshold’ has the meaning given such term in section 403(11) of this title.”

Subsec. (h). Pub. L. 103-355, § 7203(b)(1)(B), added subsec. (h).

1990—Subsec. (g)(2), (3). Pub. L. 101-510, § 806(c)(1), (2), substituted “the small purchase threshold” for “\$25,000”.

Subsec. (g)(5). Pub. L. 101-510, § 806(c)(3), added par. (5).

1985—Subsec. (f)(1)(C). Pub. L. 99-145, § 1304(c)(2), substituted “any” for “Any”.

Subsec. (f)(2). Pub. L. 99-145, § 961(a)(2), added subpars. (A) and (B), designated existing provision as subpar. (C), and redesignated as subpar. (D), cls. (i) and (ii) provisions previously designated subpars. (A) and (B), substituting in cl. (ii) “section 637(a) of title 15” for “the authority of section 637(a) of title 15”.

Subsec.(g)(1). Pub. L. 99-145, § 1304(c)(3), inserted a comma after “1984”.

1984—Subsec. (a). Pub. L. 98-369 substituted provisions requiring procurement through full and open competition for provisions requiring advertisement for bids to be made a sufficient time prior to the purchase or contract and to permit full and free competition, and struck out provision that no advertisement or bid invitation for carriage of Government property in other than Government-owned cargo containers could specify carriage in cargo containers of any stated length, height, or width.

Subsec. (b). Pub. L. 98-369 substituted provisions regarding the exclusion of a particular source of property or services from competitive procedures for provisions regarding the opening of bids and procedures for awards, and inserted provision that in fulfilling the statutory requirements relating to small business concerns and socially and economically disadvantaged small business concerns, an executive agency shall use competitive procedures but may restrict a solicitation to allow only such business concerns to compete.

Subsec. (b)(2). Pub. L. 98-577, § 504(a)(1), substituted provisions to the effect that executive agencies may provide for procurement of property or services covered by this section using competitive procedures but ex-

cluding other than small business concerns for former provisions which provided that executive agencies shall use competitive procedures but may restrict a solicitation to allow only such small business concerns to compete.

Subsec. (b)(3). Pub. L. 98-577, § 504(a)(1), added par. (3).  
Subsecs. (c) to (g). Pub. L. 98-369 added subsecs. (c) to (g).

Subsec. (f)(2). Pub. L. 98-577, § 504(a)(2), designated the final sentence as subpar. (A) and added subpar. (B).

1968—Subsec. (a). Pub. L. 90-268 inserted provision that no advertisement or invitation to bid for carriage of Government property in other than Government-owned cargo containers shall specify carriage of such property in cargo containers of any stated length, height, or width.

1952—Subsec. (a). Act July 12, 1952, substituted “property” for “supplies”.

#### 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 1985 AMENDMENT

Amendment by section 961(a)(2) of Pub. L. 99-145 effective as if included in enactment of Competition in Contracting Act of 1984, Pub. L. 98-369, div. B, title VII, see section 961(e) of Pub. L. 99-145, set out as a note under section 2304 of Title 10, Armed Forces.

#### EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98-369 applicable with respect to any solicitation for bids or proposals issued after Mar. 31, 1985, see section 2751 of Pub. L. 98-369, set out as a note under section 251 of this title.

#### EFFECTIVE DATE

Section effective July 1, 1949, see section 605 of act June 30, 1949, set out as a note under section 471 of Title 40, Public Buildings, Property, and Works.

#### 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.

#### SMALL BUSINESS ACT

Section 2711(c) of Pub. L. 98-369 provided that: “The amendments made by this section [amending this section and section 259 of this title and enacting sections 253a and 253b of this title] do not supersede or affect the provisions of section 8(a) of the Small Business Act (15 U.S.C. 637(a)).”

#### DEFINITIONS

The definitions in section 472 of Title 40, Public Buildings, Property, and Works, apply to this subchapter.

#### CROSS REFERENCES

Advertising for proposals for purchases and contracts for supplies or services, see section 5 of this title.

Agency head, definition of, see section 259 of this title.

#### Armed services—

Contracts; regulations for bids, see section 2381 of Title 10, Armed Forces.

Formal advertisements for bids; time; opening; award; rejection, see section 2305 of Title 10.

Purchases and contracts; formal advertising; exceptions, see section 2304 of Title 10.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 252, 253h, 253i, 253j, 257, 416, 417, 423 of this title; title 15 section 637;

title 22 section 2669; title 40 sections 618, 759; title 49 section 40110; title 50 App. section 2077.

### § 253a. Planning and solicitation requirements

#### (a) Preparation; planning; specifications in solicitation

(1) In preparing for the procurement of property or services, an executive agency shall—

(A) specify its needs and solicit bids or proposals in a manner designed to achieve full and open competition for the procurement;

(B) use advance procurement planning and market research; and

(C) develop specifications in such manner as is necessary to obtain full and open competition with due regard to the nature of the property or services to be acquired.

(2) Each solicitation under this subchapter shall include specifications which—

(A) consistent with the provisions of this subchapter, permit full and open competition;

(B) include restrictive provisions or conditions only to the extent necessary to satisfy the needs of the executive agency or as authorized by law.

(3) For the purposes of paragraphs (1) and (2), the type of specification included in a solicitation shall depend on the nature of the needs of the executive agency and the market available to satisfy such needs. Subject to such needs, specifications may be stated in terms of—

(A) function, so that a variety of products or services may qualify;

(B) performance, including specifications of the range of acceptable characteristics or of the minimum acceptable standards; or

(C) design requirements.

#### (b) Contents of solicitation

In addition to the specifications described in subsection (a) of this section, each solicitation for sealed bids or competitive proposals (other than for a purchase for an amount not greater than the simplified acquisition threshold) shall at a minimum include—

(1) a statement of—

(A) all significant factors and significant subfactors which the executive agency reasonably expects to consider in evaluating sealed bids (including price) or competitive proposals (including cost or price, cost-related or price-related factors and subfactors, and noncost-related or nonprice-related factors and subfactors); and

(B) the relative importance assigned to each of those factors and subfactors; and

(2)(A) in the case of sealed bids—

(i) a statement that sealed bids will be evaluated without discussions with the bidders; and

(ii) the time and place for the opening of the sealed bids; or

(B) in the case of competitive proposals—

(i) either a statement that the proposals are intended to be evaluated with, and award made after, discussions with the offerors, or a statement that the proposals are intended to be evaluated, and award made, without discussions with the offerors (other than dis-

cussions conducted for the purpose of minor clarification) unless discussions are determined to be necessary; and

(ii) the time and place for submission of proposals.

**(c) Evaluation factors**

(1) In prescribing the evaluation factors to be included in each solicitation for competitive proposals, an executive agency—

(A) shall clearly establish the relative importance assigned to the evaluation factors and subfactors, including the quality of the product or services to be provided (including technical capability, management capability, prior experience, and past performance of the offeror);

(B) shall include cost or price to the Federal Government as an evaluation factor that must be considered in the evaluation of proposals; and

(C) shall disclose to offerors whether all evaluation factors other than cost or price, when combined, are—

(i) significantly more important than cost or price;

(ii) approximately equal in importance to cost or price; or

(iii) significantly less important than cost or price.

(2) The regulations implementing subparagraph (C) of paragraph (1) may not define the terms “significantly more important” and “significantly less important” as specific numeric weights that would be applied uniformly to all solicitations or a class of solicitations.

**(d) Additional information in solicitation**

Nothing in this section prohibits an executive agency from—

(1) providing additional information in a solicitation, including numeric weights for all evaluation factors and subfactors on a case-by-case basis; or

(2) stating in a solicitation that award will be made to the offeror that meets the solicitation’s mandatory requirements at the lowest cost or price.

**(e) Evaluation of purchase options**

An executive agency, in issuing a solicitation for a contract to be awarded using sealed bid procedures, may not include in such solicitation a clause providing for the evaluation of prices for options to purchase additional property or services under the contract unless the executive agency has determined that there is a reasonable likelihood that the options will be exercised.

(June 30, 1949, ch. 288, title III, §303A, as added July 18, 1984, Pub. L. 98-369, div. B, title VII, §2711(a)(2), 98 Stat. 1178; amended Oct. 13, 1994, Pub. L. 103-355, title I, §§1061(a), (b), 1062, title IV, §4402(b), 108 Stat. 3266, 3267, 3348.)

AMENDMENTS

1994—Subsec. (b). Pub. L. 103-355, §4402(b), substituted “a purchase for an amount not greater than the simplified acquisition threshold” for “small purchases” in introductory provisions.

Subsec. (b)(1)(A). Pub. L. 103-355, §1061(a)(1)(A), amended subpar. (A) generally. Prior to amendment,

subpar. (A) read as follows: “all significant factors (including price) which the executive agency reasonably expects to consider in evaluating sealed bids or competitive proposals; and”.

Subsec. (b)(1)(B). Pub. L. 103-355, §1061(a)(1)(B), substituted “factors and subfactors” for “factors”.

Subsec. (b)(2)(B)(i). Pub. L. 103-355, §1061(a)(2), amended cl. (i) generally. Prior to amendment, cl. (i) read as follows: “a statement that the proposals are intended to be evaluated with, and awards made after, discussions with the offerors, but might be evaluated and awarded without discussions with the offerors; and”.

Subsecs. (c), (d). Pub. L. 103-355, §1061(b), added subsecs. (c) and (d).

Subsec. (e). Pub. L. 103-355, §1062, added subsec. (e).

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 with respect 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.

SMALL BUSINESS ACT

Section not to affect or supersede the provisions of section 637(a) of Title 15, Commerce and Trade, see section 2711(c) of Pub. L. 98-369, set out as a note under section 253 of this title.

DEFINITIONS

The definitions in section 472 of Title 40, Public Buildings, Property, and Works, apply to this subchapter.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 253b, 257 of this title.

**§ 253b. Evaluation and award**

**(a) Basis**

An executive agency shall evaluate sealed bids and competitive proposals, and award a contract, based solely on the factors specified in the solicitation.

**(b) Rejection of bids or proposals**

All sealed bids or competitive proposals received in response to a solicitation may be rejected if the agency head determines that such action is in the public interest.

**(c) Opening of bids; promptness of award; written notice**

Sealed bids shall be opened publicly at the time and place stated in the solicitation. The executive agency shall evaluate the bids in accordance with subsection (a) of this section without discussions with the bidders and, except as provided in subsection (b) of this section, shall award a contract with reasonable promptness to the responsible source whose bid conforms to the solicitation and is most advantageous to the United States, considering only price and the other price-related factors included in the solicitation. The award of a contract shall be made by transmitting, in writing or by electronic means, notice of the award to the successful bidder. Within 3 days after the date of contract award, the executive agency shall notify, in writing or by electronic means,



each bidder not awarded the contract that the contract has been awarded.

**(d) Discussions with offerors; written notification**

(1) An executive agency shall evaluate competitive proposals in accordance with subsection (a) of this section and may award a contract—

(A) after discussions with the offerors, provided that written or oral discussions have been conducted with all responsible offerors who submit proposals within the competitive range; or

(B) based on the proposals received and without discussions with the offerors (other than discussions conducted for the purpose of minor clarification), if, as required by section 253a(b)(2)(B)(i) of this title, the solicitation included a statement that proposals are intended to be evaluated, and award made, without discussions, unless discussions are determined to be necessary.

(2) Except as otherwise provided in subsection (b) of this section, the executive agency shall award a contract with reasonable promptness to the responsible source whose proposal is most advantageous to the United States, considering only cost or price and the other factors included in the solicitation. The executive agency shall award the contract by transmitting, in writing or by electronic means, notice of the award to such source and, within 3 days after the date of contract award, shall notify, in writing or by electronic means, all other offerors of the rejection of their proposals.

**(e) Post-award debriefings**

(1) When a contract is awarded by the head of an executive agency on the basis of competitive proposals, an unsuccessful offeror, upon written request received by the agency within 3 days after the date on which the unsuccessful offeror receives the notification of the contract award, shall be debriefed and furnished the basis for the selection decision and contract award. The executive agency shall debrief the offeror within, to the maximum extent practicable, 5 days after receipt of the request by the executive agency.

(2) The debriefing shall include, at a minimum—

(A) the executive agency's evaluation of the significant weak or deficient factors in the offeror's offer;

(B) the overall evaluated cost and technical rating of the offer of the contractor awarded the contract and the overall evaluated cost and technical rating of the offer of the debriefed offeror;

(C) the overall ranking of all offers;

(D) a summary of the rationale for the award;

(E) in the case of a proposal that includes a commercial item that is an end item under the contract, the make and model of the item being provided in accordance with the offer of the contractor awarded the contract; and

(F) reasonable responses to relevant questions posed by the debriefed offeror as to whether source selection procedures set forth in the solicitation, applicable regulations, and other applicable authorities were followed by the executive agency.

(3) The debriefing may not include point-by-point comparisons of the debriefed offeror's offer with other offers and may not disclose any information that is exempt from disclosure under section 552(b) of title 5.

(4) Each solicitation for competitive proposals shall include a statement that information described in paragraph (2) may be disclosed in post-award debriefings.

(5) If, within one year after the date of the contract award and as a result of a successful procurement protest, the executive agency seeks to fulfill the requirement under the protested contract either on the basis of a new solicitation of offers or on the basis of new best and final offers requested for that contract, the head of such executive agency shall make available to all offerors—

(A) the information provided in debriefings under this subsection regarding the offer of the contractor awarded the contract; and

(B) the same information that would have been provided to the original offerors.

(6) The contracting officer shall include a summary of the debriefing in the contract file.

**(f) Antitrust violations**

If the agency head considers that a bid or proposal evidences a violation of the antitrust laws, such agency head shall refer the bid or proposal to the Attorney General for appropriate action.

**(g) Planning for future competition**

(1)(A) In preparing a solicitation for the award of a development contract for a major system, the head of an agency shall consider requiring in the solicitation that an offeror include in its offer proposals described in subparagraph (B). In determining whether to require such proposals, the head of the agency shall give due consideration to the purposes for which the system is being procured and the technology necessary to meet the system's required capabilities. If such proposals are required, the head of the agency shall consider them in evaluating the offeror's price.

(B) The proposals that the head of an agency is to consider requiring in a solicitation for the award of a development contract are the following:

(i) Proposals to incorporate in the design of the major system items which are currently available within the supply system of the Federal agency responsible for the major system, available elsewhere in the national supply system, or commercially available from more than one source.

(ii) With respect to items that are likely to be required in substantial quantities during the system's service life, proposals to incorporate in the design of the major system items which the United States will be able to acquire competitively in the future.

(2)(A) In preparing a solicitation for the award of a production contract for a major system, the head of an agency shall consider requiring in the solicitation that an offeror include in its offer proposals described in subparagraph (B). In determining whether to require such proposals, the head of the agency shall give due consideration to the purposes for which the system is

being procured and the technology necessary to meet the system's required capabilities. If such proposals are required, the head of the agency shall consider them in evaluating the offeror's price.

(B) The proposals that the head of an agency is to consider requiring in a solicitation for the award of a production contract are proposals identifying opportunities to ensure that the United States will be able to obtain on a competitive basis items procured in connection with the system that are likely to be reproposed in substantial quantities during the service life of the system. Proposals submitted in response to such requirement may include the following:

(i) Proposals to provide to the United States the right to use technical data to be provided under the contract for competitive procurement of the item, together with the cost to the United States, if any, of acquiring such technical data and the right to use such data.

(ii) Proposals for the qualification or development of multiple sources of supply for the item.

(3) If the head of an agency is making a non-competitive award of a development contract or a production contract for a major system, the factors specified in paragraphs (1) and (2) to be considered in evaluating an offer for a contract may be considered as objectives in negotiating the contract to be awarded.

#### (h) Protest file

(1) If, in the case of a solicitation for a contract issued by, or an award or proposed award of a contract by, the head of an executive agency, a protest is filed pursuant to the procedures in subchapter V of chapter 35 of title 31, and an actual or prospective offeror so requests, a file of the protest shall be established by the procuring activity and reasonable access shall be provided to actual or prospective offerors.

(2) Information exempt from disclosure under section 552 of title 5 may be redacted in a file established pursuant to paragraph (1) unless an applicable protective order provides otherwise.

(3) Regulations implementing this subsection shall be consistent with the regulations regarding the preparation and submission of an agency's protest file (the so-called "rule 4 file") for protests to the General Services Board of Contract Appeals under section 759 of title 40.

#### (i) Agency actions on protests

If, in connection with a protest, the head of an executive agency determines that a solicitation, proposed award, or award does not comply with the requirements of law or regulation, the head of such executive agency—

(1) may take any action set out in subparagraphs (A) through (F) of subsection (b)(1) of section 3554 of title 31; and

(2) may pay costs described in paragraph (1) of section 3554(c) of such title within the limits referred to in paragraph (2) of such section.

(June 30, 1949, ch. 288, title III, §303B, as added July 18, 1984, Pub. L. 98-369, div. B, title VII, §2711(a)(2), 98 Stat. 1179; Oct. 30, 1984, Pub. L. 98-577, title II, §201(a), 98 Stat. 3068; Oct. 13, 1994, Pub. L. 103-355, title I, §§1061(c), 1063-1066, 108 Stat. 3267-3269.)

#### AMENDMENTS

1994—Subsec. (a). Pub. L. 103-355, §1061(c)(1), inserted “, and award a contract,” after “competitive proposals”.

Subsec. (c). Pub. L. 103-355, §§1061(c)(2), 1063(a), inserted “in accordance with subsection (a) of this section” after “shall evaluate the bids” in second sentence, substituted “transmitting, in writing or by electronic means, notice” for “transmitting written notice” in third sentence, and inserted at end “Within 3 days after the date of contract award, the executive agency shall notify, in writing or by electronic means, each bidder not awarded the contract that the contract has been awarded.”

Subsec. (d)(1). Pub. L. 103-355, §1061(c)(3)(A), added par. (1) and struck out former par. (1) which read as follows: “The executive agency shall evaluate competitive proposals and may award a contract—

“(A) after discussions conducted with the offerors at any time after receipt of the proposals and before the award of the contract; or

“(B) without discussions with the offerors (other than discussions conducted for the purpose of minor clarification) when it can be clearly demonstrated from the existence of full and open competition or accurate prior cost experience with the product or service that acceptance of an initial proposal without discussions would result in the lowest overall cost to the Government.”

Subsec. (d)(2). Pub. L. 103-355, §§1061(c)(3)(C), 1063(b), inserted “cost or” before “price” in first sentence, and, in second sentence, substituted “transmitting, in writing or by electronic means, notice” for “transmitting written notice” and “, within 3 days after the date of contract award, shall notify, in writing or by electronic means,” for “shall promptly notify”.

Pub. L. 103-355, §1061(c)(3)(B), redesignated par. (4) as (2) and struck out former par. (2) which read as follows: “In the case of award of a contract under paragraph (1)(A), the executive agency shall conduct, before such award, written or oral discussions with all responsible sources who submit proposals within the competitive range, considering only price and the other factors included in the solicitation.”

Subsec. (d)(3). Pub. L. 103-355, §1061(c)(3)(B), struck out par. (3) which read as follows: “In the case of award of a contract under paragraph (1)(B), the executive agency shall award the contract based on the proposals as received (and as clarified, if necessary, in discussions conducted for the purpose of minor clarification).”

Subsec. (d)(4). Pub. L. 103-355, §1061(c)(3)(B), redesignated par. (4) as (2).

Subsecs. (e) to (g). Pub. L. 103-355, §1064, added subsec. (e) and redesignated former subsecs. (e) and (f) as (f) and (g), respectively.

Subsec. (h). Pub. L. 103-355, §1065, added subsec. (h).

Subsec. (i). Pub. L. 103-355, §1066, added subsec. (i).

1984—Subsec. (f). Pub. L. 98-577 added subsec. (f).

#### 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 201(b) of Pub. L. 98-577 provided that: “The amendment made by subsection (a) [amending this section] shall apply with respect to any solicitation issued more than 180 days after the date of enactment of this Act [Oct. 30, 1984].”

#### EFFECTIVE DATE

Section applicable with respect 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.

#### SMALL BUSINESS ACT

Section not to affect or supersede the provisions of section 637(a) of Title 15, Commerce and Trade, see sec-

tion 2711(c) of Pub. L. 98-369, set out as a note under section 253 of this title.

EX. ORD. NO. 12979. AGENCY PROCUREMENT PROTESTS

Ex. Ord. No. 12979, Oct. 25, 1995, 60 F.R. 55171, 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 expenditure of public funds and fair and expeditious resolution of protests to the award of Federal procurement contracts, it is hereby ordered as follows:

SECTION 1. Heads of executive departments and agencies ("agencies") engaged in the procurement of supplies and services shall prescribe administrative procedures for the resolution of protests to the award of their procurement contracts as an alternative to protests in fora outside the procuring agencies. Procedures prescribed pursuant to this order shall:

(a) emphasize that whenever conduct of a procurement is contested, all parties should use their best efforts to resolve the matter with agency contracting officers;

(b) to the maximum extent practicable, provide for inexpensive, informal, procedurally simple, and expeditious resolution of protests, including, where appropriate and as permitted by law, the use of alternative dispute resolution techniques, third party neutrals, and another agency's personnel;

(c) allow actual or prospective bidders or offerors whose direct economic interests would be affected by the award or failure to award the contract to request a review, at a level above the contracting officer, of any decision by a contracting officer that is alleged to have violated a statute or regulation and, thereby, caused prejudice to the protester; and

(d) except where immediate contract award or performance is justified for urgent and compelling reasons or is determined to be in the best interest of the United States, prohibit award or performance of the contract while a timely filed protest is pending before the agency. To allow for the withholding of a contract award or performance, the agency must have received notice of the protest within either 10 calendar days after the contract award or 5 calendar days after the bidder or offeror who is protesting the contract award was given the opportunity to be debriefed by the agency, whichever date is later.

SEC. 2. The Administrator for Federal Procurement Policy shall: (a) work with the heads of executive agencies to provide policy guidance and leadership necessary to implement provisions of this order; and

(b) review and evaluate agency experience and performance under this order, and report on any findings to the President within 2 years from the date of this order.

SEC. 3. The Administrator of General Services, the Secretary of Defense, and the Administrator of the National Aeronautics and Space Administration, in coordination with the Office of Federal Procurement Policy, shall amend the Federal Acquisition Regulation, 48 C.F.R. 1, within 180 days of the date of this order to further the purposes of this order.

WILLIAM J. CLINTON.

DEFINITIONS

The definitions in section 472 of Title 40, Public Buildings, Property, and Works, apply to this subchapter.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 257 of this title; title 40 section 759.

**§ 253c. Encouragement of new competition**

**(a) "Qualification requirement" defined**

In this section, "qualification requirement" means a requirement for testing or other qual-

ity assurance demonstration that must be completed by an offeror before award of a contract.

**(b) Agency head; functions; prior to enforcement of qualification requirement**

Except as provided in subsection (c) of this section, the head of the agency shall, before enforcing any qualification requirement—

(1) prepare a written justification stating the necessity for establishing the qualification requirement and specify why the qualification requirement must be demonstrated before contract award;

(2) specify in writing and make available to a potential offeror upon request all requirements which a prospective offeror, or its product, must satisfy in order to become qualified, such requirements to be limited to those least restrictive to meet the purposes necessitating the establishment of the qualification requirement;

(3) specify an estimate of the costs of testing and evaluation likely to be incurred by a potential offeror in order to become qualified;

(4) ensure that a potential offeror is provided, upon request, a prompt opportunity to demonstrate at its own expense (except as provided in subsection (d) of this section) its ability to meet the standards specified for qualification using qualified personnel and facilities of the agency concerned or of another agency obtained through interagency agreement, or under contract, or other methods approved by the agency (including use of approved testing and evaluation services not provided under contract to the agency);

(5) if testing and evaluation services are provided under contract to the agency for the purposes of clause (4), provide to the extent possible that such services be provided by a contractor who is not expected to benefit from an absence of additional qualified sources and who shall be required in such contract to adhere to any restriction on technical data asserted by the potential offeror seeking qualification; and

(6) ensure that a potential offeror seeking qualification is promptly informed as to whether qualification is attained and, in the event qualification is not attained, is promptly furnished specific information why qualification was not attained.

**(c) Applicability; waiver authority; referral of offerors**

(1) Subsection (b) of this section does not apply with respect to a qualification requirement established by statute prior to October 30, 1984.

(2) Except as provided in paragraph (3), if it is unreasonable to specify the standards for qualification which a prospective offeror or its product must satisfy, a determination to that effect shall be submitted to the advocate for competition of the procuring activity responsible for the purchase of the item subject to the qualification requirement. After considering any comments of the advocate for competition reviewing such determination, the head of the procuring activity may waive the requirements of paragraphs (2) through (5) of subsection (b) of this section for up to two years with respect to the item subject to the qualification requirement.

(3) The waiver authority contained in paragraph (2) shall not apply with respect to any qualified products list.

(4) A potential offeror may not be denied the opportunity to submit and have considered an offer for a contract solely because the potential offeror has not been identified as meeting a qualification requirement, if the potential offeror can demonstrate to the satisfaction of the contracting officer that the potential offeror or its product meets the standards established for qualification or can meet such standards before the date specified for award of the contract.

(5) Nothing contained in this subsection requires the referral of an offer to the Small Business Administration pursuant to section 637(b)(7) of title 15 if the basis for the referral is a challenge by the offeror to either the validity of the qualification requirement or the offeror's compliance with such requirement.

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

**(d) Number; qualified sources or products; fewer than two actual manufacturers; functions of agency head**

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

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

(B) bear the cost of conducting the specified testing and evaluation (excluding the costs associated with producing the item or establishing the production, quality control, or other system to be tested and evaluated) for a small business concern or a product manufactured by a small business concern which has met the standards specified for qualification and which could reasonably be expected to compete for a contract for that requirement, but such costs may be borne only if the head of the agency determines that such additional qualified sources or products are likely to result in cost savings from increased competition for future requirements sufficient to offset (within a reasonable period of time considering the duration and dollar value of anticipated future requirements) the costs incurred by the agency.

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

**(e) Examination; need for qualification requirement**

Within seven years after the establishment of a qualification requirement, the need for such

qualification requirement shall be examined and the standards of such requirement revalidated in accordance with the requirements of subsection (b) of this section. The preceding sentence does not apply in the case of a qualification requirement for which a waiver is in effect under subsection (c)(2) of this section.

**(f) Enforcement determination by agency head**

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

(June 30, 1949, ch. 288, title III, §303C, formerly §303D, as added Oct. 30, 1984, Pub. L. 98-577, title II, §202(a), 98 Stat. 3069; renumbered §303C, Nov. 8, 1985, Pub. L. 99-145, title XIII, §1304(c)(4)(A), 99 Stat. 742.)

EFFECTIVE DATE

Section 202(b) of Pub. L. 98-577 provided that: "The amendment made by subsection (a) [enacting this section] shall apply with respect to solicitations issued more than 180 days after the date of enactment of this Act [Oct. 30, 1984]."

DEFINITIONS

The definitions in section 472 of Title 40, Public Buildings, Property, and Works, apply to this subchapter.

**§ 253d. Validation of proprietary data restrictions**

**(a) Contracts; delivery of technical services; contents**

A contract for property or services entered into by an executive agency which provides for the delivery of technical data, shall provide that—

(1) a contractor or subcontractor at any tier shall be prepared to furnish to the contracting officer a written justification for any restriction asserted by the contractor or subcontractor on the right of the United States to use such technical data; and

(2) the contracting officer may review the validity of any restriction asserted by the contractor or by a subcontractor under the contract on the right of the United States to use technical data furnished to the United States under the contract if the contracting officer determines that reasonable grounds exist to question the current validity of the asserted restriction and that the continued adherence to the asserted restriction by the United States would make it impracticable to procure the item competitively at a later time.

**(b) Review; challenge; notice**

If after such review the contracting officer determines that a challenge to the asserted restriction is warranted, the contracting officer shall provide written notice to the contractor or subcontractor asserting the restriction. Such notice shall state—

(1) the grounds for challenging the asserted restriction; and

(2) the requirement for a response within 60 days justifying the current validity of the asserted restriction.

**(c) Written request; additional time; schedule of responses**

If a contractor or subcontractor asserting a restriction subject to this section submits to the contracting officer a written request, showing the need for additional time to comply with the requirement to justify the current validity of the asserted restriction, additional time to adequately permit the submission of such justification shall be provided by the contracting officer as appropriate. If a party asserting a restriction receives notices of challenges to restrictions on technical data from more than one contracting officer, and notifies each contracting officer of the existence of more than one challenge, the contracting officer initiating the first in time challenge, after consultation with the party asserting the restriction and the other contracting officers, shall formulate a schedule of responses to each of the challenges that will afford the party asserting the restriction with an equitable opportunity to respond to each such challenge.

**(d) Decision; validity of asserted restriction; failure to submit response**

(1) Upon a failure by the contractor or subcontractor to submit any response under subsection (b) of this section, the contracting officer shall issue a decision pertaining to the validity of the asserted restriction.

(2) If a justification is submitted in response to the notice provided pursuant to subsection (b) of this section, a contracting officer shall within 60 days of receipt of any justification submitted, issue a decision or notify the party asserting the restriction of the time within which a decision will be issued.

**(e) Claim; considered claim within Contract Disputes Act of 1978**

If a claim pertaining to the validity of the asserted restriction is submitted in writing to a contracting officer by a contractor or subcontractor at any tier, such claim shall be considered a claim within the meaning of the Contract Disputes Act of 1978 (41 U.S.C. 601 et seq.).

**(f) Challenge; use of technical data; sustained; liability of United States for costs and fees**

(1) If, upon final disposition, the contracting officer's challenge to the restriction on the right of the United States to use such technical data is sustained—

(A) the restriction on the right of the United States to use the technical data shall be cancelled; and

(B) if the asserted restriction is found not to be substantially justified, the contractor or subcontractor, as appropriate, shall be liable to the United States for payment of the cost to the United States of reviewing the asserted restriction and the fees and other expenses (as defined in section 2412(d)(2)(A) of title 28) incurred by the United States in challenging the asserted restriction, unless special circumstances would make such payment unjust.

(2) If, upon final disposition, the contracting officer's challenge to the restriction on the right of the United States to use such technical data is not sustained—

(A) the United States shall continue to be bound by the restriction; and

(B) the United States shall be liable for payment to the party asserting the restriction for fees and other expenses (as defined in section 2412(d)(2)(A) of title 28) incurred by the party asserting the restriction in defending the asserted restriction if the challenge by the United States is found not to be made in good faith.

(June 30, 1949, ch. 288, title III, §303D, formerly §303E, as added Oct. 30, 1984, Pub. L. 98-577, title II, §203(a), 98 Stat. 3071; renumbered §303D, Nov. 8, 1985, Pub. L. 95-145, title XIII, §1304(c)(4)(A), 99 Stat. 742.)

## REFERENCES IN TEXT

The Contract Disputes Act of 1978, referred to in subsec. (e), is 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.

## EFFECTIVE DATE

Section 203(b) of Pub. L. 98-577 provided that: "The amendment made by subsection (a) [enacting this section] shall apply with respect to solicitations issued more than 60 days after the date of the enactment of this Act [Oct. 30, 1984]."

## DEFINITIONS

The definitions in section 472 of Title 40, Public Buildings, Property, and Works, apply to this subchapter.

**§ 253e. Repealed. Pub. L. 103-355, title I, § 1252, Oct. 13, 1994, 108 Stat. 3284**

Section, act June 30, 1949, ch. 288, title III, §303E, formerly §303F, as added Oct. 30, 1984, Pub. L. 98-577, title II, §204(a), 98 Stat. 3072; renumbered §303E, Nov. 8, 1985, Pub. L. 99-145, title XIII, §1304(c)(4)(A), 99 Stat. 742, related to commercial pricing for supplies.

## 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.

**§ 253f. Economic order qualities****(a) Procurement of supplies; costs advantageous to United States**

Each executive agency shall procure supplies in such quantity as (A) will result in the total cost and unit cost most advantageous to the United States, where practicable, and (B) does not exceed the quantity reasonably expected to be required by the agency.

**(b) Opinions; economic advantage to United States**

Each solicitation for a contract for supplies shall, if practicable, include a provision inviting each offeror responding to the solicitation to state an opinion on whether the quantity of the supplies proposed to be procured is economically advantageous to the United States and, if applicable, to recommend a quantity or quantities which would be more economically advantageous to the United States. Each such recommendation shall include a quotation of the total price and the unit price for supplies procured in each recommended quantity.

(June 30, 1949, ch. 288, title III, § 303F, formerly § 303G, as added Oct. 30, 1984, Pub. L. 98-577, title II, § 205(a), 98 Stat. 3073; renumbered § 303F, Nov. 8, 1985, Pub. L. 99-145, title XIII, § 1304(c)(4)(A), 99 Stat. 742.)

## EFFECTIVE DATE

Section 205(b) of Pub. L. 98-577 provided that: “The amendment made by subsection (a) [enacting this section] shall take effect at the end of the 180-day period beginning on the date of the enactment of this Act [Oct. 30, 1984].”

## DEFINITIONS

The definitions in section 472 of Title 40, Public Buildings, Property, and Works, apply to this subchapter.

**§ 253g. Prohibition of contractors limiting subcontractor sales directly to United States**

**(a) Contract restrictions**

Each contract for the purchase of property or services made by an executive agency shall provide that the contractor will not—

(1) enter into any agreement with a subcontractor under the contract that has the effect of unreasonably restricting sales by the subcontractor directly to the United States of any item or process (including computer software) made or furnished by the subcontractor under the contract (or any follow-on production contract); or

(2) otherwise act to restrict unreasonably the ability of a subcontractor to make sales to the United States described in clause (1).

**(b) Rights under law**

This section does not prohibit a contractor from asserting rights it otherwise has under law.

**(c) Inapplicability to certain contracts**

This section does not apply to a contract for an amount that is not greater than the simplified acquisition threshold.

**(d) Inapplicability when Government treated similarly to other purchasers**

An agreement between the contractor in a contract for the acquisition of commercial items and a subcontractor under such contract that restricts sales by such subcontractor directly to persons other than the contractor may not be considered to unreasonably restrict sales by that subcontractor to the United States in violation of the provision included in such contract pursuant to subsection (a) of this section if the agreement does not result in the Federal Government being treated differently with regard to the restriction than any other prospective purchaser of such commercial items from that subcontractor.

(June 30, 1949, ch. 288, title III, § 303G, formerly § 303H, as added Oct. 30, 1984, Pub. L. 98-577, title II, § 206(a), 98 Stat. 3073; renumbered § 303G, Nov. 8, 1985, Pub. L. 99-145, title XIII, § 1304(c)(4)(A), 99 Stat. 742; amended Oct. 13, 1994, Pub. L. 103-355, title IV, § 4103(b), title VIII, § 8204(a), 108 Stat. 3341, 3396.)

## AMENDMENTS

1994—Subsec. (c). Pub. L. 103-355, § 4103(b), added subsec. (c).

Subsec. (d). Pub. L. 103-355, § 8204(a), added subsec. (d).

## 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 206(b) of Pub. L. 98-577 provided that: “The amendment made by subsection (a) [enacting this section] shall apply with respect to solicitations made more than 180 days after the date of enactment of this Act [Oct. 30, 1984].”

## DEFINITIONS

The definitions in section 472 of Title 40, Public Buildings, Property, and Works, apply to this subchapter.

**§ 253h. Task and delivery order contracts: general authority**

**(a) Authority to award**

Subject to the requirements of this section, section 253j of this title, and other applicable law, the head of an executive agency may enter into a task or delivery order contract (as defined in section 253k of this title) for procurement of services or property.

**(b) Solicitation**

The solicitation for a task or delivery order contract shall include the following:

(1) The period of the contract, including the number of options to extend the contract and the period for which the contract may be extended under each option, if any.

(2) The maximum quantity or dollar value of the services or property to be procured under the contract.

(3) A statement of work, specifications, or other description that reasonably describes the general scope, nature, complexity, and purposes of the services or property to be procured under the contract.

**(c) Applicability of restriction on use of non-competitive procedures**

The head of an executive agency may use procedures other than competitive procedures to enter into a task or delivery order contract under this section only if an exception in subsection (c) of section 253 of this title applies to the contract and the use of such procedures is approved in accordance with subsection (f) of such section.

**(d) Single and multiple contract awards**

(1) The head of an executive agency may exercise the authority provided in this section—

(A) to award a single task or delivery order contract; or

(B) if the solicitation states that the head of the executive agency has the option to do so, to award separate task or delivery order contracts for the same or similar services or property to two or more sources.

(2) No determination under section 253(b) of this title is required for an award of multiple task or delivery order contracts under paragraph (1)(B).

(3) The regulations implementing this subsection shall—

(A) establish a preference for awarding, to the maximum extent practicable, multiple task or delivery order contracts for the same or similar services or property under the authority of paragraph (1)(B); and

(B) establish criteria for determining when award of multiple task or delivery order contracts would not be in the best interest of the Federal Government.

**(e) Contract modifications**

A task or delivery order may not increase the scope, period, or maximum value of the task or delivery order contract under which the order is issued. The scope, period, or maximum value of the contract may be increased only by modification of the contract.

**(f) Inapplicability to contracts for advisory and assistance services**

Except as otherwise specifically provided in section 253i of this title, this section does not apply to a task or delivery order contract for the acquisition of advisory and assistance services (as defined in section 1105(g) of title 31).

**(g) Relationship to other contracting authority**

Nothing in this section may be construed to limit or expand any authority of the head of an executive agency or the Administrator of General Services to enter into schedule, multiple award, or task or delivery order contracts under any other provision of law.

(June 30, 1949, ch. 288, title III, § 303H, as added Oct. 13, 1994, Pub. L. 103-355, title I, § 1054(a), 108 Stat. 3261.)

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.

CONSTRUCTION

Section 1054(b) of Pub. L. 103-355 provided that: “Nothing in section 303H, 303I, 303J, or 303K of the Federal Property and Administrative Services Act of 1949 [41 U.S.C. 253h, 253i, 253j, 253k], as added by subsection (a), shall be construed as modifying or superseding, or as intended to impair or restrict, authorities or responsibilities under—

“(1) the Brooks Automatic Data Processing Act (section 111 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 759)); and

“(2) the Brooks Architect-Engineers Act (title IX of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 541 et seq.)).”

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 253i, 253j, 253k of this title.

**§ 253i. Task order contracts: advisory and assistance services**

**(a) Authority to award**

(1) Subject to the requirements of this section, section 253j of this title, and other applicable law, the head of an executive agency may enter into a task order contract (as defined in section 253k of this title) for procurement of advisory and assistance services.

(2) The head of an executive agency may enter into a task order contract for advisory and as-

sistance services only under the authority of this section.

**(b) Limitation on contract period**

The period of a task order contract entered into under this section, including all periods of extensions of the contract under options, modifications, or otherwise, may not exceed five years unless a longer period is specifically authorized in a law that is applicable to such contract.

**(c) Content of notice**

The notice required by section 416 of this title and section 637(e) of title 15 shall reasonably and fairly describe the general scope, magnitude, and duration of the proposed task order contract in a manner that would reasonably enable a potential offeror to decide whether to request the solicitation and consider submitting an offer.

**(d) Required content of solicitation and contract**

(1) The solicitation shall include the information (regarding services) described in section 253h(b) of this title.

(2) A task order contract entered into under this section shall contain the same information that is required by paragraph (1) to be included in the solicitation of offers for that contract.

**(e) Multiple awards**

(1) The head of an executive agency may, on the basis of one solicitation, award separate task order contracts under this section for the same or similar services to two or more sources if the solicitation states that the head of the executive agency has the option to do so.

(2) If, in the case of a task order contract for advisory and assistance services to be entered into under the authority of this section, the contract period is to exceed three years and the contract amount is estimated to exceed \$10,000,000 (including all options), the solicitation shall—

(A) provide for a multiple award authorized under paragraph (1); and

(B) include a statement that the head of the executive agency may also elect to award only one task order contract if the head of the executive agency determines in writing that only one of the offerers is capable of providing the services required at the level of quality required.

(3) Paragraph (2) does not apply in the case of a solicitation for which the head of the executive agency concerned determines in writing that, because the services required under the contract are unique or highly specialized, it is not practicable to award more than one contract.

**(f) Contract modifications**

(1) A task order may not increase the scope, period, or maximum value of the task order contract under which the order is issued. The scope, period, or maximum value of the contract may be increased only by modification of the contract.

(2) Unless use of procedures other than competitive procedures is authorized by an exception in subsection (c) of section 253 of this title and approved in accordance with subsection (f)

of such section, competitive procedures shall be used for making such a modification.

(3) Notice regarding the modification shall be provided in accordance with section 416 of this title and section 637(e) of title 15.

**(g) Contract extensions**

(1) Notwithstanding the limitation on the contract period set forth in subsection (b) of this section or in a solicitation or contract pursuant to subsection (e) of this section, a contract entered into by the head of an executive agency under this section may be extended on a sole-source basis for a period not exceeding six months if the head of such executive agency determines that—

(A) the award of a follow-on contract has been delayed by circumstances that were not reasonably foreseeable at the time the initial contract was entered into; and

(B) the extension is necessary in order to ensure continuity of the receipt of services pending the award of, and commencement of performance under, the follow-on contract.

(2) A task order contract may be extended under the authority of paragraph (1) only once and only in accordance with the limitations and requirements of this subsection.

**(h) Inapplicability to certain contracts**

This section does not apply to a contract for the acquisition of property or services that includes acquisition of advisory and assistance services if the head of the executive agency entering into such contract determines that, under the contract, advisory and assistance services are necessarily incident to, and not a significant component of, the contract.

**(i) “Advisory and assistance services” defined**

In this section, the term “advisory and assistance services” has the meaning given such term in section 1105(g) of title 31.

(June 30, 1949, ch. 288, title III, §303I, as added Oct. 13, 1994, Pub. L. 103-355, title I, §1054(a), 108 Stat. 3262.)

**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.

**CONSTRUCTION**

Section not to be construed as modifying or superseding, or as intended to impair or restrict, authorities or responsibilities under section 759 of Title 40, Public Buildings, Property, and Works, or subchapter VI (§541 et seq.) of chapter 10 of Title 40, see section 1054(b) of Pub. L. 103-355, set out as a note under section 253h of this title.

**SECTION REFERRED TO IN OTHER SECTIONS**

This section is referred to in sections 253h, 253j, 253k of this title.

**§ 253j. Task and delivery order contracts: orders**

**(a) Issuance of orders**

The following actions are not required for issuance of a task or delivery order under a task or delivery order contract:

(1) A separate notice for such order under section 416 of this title or section 637(e) of title 15.

(2) Except as provided in subsection (b) of this section, a competition (or a waiver of competition approved in accordance with section 253(f) of this title) that is separate from that used for entering into the contract.

**(b) Multiple award contracts**

When multiple contracts are awarded under section 253h(d)(1)(B) or 253i(e) of this title, all contractors awarded such contracts shall be provided a fair opportunity to be considered, pursuant to procedures set forth in the contracts, for each task or delivery order in excess of \$2,500 that is to be issued under any of the contracts unless—

(1) the executive agency’s need for the services or property ordered is of such unusual urgency that providing such opportunity to all such contractors would result in unacceptable delays in fulfilling that need;

(2) only one such contractor is capable of providing the services or property required at the level of quality required because the services or property ordered are unique or highly specialized;

(3) the task or delivery order should be issued on a sole-source basis in the interest of economy and efficiency because it is a logical follow-on to a task or delivery order already issued on a competitive basis; or

(4) it is necessary to place the order with a particular contractor in order to satisfy a minimum guarantee.

**(c) Statement of work**

A task or delivery order shall include a statement of work that clearly specifies all tasks to be performed or property to be delivered under the order.

**(d) Protests**

A protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order except for a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued.

**(e) Task and delivery order ombudsman**

The head of each executive agency who awards multiple task or delivery order contracts pursuant to section 253h(d)(1)(B) or 253i(e) of this title shall appoint or designate a task and delivery order ombudsman who shall be responsible for reviewing complaints from the contractors on such contracts and ensuring that all of the contractors are afforded a fair opportunity to be considered for task or delivery orders when required under subsection (b) of this section. The task and delivery order ombudsman shall be a senior agency official who is independent of the contracting officer for the contracts and may be the executive agency’s competition advocate.

**(f) Applicability**

This section applies to task and delivery order contracts entered into under sections 253h and 253i of this title.

(June 30, 1949, ch. 288, title III, §303J, as added Oct. 13, 1994, Pub. L. 103-355, title I, §1054(a), 108 Stat. 3264.)

**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.

CONSTRUCTION

Section not to be construed as modifying or superseding, or as intended to impair or restrict, authorities or responsibilities under section 759 of Title 40, Public Buildings, Property, and Works, or subchapter VI (§541 et seq.) of chapter 10 of Title 40, see section 1054(b) of Pub. L. 103-355, set out as a note under section 253h of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 253h, 253i, 253k of this title.

**§ 253k. Task and delivery order contracts: definitions**

In sections 253h, 253i, and 253j of this title:

(1) The term “task order contract” means a contract for services that does not procure or specify a firm quantity of services (other than a minimum or maximum quantity) and that provides for the issuance of orders for the performance of tasks during the period of the contract.

(2) The term “delivery order contract” means a contract for property that does not procure or specify a firm quantity of property (other than a minimum or maximum quantity) and that provides for the issuance of orders for the delivery of property during the period of the contract.

(June 30, 1949, ch. 288, title III, §303K, as added Oct. 13, 1994, Pub. L. 103-355, title I, §1054(a), 108 Stat. 3265.)

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.

CONSTRUCTION

Section not to be construed as modifying or superseding, or as intended to impair or restrict, authorities or responsibilities under section 759 of Title 40, Public Buildings, Property, and Works, or subchapter VI (§541 et seq.) of chapter 10 of Title 40, see section 1054(b) of Pub. L. 103-355, set out as a note under section 253h of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 253h, 253i of this title.

**§ 253l. Severable services contracts for periods crossing fiscal years**

**(a) Authority**

The head of an executive agency may enter into a contract for procurement of severable services for a period that begins in one fiscal year and ends in the next fiscal year if (without regard to any option to extend the period of the contract) the contract period does not exceed one year.

**(b) Obligation of funds**

Funds made available for a fiscal year may be obligated for the total amount of a contract entered into under the authority of subsection (a) of this section.

(June 30, 1949, ch. 288, title III, §303L, as added Oct. 13, 1994, Pub. L. 103-355, title I, §1073, 108 Stat. 3271.)

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.

**§ 254. Contract requirements**

**(a) Contracts awarded using procedures other than sealed-bid procedures**

Except as provided in subsection (b) of this section, contracts awarded after using procedures other than sealed-bid procedures may be of any type which in the opinion of the agency head will promote the best interests of the Government. Every contract awarded after using procedures other than sealed-bid procedures shall contain a suitable warranty, as determined by the agency head, by the contractor that no person or selling agency has been employed or retained to solicit or secure such contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business, for the breach or violation of which warranty the Government shall have the right to annul such contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee. The preceding sentence does not apply to a contract for an amount that is not greater than the simplified acquisition threshold or to a contract for the acquisition of commercial items.

**(b) Barred contracts; fee limitation; determination of use; advance notification**

The cost-plus-a-percentage-of-cost system of contracting shall not be used, and in the case of a cost-plus-a-fixed-fee contract the fee shall not exceed 10 percent of the estimated cost of the contract, exclusive of the fee, as determined by the agency head at the time of entering into such contract (except that a fee not in excess of 15 percent of such estimated cost is authorized in any such contract for experimental, developmental, or research work and that a fee inclusive of the contractor's costs and not in excess of 6 percent of the estimated cost, exclusive of fees, as determined by the agency head at the time of entering into the contract, of the project to which such fee is applicable is authorized in contracts for architectural or engineering services relating to any public works or utility project). All cost and cost-plus-a-fixed-fee contracts shall provide for advance notification by the contractor to the procuring agency of any subcontract thereunder on a cost-plus-a-fixed-fee basis and of any fixed-price subcontract or purchase order which exceeds in dollar amount either the simplified acquisition threshold or 5 percent of the total estimated cost of the prime contract; and a procuring agency, through any authorized representative thereof, shall have the right to inspect the plans and to audit the books and records of any prime contractor or subcontractor engaged in the performance of a cost or cost-plus-a-fixed-fee contract.

(June 30, 1949, ch. 288, title III, §304, 63 Stat. 395; Oct. 31, 1951, ch. 652, 65 Stat. 700; July 12, 1952,

ch. 703, §1(m), 66 Stat. 594; Sept. 27, 1966, Pub. L. 89-607, § 2, 80 Stat. 850; July 18, 1984, Pub. L. 98-369, div. B, title VII, §§ 2712, 2714(a)(3), 98 Stat. 1181, 1184; Oct. 13, 1994, Pub. L. 103-355, title I, §§ 1071, 1251(a)(1), title II, § 2251(b), title IV, §§ 4103(c), 4402(c), title VIII, § 8204(b), title X, § 10005(e), 108 Stat. 3270, 3278, 3320, 3341, 3349, 3396, 3408.)

#### AMENDMENTS

1994—Subsec. (a). Pub. L. 103-355, §§ 4103(c), 8204(b), inserted at end “The preceding sentence does not apply to a contract for an amount that is not greater than the simplified acquisition threshold or to a contract for the acquisition of commercial items.”

Subsec. (b). Pub. L. 103-355, §§ 4402(c), 10005(e), substituted “percent” for “per centum” wherever appearing and “either the simplified acquisition threshold” for “either \$25,000” in last sentence.

Pub. L. 103-355, § 1071, struck out after first sentence “Neither a cost nor a cost-plus-a-fixed-fee contract nor an incentive-type contract shall be used unless the agency head determines that such method of contracting is likely to be less costly than other methods or that it is impractical to secure property or services of the kind or quality required without the use of a cost or cost-plus-a-fixed-fee contract or an incentive-type contract.”

Subsec. (c). Pub. L. 103-355, § 2251(b), struck out subsec. (c) which related to examination of books, records, etc. of contractors, time limitations, exemptions, exceptional conditions, and reports to Congress. See section 254d of this title.

Subsec. (d). Pub. L. 103-355, § 1251(a)(1), struck out subsec. (d) which related to submission of cost or pricing data by contractors and subcontractors, certificate requirements, adjustment of price, inspection of books, records, etc., necessity of data, and exceptions. See section 254b of this title.

1984—Pub. L. 98-369, § 2714(a)(2), substituted “Contract requirements” for “Negotiated contracts” in section catchline.

Subsec. (a). Pub. L. 98-369, § 2714(a)(3), substituted “awarded after using procedures other than sealed-bid procedures” for “negotiated pursuant to section 252(c) of this title” in first and second sentences.

Subsec. (c). Pub. L. 98-369, § 2714(a)(3)(C), substituted “awarded after using procedures other than sealed-bid procedures” for “negotiated without advertising pursuant to authority contained in this Act” in first sentence.

Subsec. (d). Pub. L. 98-369, § 2712, added subsec. (d).  
1966—Subsec. (c). Pub. L. 89-607 provided for exemption of certain contracts with foreign contractors from the requirement for an examination-of-records clause, such determination to be reported to Congress.

1952—Subsec. (b). Act July 12, 1952, substituted “property” for “supplies”.

1951—Subsec. (c). Act Oct. 31, 1951, added subsec. (c).

#### 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

Amendment by Pub. L. 98-369 applicable with respect to any solicitation for bids or proposals issued after Mar. 31, 1985, see section 2751 of Pub. L. 98-369, set out as a note under section 251 of this title.

#### EFFECTIVE DATE

Section effective July 1, 1949, see section 605 of act June 30, 1949, set out as a note under section 471 of Title 40, Public Buildings, Property, and Works.

#### EXEMPTION OF FUNCTIONS

Functions authorized by Foreign Assistance Act of 1961, as amended, as exempt, see Ex. Ord. No. 11223, eff.

May 12, 1965, 30 F.R. 6635, set out as a note under section 2393 of Title 22, Foreign Relations and Intercourse.

#### FOREIGN CONTRACTORS

Secretaries of Defense, Army, Navy, or Air Force, or their designees, to determine, prior to exercising the authority provided in the amendment of this section by Pub. L. 89-607 to exempt certain contracts with foreign contractors from the requirement of an examination-of-records clause, that all reasonable efforts have been made to include such examination-of-records clause, as required by par. (11) of Part I of Ex. Ord. No. 10789, and that alternate sources of supply are not reasonably available, see par. (11) of Part I of Ex. Ord. No. 10789, eff. Nov. 14, 1958, 23 F.R. 8897, as amended, set out as a note under section 1431 of Title 50, War and National Defense.

#### EXECUTIVE ORDER NO. 12800

Ex. Ord. No. 12800, Apr. 13, 1992, 57 F.R. 12985, 13413, which required Federal contractors to post a notice that employees could not be required to be members of a union in order to retain their jobs, was revoked by Ex. Ord. No. 12836, § 1, Feb. 1, 1993, 58 F.R. 7045.

#### DEFINITIONS

The definitions in section 472 of Title 40, Public Buildings, Property, and Works, apply to this subchapter.

#### CROSS REFERENCES

Agency head, definition of, see section 259 of this title.

Armed services—

Examination of contractor's books and records, see section 2313 of Title 10, Armed Forces.

Kinds of contracts, see section 2306 of Title 10.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 257 of this title; title 16 section 670o; title 19 section 2081; title 26 section 7608; title 38 section 8122.

#### § 254a. Cost-type research and development contracts with educational institutions

On and after September 5, 1962, provision may be made in cost-type research and development contracts (including grants) with universities, colleges, or other educational institutions for payment of reimbursable indirect costs on the basis of predetermined fixed-percentage rates applied to the total, or an element thereof, of the reimbursable direct costs incurred.

(Pub. L. 87-638, Sept. 5, 1962, 76 Stat. 437.)

#### CODIFICATION

Section was not enacted as part of title III of act June 30, 1949, ch. 288, 63 Stat. 393, which comprises this subchapter.

#### § 254b. Cost or pricing data: truth in negotiations

##### (a) Required cost or pricing data and certification

(1) The head of an executive agency shall require offerors, contractors, and subcontractors to make cost or pricing data available as follows:

(A) An offeror for a prime contract under this subchapter to be entered into using procedures other than sealed-bid procedures shall be required to submit cost or pricing data before the award of a contract if—

(i) in the case of a prime contract entered into after October 13, 1994, the price of the

contract to the United States is expected to exceed \$500,000; and

(ii) in the case of a prime contract entered into on or before October 13, 1994, the price of the contract to the United States is expected to exceed \$100,000.

(B) The contractor for a prime contract under this subchapter shall be required to submit cost or pricing data before the pricing of a change or modification to the contract if—

(i) in the case of a change or modification made to a prime contract referred to in subparagraph (A)(i), the price adjustment is expected to exceed \$500,000;

(ii) in the case of a change or modification made to a prime contract that was entered into on or before October 13, 1994, and that has been modified pursuant to paragraph (6), the price adjustment is expected to exceed \$500,000; and

(iii) in the case of a change or modification not covered by clause (i) or (ii), the price adjustment is expected to exceed \$100,000.

(C) An offeror for a subcontract (at any tier) of a contract under this subchapter shall be required to submit cost or pricing data before the award of the subcontract if the prime contractor and each higher-tier subcontractor have been required to make available cost or pricing data under this section and—

(i) in the case of a subcontract under a prime contract referred to in subparagraph (A)(i), the price of the subcontract is expected to exceed \$500,000;

(ii) in the case of a subcontract entered into under a prime contract that was entered into on or before October 13, 1994, and that has been modified pursuant to paragraph (6), the price of the subcontract is expected to exceed \$500,000; and

(iii) in the case of a subcontract not covered by clause (i) or (ii), the price of the subcontract is expected to exceed \$100,000.

(D) The subcontractor for a subcontract covered by subparagraph (C) shall be required to submit cost or pricing data before the pricing of a change or modification to the subcontract if—

(i) in the case of a change or modification to a subcontract referred to in subparagraph (C)(i) or (C)(ii), the price adjustment is expected to exceed \$500,000; and

(ii) in the case of a change or modification to a subcontract referred to in subparagraph (C)(iii), the price adjustment is expected to exceed \$100,000.

(2) A person required, as an offeror, contractor, or subcontractor, to submit cost or pricing data under paragraph (1) (or required by the head of the procuring activity concerned to submit such data under subsection (c) of this section) shall be required to certify that, to the best of the person's knowledge and belief, the cost or pricing data submitted are accurate, complete, and current.

(3) Cost or pricing data required to be submitted under paragraph (1) (or under subsection (c) of this section), and a certification required to be submitted under paragraph (2), shall be submitted—

(A) in the case of a submission by a prime contractor (or an offeror for a prime contract), to the contracting officer for the contract (or to a designated representative of the contracting officer); or

(B) in the case of a submission by a subcontractor (or an offeror for a subcontract), to the prime contractor.

(4) Except as provided under subsection (b) of this section, this section applies to contracts entered into by the head of an executive agency on behalf of a foreign government.

(5) For purposes of paragraph (1)(C), a contractor or subcontractor granted a waiver under subsection (b)(1)(B) of this section shall be considered as having been required to make available cost or pricing data under this section.

(6) Upon the request of a contractor that was required to submit cost or pricing data under paragraph (1) in connection with a prime contract entered into on or before October 13, 1994, the head of the executive agency that entered into such contract shall modify the contract to reflect subparagraphs (B)(ii) and (C)(ii) of paragraph (1). All such modifications shall be made without requiring consideration.

(7) Effective on October 1 of each year that is divisible by 5, each amount set forth in paragraph (1) shall be adjusted to the amount that is equal to the fiscal year 1994 constant dollar value of the amount set forth. Any amount, as so adjusted, that is not evenly divisible by \$50,000 shall be rounded to the nearest multiple of \$50,000. In the case of an amount that is evenly divisible by \$25,000 but not evenly divisible by \$50,000, the amount shall be rounded to the next higher multiple of \$50,000.

#### **(b) Exceptions**

##### **(1) In general**

Submission of cost or pricing data shall not be required under subsection (a) of this section in the case of a contract, a subcontract, or a modification of a contract or subcontract—

(A) for which the price agreed upon is based on—

(i) adequate price competition;

(ii) established catalog or market prices of commercial items that are sold in substantial quantities to the general public; or

(iii) prices set by law or regulation; or

(B) in an exceptional case when the head of the procuring activity, without delegation, determines that the requirements of this section may be waived and justifies in writing the reasons for such determination.

##### **(2) Modifications of contracts and subcontracts for commercial items**

In the case of a modification of a contract or subcontract for a commercial item that is not covered by the prohibition on the submission of cost or pricing data in paragraph (1)(A), submission of cost or pricing data shall not be required under subsection (a) of this section if—

(A) the contract or subcontract being modified is a contract or subcontract for which submission of cost or pricing data

may not be required by reason of paragraph (1)(A); and

(B) the modification would not change the contract or subcontract, as the case may be, from a contract or subcontract for the acquisition of a commercial item to a contract or subcontract for the acquisition of an item other than a commercial item.

**(3) FAR standards**

The Federal Acquisition Regulation shall provide clear standards for determining whether the exceptions provided in paragraph (1)(A) apply. In the case of the exception provided in paragraph (1)(A)(i), the regulations shall specify the criteria to be used to determine whether adequate price competition exists. In the case of the exception provided in paragraph (1)(A)(ii), the regulations shall provide that the exception applies to items that are sold in substantial quantities to the general public, without regard to the quantity of items that may be sold to the Federal Government.

**(c) Restrictions on additional authority to require cost or pricing data or other information**

**(1) Authority to require cost or pricing data on below-threshold contracts**

(A) Subject to subparagraph (B), when cost or pricing data are not required to be submitted by subsection (a) of this section for a contract, subcontract, or modification of a contract or subcontract, such data may nevertheless be required to be submitted by the head of the procuring activity, but only if the head of the procuring activity determines that such data are necessary for the evaluation by the agency of the reasonableness of the price of the contract, subcontract, or modification of a contract or subcontract. In any case in which the head of the procuring activity requires such data to be submitted under this subsection, the head of the procuring activity shall justify in writing the reason for such requirement.

(B) The head of the procuring activity may not require certified cost or pricing data to be submitted under this paragraph for any contract or subcontract, or modification of a contract or subcontract, covered by the exceptions in subsection (b)(1)(A) of this section.

(C) The head of a procuring activity may not delegate the functions under this paragraph.

**(2) Authority to require information other than certified cost or pricing data**

When certified cost or pricing data are not required to be submitted under this section for a contract, subcontract, or modification of a contract or subcontract, the head of the procuring activity may require submission of data other than certified cost or pricing data to the extent necessary to determine the reasonableness of the price of the contract, subcontract, or modification of the contract or subcontract.

**(d) Additional exception provisions regarding commercial items**

**(1) Procurements based on adequate price competition**

To the maximum extent practicable, the head of an executive agency shall conduct procurements of commercial items on a competitive basis. In any procurement of a commercial item conducted on a competitive basis and based upon adequate price competition, the head of the executive agency conducting the procurement shall not require cost or pricing data to be submitted under subsection (a) of this section for the contract, subcontract, or modification of the contract or subcontract under the procurement. If additional information is necessary to determine the reasonableness of the price of the contract, subcontract, or modification of the contract or subcontract, the head of the executive agency shall, to the maximum extent practicable, obtain the additional information from sources other than the offeror.

**(2) Procurements not based on adequate price competition**

(A)(i) In any case in which it is not practicable to conduct a procurement of a commercial item covered by subsection (a) of this section on a competitive basis, and the procurement is not covered by an exception in subsection (b) of this section, the contracting officer shall seek to obtain from the offeror or contractor information described in clause (ii). When such information is not available from that source, the contracting officer shall seek to obtain such information from another source or sources.

(ii) The information referred in<sup>1</sup> clause (i) is information on prices at which the same item or similar items have been sold in the commercial market that is adequate for evaluating, through price analysis, the reasonableness of the price of the contract, subcontract, or modification of the contract or subcontract under the procurement.

(B) The contracting officer shall exempt a contract, subcontract, or modification of a contract or subcontract under the procurement from the requirements of subsection (a) of this section if the contracting officer obtains the information described in subparagraph (A)(ii) in accordance with standards and procedures set forth in the Federal Acquisition Regulation.

(C) A contracting officer may require submission of cost or pricing data under subsection (a) of this section only if the contracting officer makes a written determination that the agency is unable to obtain the information described in subparagraph (A)(ii).

**(3) Authority to audit**

(A) In accordance with procedures prescribed in the Federal Acquisition Regulation, the head of an executive agency is authorized to examine all information provided by an offeror, contractor, or subcontractor pursuant to paragraph (2)(A) and all books and records

<sup>1</sup> So in original. Probably should be preceded by "to".

of such offeror, contractor, or subcontractor that directly relate to such information in order to determine whether the agency is receiving accurate information required under this section.

(B) The right under subparagraph (A) shall expire 2 years after the date of award of the contract, or 2 years after the date of the modification of the contract, with respect to which the information was provided.

**(4) Limitations on requests for data**

The Federal Acquisition Regulation shall include reasonable limitations on requests under this subsection for sales data relating to commercial items.

**(5) Form of information**

In requesting information from an offeror under this subsection, a contracting officer shall, to the maximum extent practicable, limit the scope of the request to include only information that is in the form regularly maintained by the offeror in commercial operations.

**(6) Confidentiality**

Any information received under this subsection that is exempt from disclosure under section 552(b) of title 5 shall not be disclosed by the Federal Government.

**(e) Price reductions for defective cost or pricing data**

(1)(A) A prime contract (or change or modification to a prime contract) under which a certificate under subsection (a)(2) of this section is required shall contain a provision that the price of the contract to the United States, including profit or fee, shall be adjusted to exclude any significant amount by which it may be determined by the head of the executive agency that such price was increased because the contractor (or any subcontractor required to make available such a certificate) submitted defective cost or pricing data.

(B) For the purposes of this section, defective cost or pricing data are cost or pricing data which, as of the date of agreement on the price of the contract (or another date agreed upon between the parties), were inaccurate, incomplete, or noncurrent. If for purposes of the preceding sentence the parties agree upon a date other than the date of agreement on the price of the contract, the date agreed upon by the parties shall be as close to the date of agreement on the price of the contract as is practicable.

(2) In determining for purposes of a contract price adjustment under a contract provision required by paragraph (1) whether, and to what extent, a contract price was increased because the contractor (or a subcontractor) submitted defective cost or pricing data, it shall be a defense that the United States did not rely on the defective data submitted by the contractor or subcontractor.

(3) It is not a defense to an adjustment of the price of a contract under a contract provision required by paragraph (1) that—

(A) the price of the contract would not have been modified even if accurate, complete, and current cost or pricing data had been submit-

ted by the contractor or subcontractor because the contractor or subcontractor—

(i) was the sole source of the property or services procured; or

(ii) otherwise was in a superior bargaining position with respect to the property or services procured;

(B) the contracting officer should have known that the cost or pricing data in issue were defective even though the contractor or subcontractor took no affirmative action to bring the character of the data to the attention of the contracting officer;

(C) the contract was based on an agreement between the contractor and the United States about the total cost of the contract and there was no agreement about the cost of each item procured under such contract; or

(D) the prime contractor or subcontractor did not submit a certification of cost or pricing data relating to the contract as required under subsection (a)(2) of this section.

(4)(A) A contractor shall be allowed to offset an amount against the amount of a contract price adjustment under a contract provision required by paragraph (1) if—

(i) the contractor certifies to the contracting officer (or to a designated representative of the contracting officer) that, to the best of the contractor's knowledge and belief, the contractor is entitled to the offset; and

(ii) the contractor proves that the cost or pricing data were available before the date of agreement on the price of the contract (or price of the modification), or, if applicable consistent with paragraph (1)(B), another date agreed upon between the parties, and that the data were not submitted as specified in subsection (a)(3) of this section before such date.

(B) A contractor shall not be allowed to offset an amount otherwise authorized to be offset under subparagraph (A) if—

(i) the certification under subsection (a)(2) of this section with respect to the cost or pricing data involved was known to be false when signed; or

(ii) the United States proves that, had the cost or pricing data referred to in subparagraph (A)(ii) been submitted to the United States before the date of agreement on the price of the contract (or price of the modification) or, if applicable under paragraph (1)(B), another date agreed upon between the parties, the submission of such cost or pricing data would not have resulted in an increase in that price in the amount to be offset.

**(f) Interest and penalties for certain overpayments**

(1) If the United States makes an overpayment to a contractor under a contract with an executive agency subject to this section and the overpayment was due to the submission by the contractor of defective cost or pricing data, the contractor shall be liable to the United States—

(A) for interest on the amount of such overpayment, to be computed—

(i) for the period beginning on the date the overpayment was made to the contractor and ending on the date the contractor repays

the amount of such overpayment to the United States; and

(ii) at the current rate prescribed by the Secretary of the Treasury under section 6621 of title 26; and

(B) if the submission of such defective data was a knowing submission, for an additional amount equal to the amount of the overpayment.

(2) Any liability under this subsection of a contractor that submits cost or pricing data but refuses to submit the certification required by subsection (a)(2) of this section with respect to the cost or pricing data shall not be affected by the refusal to submit such certification.

**(g) Right of United States to examine contractor records**

For the purpose of evaluating the accuracy, completeness, and currency of cost or pricing data required to be submitted by this section, an executive agency shall have the authority provided by section 254d(a)(2) of this title.

**(h) Required regulations**

The Federal Acquisition Regulation shall include regulations concerning the types of information that offerors must submit for a contracting officer to consider in determining whether the price of a procurement to the Government is fair and reasonable when certified cost or pricing data are not required to be submitted under this section because the price of the procurement to the United States is not expected to exceed the applicable threshold amount set forth in subsection (a) of this section (as adjusted pursuant to paragraph (7) of such subsection). Such information, at a minimum, shall include appropriate information on the prices at which the same item or similar items have previously been sold that is adequate for evaluating the reasonableness of the price of a proposed contract or subcontract for the procurement.

**(i) Definitions**

In this section:

**(1) Cost or pricing data**

The term “cost or pricing data” means all facts that, as of the date of agreement on the price of a contract (or the price of a contract modification) or, if applicable consistent with subsection (e)(1)(B) of this section, another date agreed upon between the parties, a prudent buyer or seller would reasonably expect to affect price negotiations significantly. Such term does not include information that is judgmental, but does include the factual information from which a judgment was derived.

**(2) Subcontract**

The term “subcontract” includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractor or a subcontractor.

**(3) Commercial item**

The term “commercial item” has the meaning provided such term by section 403(12) of this title.

(June 30, 1949, ch. 288, title III, §304A, as added Oct. 13, 1994, Pub. L. 103-355, title I, §1251(a)(2), 108 Stat. 3278.)

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 1251(b) of Pub. L. 103-355 provided that: “Subsection (a) of section 304A of the Office of Federal Procurement Policy Act [subsec. (a) of this section], as added by subsection (a), shall apply according to the provisions thereof on and after the date of the enactment of this Act [Oct. 13, 1994], notwithstanding section 10001(b) [see Effective Date of 1994 Amendment note set out under section 251 of this title].”

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 254d of this title.

**§ 254c. Multiyear contracts**

**(a) Authority**

An executive agency may enter into a multiyear contract for the acquisition of property or services if—

(1) funds are available and obligated for such contract, for the full period of the contract or for the first fiscal year in which the contract is in effect, and for the estimated costs associated with any necessary termination of such contract; and

(2) the executive agency determines that—

(A) the need for the property or services is reasonably firm and continuing over the period of the contract; and

(B) a multiyear contract will serve the best interests of the United States by encouraging full and open competition or promoting economy in administration, performance, and operation of the agency’s programs.

**(b) Termination clause**

A multiyear contract entered into under the authority of this section shall include a clause that provides that the contract shall be terminated if funds are not made available for the continuation of such contract in any fiscal year covered by the contract. Amounts available for paying termination costs shall remain available for such purpose until the costs associated with termination of the contract are paid.

**(c) Cancellation ceiling notice**

Before any contract described in subsection (a) of this section that contains a clause setting forth a cancellation ceiling in excess of \$10,000,000 may be awarded, the executive agency shall give written notification of the proposed contract and of the proposed cancellation ceiling for that contract to the Congress, and such contract may not then be awarded until the end of a period of 30 days beginning on the date of such notification.

**(d) Multiyear contract defined**

For the purposes of this section, a multiyear contract is a contract for the purchase of property or services for more than one, but not more than five, program years. Such a contract may provide that performance under the contract during the second and subsequent years of the contract is contingent upon the appropriation of funds and (if it does so provide) may provide for a cancellation payment to be made to the contractor if such appropriations are not made.

**(e) Rule of construction**

Nothing in this section is intended to modify or affect any other provision of law that authorizes multiyear contracts.

(June 30, 1949, ch. 288, title III, §304B, as added Oct. 13, 1994, Pub. L. 103-355, title I, §1072, 108 Stat. 3270.)

**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.

**§ 254d. Examination of records of contractor****(a) Agency authority**

(1) The head of an executive agency, acting through an authorized representative, is authorized to inspect the plant and audit the records of—

(A) a contractor performing a cost-reimbursement, incentive, time-and-materials, labor-hour, or price-redeterminable contract, or any combination of such contracts, made by that executive agency under this subchapter; and

(B) a subcontractor performing any cost-reimbursement, incentive, time-and-materials, labor-hour, or price-redeterminable subcontract or any combination of such subcontracts under a contract referred to in subparagraph (A).

(2) The head of an executive agency, acting through an authorized representative, is authorized, for the purpose of evaluating the accuracy, completeness, and currency of certified cost or pricing data required to be submitted pursuant to section 254b<sup>1</sup> of this title with respect to a contract or subcontract, to examine all records of the contractor or subcontractor related to—

(A) the proposal for the contract or subcontract;

(B) the discussions conducted on the proposal;

(C) pricing of the contract or subcontract; or

(D) performance of the contract or subcontract.

**(b) Subpoena power**

(1) The Inspector General of an executive agency appointed under section 3 or 8G<sup>1</sup> of the Inspector General Act of 1978 (5 U.S.C. App.) or, upon request of the head of an executive agency, the Director of the Defense Contract Audit Agency (or any successor agency) of the Department of Defense or the Inspector General of the General Services Administration may require by subpoena the production of records of a contractor, access to which is provided for that executive agency by subsection (a) of this section.

(2) Any such subpoena, in the case of contumacy or refusal to obey, shall be enforceable by order of an appropriate United States district court.

(3) The authority provided by paragraph (1) may not be delegated.

(4) In the year following a year in which authority provided in paragraph (1) is exercised for

an executive agency, the head of the executive agency shall submit to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives a report on the exercise of such authority during such preceding year and the reasons why such authority was exercised in any instance.

**(c) Comptroller General authority**

(1) Except as provided in paragraph (2), each contract awarded after using procedures other than sealed bid procedures shall provide that the Comptroller General and his representatives are authorized to examine any records of the contractor, or any of its subcontractors, that directly pertain to, and involve transactions relating to, the contract or subcontract.

(2) Paragraph (1) does not apply to a contract or subcontract with a foreign contractor or foreign subcontractor if the executive agency concerned determines, with the concurrence of the Comptroller General or his designee, that the application of that paragraph to the contract or subcontract would not be in the public interest. However, the concurrence of the Comptroller General or his designee is not required—

(A) where the contractor or subcontractor is a foreign government or agency thereof or is precluded by the laws of the country involved from making its records available for examination; and

(B) where the executive agency determines, after taking into account the price and availability of the property and services from United States sources, that the public interest would be best served by not applying paragraph (1).

(3) Paragraph (1) may not be construed to require a contractor or subcontractor to create or maintain any record that the contractor or subcontractor does not maintain in the ordinary course of business or pursuant to another provision of law.

**(d) Limitation on preaward audits relating to indirect costs**

An executive agency may not perform a preaward audit to evaluate proposed indirect costs under any contract, subcontract, or modification to be entered into in accordance with this subchapter in any case in which the contracting officer determines that the objectives of the audit can reasonably be met by accepting the results of an audit conducted by any other department or agency of the Federal Government within one year preceding the date of the contracting officer's determination.

**(e) Limitation**

The authority of an executive agency under subsection (a) of this section, and the authority of the Comptroller General under subsection (c) of this section, with respect to a contract or subcontract shall expire three years after final payment under such contract or subcontract.

**(f) Inapplicability to certain contracts**

This section does not apply to the following contracts:

(1) Contracts for utility services at rates not exceeding those established to apply uni-

<sup>1</sup> See References in Text note below.

formly to the public, plus any applicable reasonable connection charge.

(2) A contract or subcontract that is not greater than the simplified acquisition threshold.

**(g) Form of original record storage**

Nothing in this section shall be construed to preclude a contractor from duplicating or storing original records in electronic form.

**(h) Use of images of original records**

An executive agency shall not require a contractor or subcontractor to provide original records in an audit carried out pursuant to this section if the contractor or subcontractor provides photographic or electronic images of the original records and meets the following requirements:

(1) The contractor or subcontractor has established procedures to ensure that the imaging process preserves the integrity, reliability, and security of the original records.

(2) The contractor or subcontractor maintains an effective indexing system to permit timely and convenient access to the imaged records.

(3) The contractor or subcontractor retains the original records for a minimum of one year after imaging to permit periodic validation of the imaging systems.

**(i) "Records" defined**

In this section, the term "records" includes books, documents, accounting procedures and practices, and other data, regardless of type and regardless of whether such items are in written form, in the form of computer data, or in any other form.

(June 30, 1949, ch. 288, title III, §304C, as added and amended Oct. 13, 1994, Pub. L. 103-355, title II, §2251(a), title IV, §4103(d), 108 Stat. 3318, 3341.)

REFERENCES IN TEXT

Section 254b of this title, referred to in subsec. (a)(2), was in the original "section 304B", and was translated as reading "section 304A", meaning section 304A of act June 30, 1949, to reflect the probable intent of Congress, because section 304A, rather than section 304B of act June 30, 1949 (41 U.S.C. 254c), contains provisions relating to submission of certified cost or pricing data.

Section 3 and 8G of the Inspector General Act of 1978, referred to in subsec. (b)(1), are sections 3 and 8G of Pub. L. 95-452, which are set out in the Appendix to Title 5, Government Organization and Employees. The reference to section 8G of the Act probably means the section 8G which was renumbered by Pub. L. 103-204, §23(a)(3), Dec. 17, 1993, 107 Stat. 2408, and which relates to requirements for Federal entities and designated Federal entities.

AMENDMENTS

1994—Subsec. (f)(2). Pub. L. 103-355, §4103(d), added par. (2).

CHANGE OF NAME

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.

EFFECTIVE DATE

For effective date and applicability of section, including amendment by Pub. L. 103-355, 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 REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 254b, 262 of this title.

**§ 255. Contract financing**

**(a) Payment authority**

Any executive agency may—

(1) make advance, partial, progress or other payments under contracts for property or services made by the agency; and

(2) insert in solicitations for procurement of property or services a provision limiting to small business concerns advance or progress payments.

**(b) Performance-based payments**

Whenever practicable, payments under subsection (a) of this section shall be made on any of the following bases:

(1) Performance measured by objective, quantifiable methods such as delivery of acceptable items, work measurement, or statistical process controls.

(2) Accomplishment of events defined in the program management plan.

(3) Other quantifiable measures of results.

**(c) Payment amount**

Payments made under subsection (a) of this section may not exceed the unpaid contract price.

**(d) Security for advance payments**

Advance payments under subsection (a) of this section may be made only upon adequate security and a determination by the agency head that to do so would be in the public interest. Such security may be in the form of a lien in favor of the Government on the property contracted for, on the balance in an account in which such payments are deposited, and on such of the property acquired for performance of the contract as the parties may agree. This lien shall be paramount to all other liens and is effective immediately upon the first advancement of funds without filing, notice, or any other action by the United States.

**(e) Conditions for progress payments**

(1) The executive agency shall ensure that any payment for work in progress (including materials, labor, and other items) under a contract of an executive agency that provides for such payments is commensurate with the work accomplished that meets standards established under the contract. The contractor shall provide such information and evidence as the executive agency determines necessary to permit the executive agency to carry out the preceding sentence.

(2) The executive agency shall ensure that progress payments referred to in paragraph (1) are not made for more than 80 percent of the work accomplished under the contract so long as the executive agency has not made the contractual terms, specifications, and price definite.

(3) This subsection applies to any contract in an amount greater than \$25,000.

**(f) Conditions for payments for commercial items**

(1) Payments under subsection (a) of this section for commercial items may be made under



such terms and conditions as the head of the executive agency determines are appropriate or customary in the commercial marketplace and are in the best interests of the United States. The head of the executive agency shall obtain adequate security for such payments. If the security is in the form of a lien in favor of the United States, such lien is paramount to all other liens and is effective immediately upon the first payment, without filing, notice, or other action by the United States.

(2) Advance payments made under subsection (a) of this section for commercial items may include payments, in a total amount of not more than 15 percent of the contract price, in advance of any performance of work under the contract.

(3) The conditions of subsections (d) and (e) of this section need not be applied if they would be inconsistent, as determined by the head of the executive agency, with commercial terms and conditions pursuant to paragraphs (1) and (2).

**(g) Action in case of fraud**

(1) In any case in which the remedy coordination official of an executive agency finds that there is substantial evidence that the request of a contractor for advance, partial, or progress payment under a contract awarded by that executive agency is based on fraud, the remedy coordination official shall recommend that the executive agency reduce or suspend further payments to such contractor.

(2) The head of an executive agency receiving a recommendation under paragraph (1) in the case of a contractor's request for payment under a contract shall determine whether there is substantial evidence that the request is based on fraud. Upon making such a determination, the head of the executive agency may reduce or suspend further payments to the contractor under such contract.

(3) The extent of any reduction or suspension of payments by an executive agency under paragraph (2) on the basis of fraud shall be reasonably commensurate with the anticipated loss to the United States resulting from the fraud.

(4) A written justification for each decision of the head of an executive agency whether to reduce or suspend payments under paragraph (2), and for each recommendation received by the executive agency in connection with such decision, shall be prepared and be retained in the files of the executive agency.

(5) The head of each executive agency shall prescribe procedures to ensure that, before the head of the executive agency decides to reduce or suspend payments in the case of a contractor under paragraph (2), the contractor is afforded notice of the proposed reduction or suspension and an opportunity to submit matters to the executive agency in response to such proposed reduction or suspension.

(6) Not later than 180 days after the date on which the head of an executive agency reduces or suspends payments to a contractor under paragraph (2), the remedy coordination official of the executive agency shall—

(A) review the determination of fraud on which the reduction or suspension is based; and

(B) transmit a recommendation to the head of such executive agency whether the suspension or reduction should continue.

(7) The head of each executive agency who receives recommendations made by a remedy coordination official of the executive agency to reduce or suspend payments under paragraph (2) during a fiscal year shall prepare for such year a report that contains the recommendations, the actions taken on the recommendations and the reasons for such actions, and an assessment of the effects of such actions on the Federal Government. Any such report shall be available to any Member of Congress upon request.

(8) The head of an executive agency may not delegate responsibilities under this subsection to any person in a position below level IV of the Executive Schedule.

(9) In this subsection, the term “remedy coordination official”, with respect to an executive agency, means the person or entity in that executive agency who coordinates within that executive agency the administration of criminal, civil, administrative, and contractual remedies resulting from investigations of fraud or corruption related to procurement activities.

(June 30, 1949, ch. 288, title III, §305, 63 Stat. 396; July 12, 1952, ch. 703, §1(m), 66 Stat. 594; Aug. 28, 1958, Pub. L. 85-800, §4, 72 Stat. 966; Oct. 13, 1994, Pub. L. 103-355, title II, §2051(a)-(e), 108 Stat. 3303, 3304.)

REFERENCES IN TEXT

Level IV of the Executive Schedule, referred to in subsec. (g)(8), is set out in section 5315 of Title 5, Government Organization and Employees.

AMENDMENTS

1994—Pub. L. 103-355, §2051(a)(1), inserted section catchline.

Subsec. (a). Pub. L. 103-355, §2051(a)(2), (c), inserted heading and struck out “bid” before “solicitations” in par. (2).

Subsec. (b). Pub. L. 103-355, §2051(a)(5), (b), added subsec. (b) and redesignated former subsec. (b) as (c).

Pub. L. 103-355, §2051(a)(3), inserted heading.

Subsec. (c). Pub. L. 103-355, §2051(a)(5), redesignated subsec. (b) as (c). Former subsec. (c) redesignated (d).

Pub. L. 103-355, §2051(a)(4), inserted heading.

Subsec. (d). Pub. L. 103-355, §2051(d), inserted before period at end of third sentence “and is effective immediately upon the first advancement of funds without filing, notice, or any other action by the United States”.

Pub. L. 103-355, §2051(a)(5), redesignated subsec. (c) as (d).

Subsecs. (e) to (g). Pub. L. 103-355, §2051(e), added subsecs. (e) to (g).

1958—Pub. L. 85-800 authorized advance or other payments under contracts for property or services by agency and insertion in bid solicitations of provision limiting advance or progress payments to small business concerns, restricted payments under subsec. (a) of this section to unpaid contract price, and reworded generally conditions for making advance payments.

1952—Subsecs. (a), (b). Act July 12, 1952, substituted “property” for “supplies” wherever appearing.

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 effective July 1, 1949, see section 605 of act June 30, 1949, set out as a note under section 471 of Title 40, Public Buildings, Property, and Works.

EXEMPTION OF FUNCTIONS

Functions authorized by Foreign Assistance Act of 1961, as amended, as exempt, see Ex. Ord. No. 11223, eff.

May 12, 1965, 30 F.R. 6635, set out as a note under section 2393 of Title 22, Foreign Relations and Intercourse.

#### RELATIONSHIP TO PROMPT PAYMENT REQUIREMENTS

Section 2051(f) of Pub. L. 103-355 provided that: "The amendments made by this section [amending this section] are not intended to impair or modify procedures required by the provisions of chapter 39 of title 31, United States Code, and the regulations issued pursuant to such provisions of law (as such procedures are in effect on the date of the enactment of this Act [Oct. 13, 1994]), except that the Government may accept payment terms offered by a contractor offering a commercial item."

#### DEFINITIONS

The definitions in section 472 of Title 40, Public Buildings, Property, and Works, apply to this subchapter.

#### CROSS REFERENCES

Advance payments on negotiated armed services contracts, see section 2307 of Title 10, Armed Forces.

Agency head, definition of, see section 259 of this title.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 257, 262 of this title; title 19 section 2081; title 26 section 7608.

### § 256. Allowable costs

#### (a) Indirect cost that violates FAR cost principle

An executive agency shall require that a covered contract provide that if the contractor submits to the executive agency a proposal for settlement of indirect costs incurred by the contractor for any period after such costs have been accrued and if that proposal includes the submission of a cost which is unallowable because the cost violates a cost principle in the Federal Acquisition Regulation (referred to in section 421(c)(1) of this title) or an executive agency supplement to the Federal Acquisition Regulation, the cost shall be disallowed.

#### (b) Penalty for violation of cost principle

(1) If the executive agency determines that a cost submitted by a contractor in its proposal for settlement is expressly unallowable under a cost principle referred to in subsection (a) of this section that defines the allowability of specific selected costs, the executive agency shall assess a penalty against the contractor in an amount equal to—

(A) the amount of the disallowed cost allocated to covered contracts for which a proposal for settlement of indirect costs has been submitted; plus

(B) interest (to be computed based on provisions in the Federal Acquisition Regulation) to compensate the United States for the use of any funds which a contractor has been paid in excess of the amount to which the contractor was entitled.

(2) If the executive agency determines that a proposal for settlement of indirect costs submitted by a contractor includes a cost determined to be unallowable in the case of such contractor before the submission of such proposal, the executive agency shall assess a penalty against the contractor in an amount equal to two times the amount of the disallowed cost allocated to covered contracts for which a proposal for settlement of indirect costs has been submitted.

#### (c) Waiver of penalty

The Federal Acquisition Regulation shall provide for a penalty under subsection (b) of this section to be waived in the case of a contractor's proposal for settlement of indirect costs when—

(1) the contractor withdraws the proposal before the formal initiation of an audit of the proposal by the Federal Government and re-submits a revised proposal;

(2) the amount of unallowable costs subject to the penalty is insignificant; or

(3) the contractor demonstrates, to the contracting officer's satisfaction, that—

(A) it has established appropriate policies and personnel training and an internal control and review system that provide assurances that unallowable costs subject to penalties are precluded from being included in the contractor's proposal for settlement of indirect costs; and

(B) the unallowable costs subject to the penalty were inadvertently incorporated into the proposal.

#### (d) Applicability of contract disputes procedure to disallowance of cost and assessment of penalty

An action of an executive agency under subsection (a) or (b) of this section—

(1) shall be considered a final decision for the purposes of section 605 of this title; and

(2) is appealable in the manner provided in section 606 of this title.

#### (e) Specific costs not allowable

(1) The following costs are not allowable under a covered contract:

(A) Costs of entertainment, including amusement, diversion, and social activities, and any costs directly associated with such costs (such as tickets to shows or sports events, meals, lodging, rentals, transportation, and gratuities).

(B) Costs incurred to influence (directly or indirectly) legislative action on any matter pending before Congress, a State legislature, or a legislative body of a political subdivision of a State.

(C) Costs incurred in defense of any civil or criminal fraud proceeding or similar proceeding (including filing of any false certification) brought by the United States where the contractor is found liable or had pleaded nolo contendere to a charge of fraud or similar proceeding (including filing of a false certification).

(D) Payments of fines and penalties resulting from violations of, or failure to comply with, Federal, State, local, or foreign laws and regulations, except when incurred as a result of compliance with specific terms and conditions of the contract or specific written instructions from the contracting officer authorizing in advance such payments in accordance with applicable provisions of the Federal Acquisition Regulation.

(E) Costs of membership in any social, dining, or country club or organization.

(F) Costs of alcoholic beverages.

(G) Contributions or donations, regardless of the recipient.

(H) Costs of advertising designed to promote the contractor or its products.

(I) Costs of promotional items and memorabilia, including models, gifts, and souvenirs.

(J) Costs for travel by commercial aircraft which exceed the amount of the standard commercial fare.

(K) Costs incurred in making any payment (commonly known as a 'golden parachute payment') which is—

(i) in an amount in excess of the normal severance pay paid by the contractor to an employee upon termination of employment; and

(ii) is paid to the employee contingent upon, and following, a change in management control over, or ownership of, the contractor or a substantial portion of the contractor's assets.

(L) Costs of commercial insurance that protects against the costs of the contractor for correction of the contractor's own defects in materials or workmanship.

(M) Costs of severance pay paid by the contractor to foreign nationals employed by the contractor under a service contract performed outside the United States, to the extent that the amount of severance pay paid in any case exceeds the amount paid in the industry involved under the customary or prevailing practice for firms in that industry providing similar services in the United States, as determined under the Federal Acquisition Regulation.

(N) Costs of severance pay paid by the contractor to a foreign national employed by the contractor under a service contract performed in a foreign country if the termination of the employment of the foreign national is the result of the closing of, or the curtailment of activities at, a United States facility in that country at the request of the government of that country.

(O) Costs incurred by a contractor in connection with any criminal, civil, or administrative proceeding commenced by the United States or a State, to the extent provided in subsection (k) of this section.

(2)(A) Pursuant to the Federal Acquisition Regulation and subject to the availability of appropriations, an executive agency, in awarding a covered contract, may waive the application of the provisions of paragraphs (1)(M) and (1)(N) to that contract if the executive agency determines that—

(i) the application of such provisions to the contract would adversely affect the continuation of a program, project, or activity that provides significant support services for employees of the executive agency posted outside the United States;

(ii) the contractor has taken (or has established plans to take) appropriate actions within the contractor's control to minimize the amount and number of incidents of the payment of severance pay by the contractor to employees under the contract who are foreign nationals; and

(iii) the payment of severance pay is necessary in order to comply with a law that is

generally applicable to a significant number of businesses in the country in which the foreign national receiving the payment performed services under the contract or is necessary to comply with a collective bargaining agreement.

(B) An executive agency shall include in the solicitation for a covered contract a statement indicating—

(i) that a waiver has been granted under subparagraph (A) for the contract; or

(ii) whether the executive agency will consider granting such a waiver, and, if the executive agency will consider granting a waiver, the criteria to be used in granting the waiver.

(C) An executive agency shall make the final determination regarding whether to grant a waiver under subparagraph (A) with respect to a covered contract before award of the contract.

(3) The provisions of the Federal Acquisition Regulation implementing this section may establish appropriate definitions, exclusions, limitations, and qualifications. Any submission by a contractor of costs which are incurred by the contractor and which are claimed to be allowable under Department of Energy management and operating contracts shall be considered a "proposal for settlement of indirect costs incurred by the contractor for any period after such costs have been accrued", as used in this section.

**(f) Required regulations**

(1) The Federal Acquisition Regulation shall contain provisions on the allowability of contractor costs. Such provisions shall define in detail and in specific terms those costs which are unallowable, in whole or in part, under covered contracts. The regulations shall, at a minimum, clarify the cost principles applicable to contractor costs of the following:

(A) Air shows.

(B) Membership in civic, community, and professional organizations.

(C) Recruitment.

(D) Employee morale and welfare.

(E) Actions to influence (directly or indirectly) executive branch action on regulatory and contract matters (other than costs incurred in regard to contract proposals pursuant to solicited or unsolicited bids).

(F) Community relations.

(G) Dining facilities.

(H) Professional and consulting services, including legal services.

(I) Compensation.

(J) Selling and marketing.

(K) Travel.

(L) Public relations.

(M) Hotel and meal expenses.

(N) Expense of corporate aircraft.

(O) Company-furnished automobiles.

(P) Advertising.

(Q) Conventions.

(2) The Federal Acquisition Regulation shall require that a contracting officer not resolve any questioned costs until the contracting officer has obtained—

(A) adequate documentation with respect to such costs; and

(B) the opinion of the contract auditor on the allowability of such costs.

(3) The Federal Acquisition Regulation shall provide that, to the maximum extent practicable, a contract auditor be present at any negotiation or meeting with the contractor regarding a determination of the allowability of indirect costs of the contractor.

(4) The Federal Acquisition Regulation shall require that all categories of costs designated in the report of a contract auditor as questioned with respect to a proposal for settlement be resolved in such a manner that the amount of the individual questioned costs that are paid will be reflected in the settlement.

**(g) Applicability of regulations to subcontractors**

The regulations referred to in subsections (e) and (f)(1) of this section shall require prime contractors of a covered contract, to the maximum extent practicable, to apply the provisions of such regulations to all subcontractors of the covered contract.

**(h) Contractor certification required**

(1) A proposal for settlement of indirect costs applicable to a covered contract shall include a certification by an official of the contractor that, to the best of the certifying official's knowledge and belief, all indirect costs included in the proposal are allowable. Any such certification shall be in a form prescribed in the Federal Acquisition Regulation.

(2) An executive agency may, in an exceptional case, waive the requirement for certification under paragraph (1) in the case of any contract if the agency—

(A) determines in such case that it would be in the interest of the United States to waive such certification; and

(B) states in writing the reasons for that determination and makes such determination available to the public.

**(i) Penalties for submission of cost known as not allowable**

The submission to an executive agency of a proposal for settlement of costs for any period after such costs have been accrued that includes a cost that is expressly specified by statute or regulation as being unallowable, with the knowledge that such cost is unallowable, shall be subject to the provisions of section 287 of title 18 and section 3729 of title 31.

**(j) Contractor to have burden of proof**

In a proceeding before a board of contract appeals, the United States Court of Federal Claims, or any other Federal court in which the reasonableness of indirect costs for which a contractor seeks reimbursement from the United States is in issue, the burden of proof shall be upon the contractor to establish that those costs are reasonable.

**(k) Proceeding costs not allowable**

(1) Except as otherwise provided in this subsection, costs incurred by a contractor in connection with any criminal, civil, or administrative proceeding commenced by the United States or a State are not allowable as reimbursable costs under a covered contract if the pro-

ceeding (A) relates to a violation of, or failure to comply with, a Federal or State statute or regulation, and (B) results in a disposition described in paragraph (2).

(2) A disposition referred to in paragraph (1)(B) is any of the following:

(A) In the case of a criminal proceeding, a conviction (including a conviction pursuant to a plea of nolo contendere) by reason of the violation or failure referred to in paragraph (1).

(B) In the case of a civil or administrative proceeding involving an allegation of fraud or similar misconduct, a determination of contractor liability on the basis of the violation or failure referred to in paragraph (1).

(C) In the case of any civil or administrative proceeding, the imposition of a monetary penalty by reason of the violation or failure referred to in paragraph (1).

(D) A final decision—

(i) to debar or suspend the contractor,

(ii) to rescind or void the contract, or

(iii) to terminate the contract for default,

by reason of the violation or failure referred to in paragraph (1).

(E) A disposition of the proceeding by consent or compromise if such action could have resulted in a disposition described in subparagraph (A), (B), (C), or (D).

(3) In the case of a proceeding referred to in paragraph (1) that is commenced by the United States and is resolved by consent or compromise pursuant to an agreement entered into by a contractor and the United States, the costs incurred by the contractor in connection with such proceeding that are otherwise not allowable as reimbursable costs under such paragraph may be allowed to the extent specifically provided in such agreement.

(4) In the case of a proceeding referred to in paragraph (1) that is commenced by a State, the executive agency that awarded the covered contract involved in the proceeding may allow the costs incurred by the contractor in connection with such proceeding as reimbursable costs if the executive agency determines, in accordance with the Federal Acquisition Regulation, that the costs were incurred as a result of (A) a specific term or condition of the contract, or (B) specific written instructions of the executive agency.

(5)(A) Except as provided in subparagraph (C), costs incurred by a contractor in connection with a criminal, civil, or administrative proceeding commenced by the United States or a State in connection with a covered contract may be allowed as reimbursable costs under the contract if such costs are not disallowable under paragraph (1), but only to the extent provided in subparagraph (B).

(B)(i) The amount of the costs allowable under subparagraph (A) in any case may not exceed the amount equal to 80 percent of the amount of the costs incurred, to the extent that such costs are determined to be otherwise allowable and allocable under the Federal Acquisition Regulation.

(ii) Regulations issued for the purpose of clause (i) shall provide for appropriate consideration of the complexity of procurement litiga-

tion, generally accepted principles governing the award of legal fees in civil actions involving the United States as a party, and such other factors as may be appropriate.

(C) In the case of a proceeding referred to in subparagraph (A), contractor costs otherwise allowable as reimbursable costs under this paragraph are not allowable if (i) such proceeding involves the same contractor misconduct alleged as the basis of another criminal, civil, or administrative proceeding, and (ii) the costs of such other proceeding are not allowable under paragraph (1).

(6) In this subsection:

(A) The term “proceeding” includes an investigation.

(B) The term “costs”, with respect to a proceeding—

(i) means all costs incurred by a contractor, whether before or after the commencement of any such proceeding; and

(ii) includes—

(I) administrative and clerical expenses;

(II) the cost of legal services, including legal services performed by an employee of the contractor;

(III) the cost of the services of accountants and consultants retained by the contractor; and

(IV) the pay of directors, officers, and employees of the contractor for time devoted by such directors, officers, and employees to such proceeding.

(C) The term “penalty” does not include restitution, reimbursement, or compensatory damages.

**(l) “Covered contract” defined**

(1) In this section, the term “covered contract” means a contract for an amount in excess of \$500,000 that is entered into by an executive agency, except that such term does not include a fixed-price contract without cost incentives or any firm, fixed price contract for the purchase of commercial items.

(2) Effective on October 1 of each year that is divisible by five, the amount set forth in paragraph (1) shall be adjusted to the equivalent amount in constant fiscal year 1994 dollars. An amount, as so adjusted, that is not evenly divisible by \$50,000 shall be rounded to the nearest multiple of \$50,000. In the case of an amount that is evenly divisible by \$25,000 but is not evenly divisible by \$50,000, the amount shall be rounded to the next higher multiple of \$50,000.

(June 30, 1949, ch. 288, title III, §306, as added Nov. 19, 1988, Pub. L. 100-700, §8(a)(1), 102 Stat. 4634; amended Oct. 13, 1994, Pub. L. 103-355, title II, §2151, 108 Stat. 3309.)

PRIOR PROVISIONS

A prior section 256, act June 30, 1949, ch. 288, title III, §306, 63 Stat. 396, related to waiver of liquidated damages, prior to repeal by act Sept. 5, 1950, ch. 849, §10(b), 64 Stat. 591, eff. July 1, 1949. See section 256a of this title.

AMENDMENTS

1994—Pub. L. 103-355 amended section generally, substituting present provisions for provisions outlining limitations on allowability of costs incurred by con-

tractors in criminal, civil, or administrative proceedings relating to violations of Federal or State statutes or regulations, which resulted in dispositions against contractors based on such violations.

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 effective with respect to contracts awarded after Nov. 19, 1988, see section 8(e) of Pub. L. 100-700, set out as an Effective and Termination Dates of 1988 Amendment note under section 2324 of Title 10, Armed Forces.

REVISION OF COST PRINCIPLE RELATING TO ENTERTAINMENT, GIFT, AND RECREATION COSTS FOR CONTRACTOR EMPLOYEES

Section 2192 of Pub. L. 103-355 provided that:

“(a) COSTS NOT ALLOWABLE.—(1) The costs of gifts or recreation for employees of a contractor or members of their families that are provided by the contractor to improve employee morale or performance or for any other purpose are not allowable under a covered contract unless, within 120 days after the date of the enactment of this Act [Oct. 13, 1994], the Federal Acquisition Regulatory Council prescribes amendments to the Federal Acquisition Regulation specifying circumstances under which such costs are allowable under a covered contract.

“(2) Not later than 90 days after the date of the enactment of this Act, the Federal Acquisition Regulatory Council shall amend the cost principle in the Federal Acquisition Regulation that is set out in section 31.205-14 of title 48, Code of Federal Regulations, relating to unallowability of entertainment costs—

“(A) by inserting in the cost principle a statement that costs made specifically unallowable under that cost principle are not allowable under any other cost principle; and

“(B) by striking out ‘(but see 31.205-1 and 31.205-13)’.

“(b) DEFINITIONS.—In this section:

“(1) The term ‘employee’ includes officers and directors of a contractor.

“(2) The term ‘covered contract’ has the meaning given such term in section 2324(l) of title 10, United States Code (as amended by section 2101(c)), and section 306(l) of the Federal Property and Administrative Services Act of 1949 (as added by section 2151) [41 U.S.C. 256(l)].

“(c) EFFECTIVE DATE.—Any amendments to the Federal Acquisition Regulation made pursuant to subsection (a) shall apply with respect to costs incurred after the date on which the amendments made by section 2101 apply (as provided in section 10001) [set out as an Effective Date of 1994 Amendment note under section 251 of this title] or the date on which the amendments made by section 2151 apply (as provided in section 10001), whichever is later.”

**§ 256a. Waiver of liquidated damages**

Whenever any contract made on behalf of the Government by the head of any Federal Agency, or by officers authorized by him so to do, includes a provision for liquidated damages for delay, the Comptroller General upon recommendation of such head is authorized and empowered to remit the whole or any part of such damages as in his discretion may be just and equitable.

(Sept. 5, 1950, ch. 849, §10(a), 64 Stat. 591.)

CODIFICATION

Section was not enacted as part of title III of act June 30, 1949, ch. 288, 63 Stat. 393, which comprises this subchapter.

## TRANSFER OF FUNCTIONS

Functions of Comptroller General under this section transferred, effective June 30, 1996, to Director of Office of Management and Budget, see section 211 of Pub. L. 104-53, set out as a note under section 501 of Title 31, Money and Finance.

## CROSS REFERENCES

Armed services contracts, remission of liquidated damages, see section 2312 of Title 10, Armed Forces.

**§ 257. Administrative determinations****(a) Conclusiveness; delegation of powers**

Determinations and decisions provided in this Act to be made by the Administrator or other agency head shall be final. Such determinations or decisions may be made with respect to individual purchases or contracts or, except for determinations or decisions under sections 253, 253a, and 253b of this title, with respect to classes of purchases or contracts. Except as provided in section 253(d)(2) of this title, and except as provided in section 486(d) of title 40 with respect to the Administrator, the agency head is authorized to delegate his powers provided by this Act, including the making of such determinations and decisions, in his discretion and subject to his direction, to any other officer or officers or officials of the agency.

**(b) Basis of determinations; finding conclusive; preservation of findings; copy**

Each determination or decision required by section 254 or by section 255(c)<sup>1</sup> of this title shall be based upon written findings made by the official making such determination, which findings shall be final and shall be available within the agency for a period of at least six years following the date of the determination. A copy of the findings shall be submitted to the General Accounting Office with the contract.

(June 30, 1949, ch. 288, title III, § 307, 63 Stat. 396; Aug. 28, 1958, Pub. L. 85-800, § 5, 72 Stat. 967; Nov. 8, 1965, Pub. L. 89-343, §§ 3, 4, 79 Stat. 1303; July 18, 1984, Pub. L. 98-369, div. B, title VII, § 2714(a)(4), 98 Stat. 1184.)

## REFERENCES IN TEXT

This Act, referred to in subsec. (a), is act June 30, 1949, ch. 288, 63 Stat. 377, as amended, known as the Federal Property and Administrative Services Act of 1949. For complete classification of this Act to the Code, see Short Title note set out under section 471 of Title 40, Public Buildings, Property, and Works, and Tables.

Section 255(c) of this title, referred to in subsec. (b), was redesignated section 255(d) of this title by Pub. L. 103-355, title II, § 2051(a)(5), Oct. 13, 1994, 108 Stat. 3304.

## AMENDMENTS

1984—Subsec. (a). Pub. L. 98-369, § 2714(a)(4), substituted provision that determinations and decisions provided in this Act to be made by the Administrator or other agency head shall be final for provision that such determinations and decisions provided in this subchapter to be made by such official would be final, and inserted exception for determinations or decisions under sections 253, 253a, and 253b of this title, substituted “Except as provided in section 253(d)(2) of this title” for “Except as provided in subsection (b) of this section”, and directed the substitution of “this Act”

<sup>1</sup> See References in Text note below.

for “this chapter” after “powers provided by”, which substitution was not capable of literal execution because the original text read “this title”. Consequently, the amendment was executed by substituting “this Act” for “this title” as the probable intent of Congress.

Subsecs. (b), (c). Pub. L. 98-369, § 2714(a)(4)(D)-(F), redesignated subsec. (c) as (b), struck out “paragraphs (11), (12), (13), or of section 253(c)”, and struck out former subsec. (b) which related to nondelegable powers and powers delegable to certain persons.

Subsec. (d). Pub. L. 98-369, § 2714(a)(4)(G), struck out subsec. (d) which related to preservation of data relating to contracts negotiated pursuant to the former provisions of section 252(c) of this title.

1965—Subsec. (a). Pub. L. 89-343, § 3, inserted “and except as provided in section 486(d) of title 40 with respect to the Administrator”.

Subsec. (b). Pub. L. 89-343, § 4, struck out provisions which made the power of Administrator to make the delegations and determinations specified in section 252(a) of this title delegable only to Deputy Administrator or to chief official of any principal organizational unit of General Services Administration.

1958—Subsec. (b). Pub. L. 85-800, § 5(a), (b), substituted “(12)” for “(11)”, “(13)” for “(12)”, and “(11)” for “(10)” and struck out “and in section 255(a) of this title” before “shall not be delegable” in first sentence.

Subsec. (c). Pub. L. 85-800, § 5(a), (c), substituted “(11), (12), (13), or (14)” for “(10), (11), (12), or (13)”, and “255(c)” for “255(a)”.

## EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98-369 applicable with respect to any solicitation for bids or proposals issued after Mar. 31, 1985, see section 2751 of Pub. L. 98-369, set out as a note under section 251 of this title.

## EFFECTIVE DATE

Section effective July 1, 1949, see section 605 of act June 30, 1949, set out as a note under section 471 of Title 40, Public Buildings, Property, and Works.

## DEFINITIONS

The definitions in section 472 of Title 40, Public Buildings, Property, and Works, apply to this subchapter.

## CROSS REFERENCES

Agency head, definition of, see section 259 of this title.

Determinations and decisions on armed services contracts, see section 2310 of Title 10, Armed Forces.

**§ 258. Repealed. Pub. L. 103-355, title VII, § 7205, Oct. 13, 1994, 108 Stat. 3382**

Section, acts June 30, 1949, ch. 288, title III, § 308, 63 Stat. 397; July 18, 1984, Pub. L. 98-369, div. B, title VII, § 2714(a)(5), 98 Stat. 1185, related to application of certain laws to purchases or contracts.

**§ 259. Definitions**

As used in this subchapter—

(a) The term “agency head” shall mean the head or any assistant head of any executive agency, and may at the option of the Administrator include the chief official of any principal organizational unit of the General Services Administration.

(b) The term “competitive procedures” means procedures under which an executive agency enters into a contract pursuant to full and open competition. Such term also includes—

(1) procurement of architectural or engineering services conducted in accordance with title IX of this Act (40 U.S.C. 541 et seq.);

(2) the competitive selection of basic research proposals resulting from a general so-

licitation and the peer review or scientific review (as appropriate) of such proposals; and<sup>1</sup>

(3) the procedures established by the Administrator for the multiple awards schedule program of the General Services Administration if—

(A) participation in the program has been open to all responsible sources; and

(B) orders and contracts under such procedures result in the lowest overall cost alternative to meet the needs of the Government;

(4) procurements conducted in furtherance of section 644 of title 15 as long as all responsible business concerns that are entitled to submit offers for such procurements are permitted to compete; and

(5) a competitive selection of research proposals resulting from a general solicitation and peer review or scientific review (as appropriate) solicited pursuant to section 638 of title 15.

(c) The following terms have the meanings provided such terms in section 403 of this title:

- (1) The term “procurement”.
- (2) The term “procurement system”.
- (3) The term “standards”.
- (4) The term “full and open competition”.
- (5) The term “responsible source”.
- (6) The term “technical data”.
- (7) The term “major system”.
- (8) The term “item”.
- (9) The term “item of supply”.
- (10) The term “supplies”.
- (11) The term “commercial item”.
- (12) The term “nondevelopmental item”.
- (13) The term “commercial component”.
- (14) The term “component”.

(d) The term “simplified acquisition threshold” has the meaning provided that term in section 403 of this title, except that, in the case of any contract to be awarded and performed, or purchase to be made, outside the United States in support of a contingency operation, the term means an amount equal to two times the amount specified for that term in section 403 of this title.

(e) The term “Federal Acquisition Regulation” means the Federal Acquisition Regulation issued pursuant to section 421(c)(1) of this title.

(June 30, 1949, ch. 288, title III, §309, 63 Stat. 397; July 12, 1952, ch. 703, §1(h), 66 Stat. 593; July 18, 1984, Pub. L. 98-369, div. B, title VII, §2711(a)(3), 98 Stat. 1180; Oct. 30, 1984, Pub. L. 98-577, title V, §504(a)(3), (4), 98 Stat. 3086; Oct. 13, 1994, Pub. L. 103-355, title I, §1551, 108 Stat. 3298.)

#### REFERENCES IN TEXT

This Act, referred to in subsec. (b)(1), is the Federal Property and Administrative Services Act of 1949, approved June 30, 1949, ch. 288, 63 Stat. 377, as amended. Title IX of this Act is classified generally to subchapter VI (§541 et seq.) of chapter 10 of Title 40, Public Buildings, Property, and Works. For complete classification of this Act to the Code, see Short Title note set out under section 471 of Title 40 and Tables.

#### AMENDMENTS

1994—Subsecs. (c) to (e). Pub. L. 103-355 added subsecs. (c) to (e) and struck out former subsec. (c) which read

as follows: “The terms ‘full and open competition’, ‘responsible source’, ‘technical data’, ‘major system’, ‘item’, ‘item of supply’, and ‘supplies’ have the same meanings provided such terms in section 403 of this title.”

1984—Subsec. (b). Pub. L. 98-369 added subsec. (b).

Subsec. (b)(4), (5). Pub. L. 98-577, §504(a)(3), added pars. (4) and (5).

Subsec. (c). Pub. L. 98-577, §504(a)(4), substituted “‘responsible source’, ‘technical data’, ‘major system’, ‘item’, ‘item of supply’, and ‘supplies’ have” for “and ‘responsible source’ have” before “the meaning”.

Pub. L. 98-369 added subsec. (c).

1952—Subsec. (b). Act July 12, 1952, repealed subsec. (b) which defined “supplies”.

#### 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

Amendment by Pub. L. 98-369 applicable with respect to any solicitation for bids or proposals issued after Mar. 31, 1985, see section 2751 of Pub. L. 98-369, set out as a note under section 251 of this title.

#### EFFECTIVE DATE

Section effective July 1, 1949, see section 605 of act June 30, 1949, set out as a note under section 471 of Title 40, Public Buildings, Property, and Works.

#### SMALL BUSINESS ACT

Amendment to this section by section 2711(a)(3) of Pub. L. 98-369 not to affect or supersede the provisions of section 637(a) of Title 15, Commerce and Trade, see section 2711(c) of Pub. L. 98-369, set out as a note under section 253 of this title.

#### DEFINITIONS

The definitions in section 472 of Title 40, Public Buildings, Property, and Works, apply to this subchapter.

### § 260. Laws not applicable to contracts

Sections 5, 8, and 13 of this title shall not apply to the procurement of property or services made by an executive agency pursuant to this subchapter. Any provision of law which authorizes an executive agency (other than an executive agency which is exempted from the provisions of this subchapter by section 252(a) of this title), to procure any property or services without advertising or without regard to said section 5 of this title shall be construed to authorize the procurement of such property or services pursuant to the provisions of this subchapter relating to procedures other than sealed-bid procedures.

(June 30, 1949, ch. 288, title III, §310, 63 Stat. 397; July 12, 1952, ch. 703, §1(m), (n), 66 Stat. 594; Aug. 28, 1958, Pub. L. 85-800, §6, 72 Stat. 967; Nov. 8, 1965, Pub. L. 89-343, §5, 79 Stat. 1303; July 18, 1984, Pub. L. 98-369, div. B, title VII, §2714(a)(6), 98 Stat. 1185.)

#### AMENDMENTS

1984—Pub. L. 98-369 substituted “the provisions of this subchapter relating to procedures other than sealed-bid procedures” for “section 252(c)(15) of this title without regard to the advertising requirements of sections 252(c) and 253 of this title”.

1965—Pub. L. 89-343 substituted provisions making sections 5, 8, and 13 of this title inapplicable to the procurement of property or services made by an executive agency pursuant to this subchapter, and requiring any

<sup>1</sup> So in original. The word “and” probably should not appear.

provision of law which authorizes an executive agency (other than an executive agency which is exempted from the provisions of this subchapter by section 252(a) of this title) to procure any property or services without advertising or without regard to said section 5 of this title to be construed to authorize the procurement of such property or services pursuant to section 252(c)(15) of this title without regard to the advertising requirements of section 252(c) and 253 of this title, for provisions which made sections 5, 6, 6a, and 13 of this title inapplicable to the procurement of property or services by the General Services Administration, or within the scope of authority delegated by the Administrator to any other executive agency, and which required reference in any Act to the applicability of section 5 of this title to the procurement of property or services by the General Services Administration or any constituent organization thereof or any other executive agency delegated authority pursuant to section 252(a)(2) of this title to be deemed a reference to section 252(c) of this title.

1958—Subsec. (b). Pub. L. 85-800 inserted “or any other executive agency delegated authority pursuant to section 252(a)(2) of this title”.

1952—Act July 12, 1952, designated existing provisions as subsec. (a), added subsec. (b), and substituting “property” for “supplies” in subsec. (a).

#### EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98-369 applicable with respect to any solicitation for bids or proposals issued after Mar. 31, 1985, see section 2751 of Pub. L. 98-369, set out as a note under section 251 of this title.

#### EFFECTIVE DATE

Section effective July 1, 1949, see section 605 of act June 30, 1949, set out as a note under section 471 of Title 40, Public Buildings, Property, and Works.

#### CROSS REFERENCES

Laws inapplicable to armed services contracts, see section 2314 of Title 10, Armed Forces.

### § 261. Assignment and delegation of procurement functions and responsibilities

#### (a) In general

Except to the extent expressly prohibited by another provision of law, the head of an executive agency may delegate to any other officer or official of that agency, any power under this subchapter.

#### (b) Procurements for or with other agencies

Subject to subsection (a) of this section, to facilitate the procurement of property and services covered by this subchapter by each executive agency for any other executive agency, and to facilitate joint procurement by those executive agencies—

(1) the head of an executive agency may delegate functions and assign responsibilities relating to procurement to any officer or employee within such agency;

(2) the heads of two or more executive agencies may by agreement delegate procurement functions and assign procurement responsibilities, consistent with section 1535 of title 31 and regulations issued under section 1074 of the Federal Acquisition Streamlining Act of 1994, from one executive agency to another of those executive agencies or to an officer or civilian employee of another of those executive agencies; and

(3) the heads of two or more executive agencies may establish joint or combined offices to

exercise procurement functions and responsibilities.

(June 30, 1949, ch. 288, title III, §311, as added Oct. 13, 1994, Pub. L. 103-355, title I, §1552, 108 Stat. 3299.)

#### REFERENCES IN TEXT

Section 1074 of the Federal Acquisition Streamlining Act of 1994, referred to in subsec. (b)(2), is section 1074 of Pub. L. 103-355, which is set out as a note under section 1535 of Title 31, Money and Finance.

#### PRIOR PROVISIONS

A prior section 261, Pub. L. 101-509, title V, §532, Nov. 5, 1990, 104 Stat. 1470; Pub. L. 102-393, title V, §529, Oct. 6, 1992, 106 Stat. 1761, related to Internal Revenue Service procurement of expert services, prior to repeal by Pub. L. 103-355, §1055(c).

#### 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.

### § 262. Determinations and decisions

#### (a) Individual or class determinations and decisions authorized

Determinations and decisions required to be made under this subchapter by the head of an executive agency may be made for an individual purchase or contract or, except to the extent expressly prohibited by another provision of law, for a class of purchases or contracts. Such determinations and decisions are final.

#### (b) Written findings required

(1) Each determination under section 255(d) of this title or section 254d(c)(2)(B) of this title shall be based on a written finding by the person making the determination or decision. The finding shall set out facts and circumstances that support the determination or decision.

(2) Each finding referred to in paragraph (1) is final.

(3) The head of an executive agency shall maintain for a period of not less than 6 years a copy of each finding referred to in paragraph (1) that is made by a person in that executive agency. The period begins on the date of the determination or decision to which the finding relates.

(June 30, 1949, ch. 288, title III, §312, as added Oct. 13, 1994, Pub. L. 103-355, title I, §1553, 108 Stat. 3300.)

#### 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.

### § 263. Performance based management: acquisition programs

#### (a) Congressional policy

It is the policy of Congress that the head of each executive agency should achieve, on average, 90 percent of the cost and schedule goals established for major and nonmajor acquisition programs of the agency without reducing the performance or capabilities of the items being acquired.



**(b) Establishment of goals**

(1) The head of each executive agency shall approve or define the cost, performance, and schedule goals for major acquisition programs of the agency.

(2) The chief financial officer of an executive agency shall evaluate the cost goals proposed for each major acquisition program of the agency.

**(c) Identification of noncompliant programs**

Whenever it is necessary to do so in order to implement the policy set out in subsection (a) of this section, the head of an executive agency shall—

(1) determine whether there is a continuing need for programs that are significantly behind schedule, over budget, or not in compliance with performance or capability requirements; and

(2) identify suitable actions to be taken, including termination, with respect to such programs.

(June 30, 1949, ch. 288, title III, §313, as added Oct. 13, 1994, Pub. L. 103-355, title V, §5051(a), 108 Stat. 3351.)

**ENHANCED SYSTEM OF PERFORMANCE INCENTIVES**

Section 5051(c) of Pub. L. 103-355 provided that: “Within one year after the date of the enactment of this Act [Oct. 13, 1994], the Deputy Director for Management of the Office of Management and Budget, in consultation with appropriate officials in other departments and agencies of the Federal Government, shall, to the maximum extent consistent with applicable law—

“(1) establish policies and procedures for the heads of such departments and agencies to designate acquisition positions and manage employees (including the accession, education, training and career development of employees) in the designated acquisition positions; and

“(2) review the incentives and personnel actions available to the heads of departments and agencies of the Federal Government for encouraging excellence in the acquisition workforce of the Federal Government and provide an enhanced system of incentives for the encouragement of excellence in such workforce which—

“(A) relates 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 313(b) of the Federal Property and Administrative Services Act of 1949, as added by subsection (a) [41 U.S.C. 263(b)]); and

“(B) provides 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.”

**RECOMMENDED LEGISLATION**

Section 5051(d) of Pub. L. 103-355 provided that: “Not later than one year after the date of the enactment of this Act [Oct. 13, 1994], the Administrator for Federal Procurement Policy shall submit to Congress any recommended legislation that the Secretary considers necessary to carry out section 313 of the Federal Property and Administrative Services Act of 1949, as added by subsection (a) [41 U.S.C. 263], and otherwise to facilitate and enhance management of Federal Government acquisition programs and the acquisition workforce of the Federal Government on the basis of performance.”

**SECTION REFERRED TO IN OTHER SECTIONS**

This section is referred to in section 405 of this title.

**§ 264. Relationship of commercial item provisions to other provisions of law****(a) Applicability of subchapter**

Unless otherwise specifically provided, nothing in this section, section 264a of this title, or section 264b of this title shall be construed as providing that any other provision of this subchapter relating to procurement is inapplicable to the procurement of commercial items.

**(b) List of laws inapplicable to contracts for acquisition of commercial items**

No contract for the procurement of a commercial item entered into by the head of an executive agency shall be subject to any law properly listed in the Federal Acquisition Regulation (pursuant to section 430 of this title).

(June 30, 1949, ch. 288, title III, §314, as added Oct. 13, 1994, Pub. L. 103-355, title VIII, §8201, 108 Stat. 3394.)

**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.

**REGULATIONS**

Section 8002 of Pub. L. 103-355 provided that:

“(a) IN GENERAL.—The Federal Acquisition Regulation shall provide regulations to implement paragraphs (12) through (15) of section 4 of the Office of Federal Procurement Policy Act [41 U.S.C. 403(12)-(15)], chapter 140 of title 10, United States Code, and sections 314 through 314B of the Federal Property and Administrative Services Act of 1949 [41 U.S.C. 264-264b].

“(b) CONTRACT CLAUSES.—(1) The regulations prescribed under subsection (a) shall contain a list of contract clauses to be included in contracts for the acquisition of commercial end items. Such list shall, to the maximum extent practicable, include only those contract clauses—

“(A) that are required to implement provisions of law or executive orders applicable to acquisitions of commercial items or commercial components, as the case may be; or

“(B) that are determined to be consistent with standard commercial practice.

“(2) Such regulations shall provide that a prime contractor shall not be required by the Federal Government to apply to any of its divisions, subsidiaries, affiliates, subcontractors, or suppliers that are furnishing commercial items any contract clause except those—

“(A) that are required to implement provisions of law or executive orders applicable to subcontractors furnishing commercial items or commercial components, as the case may be; or

“(B) that are determined to be consistent with standard commercial practice.

“(3) To the maximum extent practicable, only the contract clauses listed pursuant to paragraph (1) may be used in a contract, and only the contract clauses referred to in paragraph (2) may be required to be used in a subcontract, for the acquisition of commercial items or commercial components by or for an executive agency.

“(4) The Federal Acquisition Regulation shall provide standards and procedures for waiving the use of contract clauses required pursuant to paragraph (1), other than those required by law, including standards for determining the cases in which a waiver is appropriate.

“(5) For purposes of this subsection, the term ‘subcontract’ includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractor or subcontractor.

“(c) MARKET ACCEPTANCE.—(1) The Federal Acquisition Regulation shall provide that under appropriate conditions the head of an executive agency may require offerors to demonstrate that the items offered—

“(A) have either—

“(i) achieved commercial market acceptance; or

“(ii) been satisfactorily supplied to an executive agency under current or recent contracts for the same or similar requirements; and

“(B) otherwise meet the item description, specifications, or other criteria prescribed in the public notice and solicitation relating to the contract.

“(2) The Federal Acquisition Regulation shall provide guidance to ensure that the criteria for determining commercial market acceptance include the consideration of—

“(A) the minimum needs of the executive agency concerned; and

“(B) the entire relevant commercial market, including small businesses.

“(d) USE OF FIRM, FIXED PRICE CONTRACTS.—The Federal Acquisition Regulation shall include, for acquisitions of commercial items—

“(1) a requirement that firm, fixed price contracts or fixed price with economic price adjustment contracts be used to the maximum extent practicable; and

“(2) a prohibition on use of cost type contracts.

“(e) CONTRACT QUALITY REQUIREMENTS.—The regulations prescribed under subsection (a) shall include provisions that—

“(1) permit, to the maximum extent practicable, a contractor under a commercial items acquisition to use the existing quality assurance system of the contractor as a substitute for compliance with an otherwise applicable requirement for the Government to inspect or test the commercial items before the contractor’s tender of those items for acceptance by the Government;

“(2) require that, to the maximum extent practicable, the executive agency take advantage of warranties (including extended warranties) offered by offerors of commercial items and use such warranties for the repair and replacement of commercial items; and

“(3) set forth guidance regarding the use of past performance of commercial items and sources as a factor in contract award decisions.

“(f) DEFENSE CONTRACT CLAUSES.—(1) Section 824(b) of the National Defense Authorization Act for Fiscal Years 1990 and 1991 (Public Law 101-189; [former] 10 U.S.C. 2325 note) shall cease to be effective on the date on which the regulations implementing this section become effective [Oct. 1, 1995, see 60 F.R. 48231, Sept. 18, 1995].

“(2) Notwithstanding subsection (b), a contract of the Department of Defense entered into before the date on which section 824(b) ceases to be effective under paragraph (1), and a subcontract entered into before such date under such a contract, may include clauses developed pursuant to paragraphs (2) and (3) of section 824(b) of the National Defense Authorization Act for Fiscal Years 1990 and 1991 (Public Law 101-189; [former] 10 U.S.C. 2325 note).”

PROVISIONS NOT AFFECTED BY TITLE VIII OF PUB. L.  
103-355

Section 8304 of title VIII of Pub. L. 103-355 provided that: “Nothing in this title [enacting this section, sections 264a, 264b, and 430 of this title, sections 2375 to 2377 of Title 10, Armed Forces, and section 334 of Title 40, Public Buildings, Property, and Works, amending sections 57, 58, 253g, 254, 403, 416, 418, 422, 423, and 701 of this title, sections 2306, 2320, 2321, 2384, 2393, 2397, 2397b, 2397c, 2402, 2408, and 2410b of Title 10, section 1368 of Title 33, Navigation and Navigable Waters, and section 40118 of Title 49, Transportation, repealing section 424 of this title and section 2325 of Title 10, enacting provisions set out as notes under this section, sections 264b and 430 of this title, and section 7606 of Title 42, The

Public Health and Welfare, and amending provisions set out as notes under sections 2301 and 2327 of Title 10] shall be construed as modifying or superseding, or as intended to impair or restrict, authorities or responsibilities under—

“(1) 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) the Brooks Automatic Data Processing Act (section 111 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 759));

“(3) Brooks Architect-Engineers Act (title IX of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 541 et seq.));

“(4) subsections (a) and (d) of section 8 of the Small Business Act (15 U.S.C. 637(a) and (d)); or

“(5) the Javits-Wagner-O’Day Act (41 U.S.C. 46-48c).”

### § 264a. Definitions

As used in this subchapter, the terms “commercial item”, “nondevelopmental item”, “component”, and “commercial component” have the meanings provided in section 403 of this title.

(June 30, 1949, ch. 288, title III, §314A, as added Oct. 13, 1994, Pub. L. 103-355, title VIII, §8202, 108 Stat. 3394.)

#### 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 REFERRED TO IN OTHER SECTIONS

This section is referred to in section 264 of this title.

### § 264b. Preference for acquisition of commercial items

#### (a) Preference

The head of each executive agency shall ensure that, to the maximum extent practicable—

(1) requirements of the executive agency with respect to a procurement of supplies or services are stated in terms of—

(A) functions to be performed;

(B) performance required; or

(C) essential physical characteristics;

(2) such requirements are defined so that commercial items or, to the extent that commercial items suitable to meet the executive agency’s needs are not available, nondevelopmental items other than commercial items, may be procured to fulfill such requirements; and

(3) offerors of commercial items and nondevelopmental items other than commercial items are provided an opportunity to compete in any procurement to fill such requirements.

#### (b) Implementation

The head of each executive agency shall ensure that procurement officials in that executive agency, to the maximum extent practicable—

(1) acquire commercial items or nondevelopmental items other than commercial items to meet the needs of the executive agency;

(2) require prime contractors and subcontractors at all levels under the executive agency contracts to incorporate commercial

items or nondevelopmental items other than commercial items as components of items supplied to the executive agency;

(3) modify requirements in appropriate cases to ensure that the requirements can be met by commercial items or, to the extent that commercial items suitable to meet the executive agency's needs are not available, nondevelopmental items other than commercial items;

(4) state specifications in terms that enable and encourage bidders and offerors to supply commercial items or, to the extent that commercial items suitable to meet the executive agency's needs are not available, nondevelopmental items other than commercial items in response to the executive agency solicitations;

(5) revise the executive agency's procurement policies, practices, and procedures not required by law to reduce any impediments in those policies, practices, and procedures to the acquisition of commercial items; and

(6) require training of appropriate personnel in the acquisition of commercial items.

**(c) Preliminary market research**

(1) The head of an executive agency shall conduct market research appropriate to the circumstances—

(A) before developing new specifications for a procurement by that executive agency; and

(B) before soliciting bids or proposals for a contract in excess of the simplified acquisition threshold.

(2) The head of an executive agency shall use the results of market research to determine whether there are commercial items or, to the extent that commercial items suitable to meet the executive agency's needs are not available, nondevelopmental items other than commercial items available that—

(A) meet the executive agency's requirements;

(B) could be modified to meet the executive agency's requirements; or

(C) could meet the executive agency's requirements if those requirements were modified to a reasonable extent.

(3) In conducting market research, the head of an executive agency should not require potential sources to submit more than the minimum information that is necessary to make the determinations required in paragraph (2).

(June 30, 1949, ch. 288, title III, §314B, as added Oct. 13, 1994, Pub. L. 103-355, title VIII, §8203, 108 Stat. 3394.)

**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.

**COMPTROLLER GENERAL REVIEW OF FEDERAL GOVERNMENT USE OF MARKET RESEARCH**

Section 8305 of Pub. L. 103-355 provided that:

“(a) **REPORT REQUIRED.**—Not later than 2 years after the date of the enactment of this Act [Oct. 13, 1994], the Comptroller General of the United States shall submit to the Congress a report on the use of market research by the Federal Government in support of the procurement of commercial items and nondevelopmental items.

“(b) **CONTENT OF REPORT.**—The report shall include the following:

“(1) A review of existing Federal Government market research efforts to gather data concerning commercial and other nondevelopmental items.

“(2) A review of the feasibility of creating a Government-wide data base for storing, retrieving, and analyzing market data, including use of existing Federal Government resources.

“(3) Any recommendations for changes in law or regulations that the Comptroller General considers appropriate.”

**SECTION REFERRED TO IN OTHER SECTIONS**

This section is referred to in section 264 of this title.

**§ 265. Contractor employees: protection from reprisal for disclosure of certain information**

**(a) Prohibition of reprisals**

An employee of a contractor may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a Member of Congress or an authorized official of an executive agency or the Department of Justice information relating to a substantial violation of law related to a contract (including the competition for or negotiation of a contract).

**(b) Investigation of complaints**

A person who believes that the person has been subjected to a reprisal prohibited by subsection (a) of this section may submit a complaint to the Inspector General of the executive agency. Unless the Inspector General determines that the complaint is frivolous, the Inspector General shall investigate the complaint and, upon completion of such investigation, submit a report of the findings of the investigation to the person, the contractor concerned, and the head of the agency. In the case of an executive agency that does not have an inspector general, the duties of the inspector general under this section shall be performed by an official designated by the head of the executive agency.

**(c) Remedy and enforcement authority**

(1) If the head of an executive agency determines that a contractor has subjected a person to a reprisal prohibited by subsection (a) of this section, the head of the executive agency may take one or more of the following actions:

(A) Order the contractor to take affirmative action to abate the reprisal.

(B) Order the contractor to reinstate the person to the position that the person held before the reprisal, together with the compensation (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.

(C) Order the contractor to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal, as determined by the head of the executive agency.

(2) Whenever a person fails to comply with an order issued under paragraph (1), the head of the executive agency shall file an action for enforce-

ment of such order in the United States district court for a district in which the reprisal was found to have occurred. In any action brought under this paragraph, the court may grant appropriate relief, including injunctive relief and compensatory and exemplary damages.

(3) Any person adversely affected or aggrieved by an order issued under paragraph (1) may obtain review of the order's conformance with this subsection, and any regulations issued to carry out this section, in the United States court of appeals for a circuit in which the reprisal is alleged in the order to have occurred. No petition seeking such review may be filed more than 60 days after issuance of the order by the head of the agency. Review shall conform to chapter 7 of title 5.

**(d) Construction**

Nothing in this section may be construed to authorize the discharge of, demotion of, or discrimination against an employee for a disclosure other than a disclosure protected by subsection (a) of this section or to modify or derogate from a right or remedy otherwise available to the employee.

**(e) Definitions**

In this section:

(1) The term "contract" means a contract awarded by the head of an executive agency.

(2) The term "contractor" means a person awarded a contract with an executive agency.

(3) The term "Inspector General" means an Inspector General appointed under the Inspector General Act of 1978.

(June 30, 1949, ch. 288, title III, §315, as added Oct. 13, 1994, Pub. L. 103-355, title VI, §6006, 108 Stat. 3365.)

REFERENCES IN TEXT

The Inspector General Act of 1978, referred to in subsec. (e)(3), 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.

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.

**§ 266. Merit-based award of grants for research and development**

**(a) Policy**

It is the policy of Congress that an executive agency should not be required by legislation to award a new grant for research, development, test, or evaluation to a non-Federal Government entity. It is further the policy of Congress that any program, project, or technology identified in legislation be awarded through merit-based selection procedures.

**(b) Rule of construction**

A provision of law may not be construed as requiring a new grant to be awarded to a specified non-Federal Government entity unless that provision of law—

(1) specifically refers to this subsection;

(2) specifically identifies the particular non-Federal Government entity involved; and

(3) specifically states that the award to that entity is required by such provision of law in contravention of the policy set forth in subsection (a) of this section.

**(c) New grant defined**

For purposes of this section, a grant is a new grant unless the work provided for in the grant is a continuation of the work performed by the specified entity under a preceding grant.

**(d) Inapplicability to certain grants**

This section shall not apply with respect to any grant that calls upon the National Academy of Sciences to investigate, examine, or experiment upon any subject of science or art of significance to an executive agency and to report on such matters to Congress or any agency of the Federal Government.

(June 30, 1949, ch. 288, title III, §316, as added Oct. 13, 1994, Pub. L. 103-355, title VII, §7203(b)(2), 108 Stat. 3381.)

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.

SUBCHAPTER V—FOREIGN EXCESS PROPERTY

**§§ 271 to 274. Transferred**

CODIFICATION

Section 271, act June 30, 1949, ch. 288, title IV, §401, 63 Stat. 397, which related to disposal of foreign excess property, was transferred to section 511 of Title 40, Public Buildings, Property, and Works.

Section 272, act June 30, 1949, ch. 288, title IV, §402, 63 Stat. 398, which related to methods and terms of disposal, was transferred to section 512 of Title 40.

Section 273, act June 30, 1949, ch. 288, title IV, §403, 63 Stat. 398, which related to proceeds from disposals, was transferred to section 513 of Title 40.

Section 274, act June 30, 1949, ch. 288, title IV, §404, 63 Stat. 398, which related to general provisions, was transferred to section 514 of Title 40.

SUBCHAPTER VI—FEDERAL RECORD MANAGEMENT

**§§ 281 to 291. Transferred**

CODIFICATION

Section 281, acts June 30, 1949, ch. 288, title V, §502; Sept. 5, 1950, ch. 849, §6(d), 64 Stat. 583, which related to custody and control of property, was transferred to section 392 of former Title 44, Public Printing and Documents.

Section 282, acts June 30, 1949, ch. 288, title V, §503; Sept. 5, 1950, ch. 849, §6(d), 64 Stat. 583, which related to National Historical Publications Commission, was transferred to section 393 of former Title 44.

Section 283, acts June 30, 1949, ch. 288, title V, §504; Sept. 5, 1950, ch. 849, §6(d), 64 Stat. 583, which related to establishment of Federal Records Council, was transferred to section 394 of former Title 44.

Section 284, acts June 30, 1949, ch. 288, title V, §505; Sept. 5, 1950, ch. 849, §6(d), 64 Stat. 583, which related to records management by Administrator, was transferred to section 395 of former Title 44.

Section 285, acts June 30, 1949, ch. 288, title V, §506; Sept. 5, 1950, ch. 849, §6(d), 64 Stat. 583, which related to records management by agency heads, was transferred to section 396 of former Title 44.

Section 286, acts June 30, 1949, ch. 288, title V, §507; Sept. 5, 1950, ch. 849, §6(d), 64 Stat. 583, which related to Archival administration, was transferred to section 397 of former Title 44.

Section 287, acts June 30, 1949, ch. 288, title V, §508; Sept. 5, 1950, ch. 849, §6(d), 64 Stat. 583, which related to reports, was transferred to section 398 of former Title 44.

Section 288, acts June 30, 1949, ch. 288, title V, §509; Sept. 5, 1950, ch. 849, §6(d), 64 Stat. 583, which related to legal status of reproductions; official seal; fees for copies and reproductions, was transferred to section 399 of former Title 44.

Section 289, acts June 30, 1949, ch. 288, title V, §510; Sept. 5, 1950, ch. 849, §6(d), 64 Stat. 583, which related to limitation on liability, was transferred to section 400 of former Title 44.

Section 290, acts June 30, 1949, ch. 288, title V, §511; Sept. 5, 1950, ch. 849, §6(d), 64 Stat. 583, which related to definitions, was transferred to section 401 of former Title 44.

Section 291, act Aug. 2, 1946, ch. 753, title I, §140, 60 Stat. 833, which related to transfer of records of Congress, was transferred to section 402 of former Title 44.

Sections 392 to 402 of former Title 44 are covered by chapter 21 (§2101 et seq.), chapter 25 (§2501 et seq.), chapter 27 (§2701 et seq.), chapter 29 (§2901 et seq.), and chapter 31 (§3101 et seq.) of Title 44, Public Printing and Documents.

#### CHAPTER 5—JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS

- |      |   |
|------|---|
| Sec. |   |
| 321. | Limitation on pleading contract provisions relating to finality; standards of review. |
| 322. | Contract provisions making decisions final on questions of law.                       |

#### § 321. Limitation on pleading contract provisions relating to finality; standards of review

No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however*, That any such decision shall be final and conclusive unless the same is fraudulent<sup>1</sup> or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

(May 11, 1954, ch. 199, §1, 68 Stat. 81.)

#### AGENCY ACTIONS GENERALLY, JUDICIAL REVIEW

Judicial review of agency actions generally, see section 701 et seq. of Title 5, Government Organization and Employees.

#### § 322. Contract provisions making decisions final on questions of law

No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.

(May 11, 1954, ch. 199, §2, 68 Stat. 81.)

<sup>1</sup> So in original. Probably should be "fraudulent".

#### CHAPTER 6—SERVICE CONTRACT LABOR STANDARDS

- |      |   |
|------|---|
| Sec. |   |
| 351. | Required contract provisions; minimum wages.  |
| 352. | Violations. <ul style="list-style-type: none"> <li>(a) Liability of responsible party; withholding payments due on contract; payment of underpaid employees from withheld payments.</li> <li>(b) Enforcement of section.</li> <li>(c) Cancellation of contract; contracts for completion of original contract; liability of original contractor for additional cost.</li> </ul> |
| 353. | Law governing authority of Secretary. <ul style="list-style-type: none"> <li>(a) Enforcement of chapter.</li> <li>(b) Limitations and regulations allowing variations, tolerances, and exemptions.</li> <li>(c) Predecessor contracts; employees' wages and fringe benefits.</li> <li>(d) Duration of contract.</li> </ul>  |
| 354. | List of violators; prohibition of contract award to firms appearing on list; actions to recover underpayments; payment of sums recovered.   |
| 355. | Exclusion of fringe benefit payments in determining overtime pay.   |
| 356. | Exemptions.   |
| 357. | Definitions.  |
| 358. | Wage and fringe benefit determinations of Secretary.  |

#### CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in title 25 section 450j; title 29 sections 206, 653; title 42 section 2297b-11.

#### § 351. Required contract provisions; minimum wages

(a) Every contract (and any bid specification therefor) entered into by the United States or the District of Columbia in excess of \$2,500, except as provided in section 356 of this title, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States through the use of service employees, shall contain the following:

(1) A provision specifying the minimum monetary wages to be paid the various classes of service employees in the performance of the contract or any subcontract thereunder, as determined by the Secretary, or his authorized representative, in accordance with prevailing rates for such employees in the locality, or, where a collective-bargaining agreement covers any such service employees, in accordance with the rates for such employees provided for in such agreement, including prospective wage increases provided for in such agreement as a result of arm's length negotiations. In no case shall such wages be lower than the minimum specified in subsection (b) of this section.

(2) A provision specifying the fringe benefits to be furnished in the various classes of service employees, engaged in the performance of the contract or any subcontract thereunder, as determined by the Secretary or his authorized representative to be prevailing for such employees in the locality, or, where a collective-bargaining agreement covers any such service employees, to be provided for in such agreement, including prospective fringe benefits increases provided for in such agreement as a re-

sult of arm's-length negotiations. Such fringe benefits shall include medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, unemployment benefits, life insurance, disability and sickness insurance, accident insurance, vacation and holiday pay, costs of apprenticeship or other similar programs and other bona fide fringe benefits not otherwise required by Federal, State, or local law to be provided by the contractor or subcontractor. The obligation under this subparagraph may be discharged by furnishing any equivalent combinations of fringe benefits or by making equivalent or differential payments in cash under rules and regulations established by the Secretary.

(3) A provision that no part of the services covered by this chapter will be performed in buildings or surroundings or under working conditions, provided by or under the control or supervision of the contractor or any subcontractor, which are unsanitary or hazardous or dangerous to the health or safety of service employees engaged to furnish the services.

(4) A provision that on the date a service employee commences work on a contract to which this chapter applies, the contractor or subcontractor will deliver to the employee a notice of the compensation required under paragraphs (1) and (2) of this subsection, on a form prepared by the Federal agency, or will post a notice of the required compensation in a prominent place at the worksite.

(5) A statement of the rates that would be paid by the Federal agency to the various classes of service employees if section 5341 or section 5332 of title 5 were applicable to them. The Secretary shall give due consideration to such rates in making the wage and fringe benefit determinations specified in this section.

(b)(1) No contractor who enters into any contract with the Federal Government the principal purpose of which is to furnish services through the use of service employees and no subcontractor thereunder shall pay any of his employees engaged in performing work on such contracts less than the minimum wage specified under section 206(a)(1) of title 29.

(2) The provisions of sections 352 to 354 of this title shall be applicable to violations of this subsection.

(Pub. L. 89-286, §2, Oct. 22, 1965, 79 Stat. 1034; Pub. L. 92-473, §§1, 2, Oct. 9, 1972, 86 Stat. 789; Pub. L. 94-489, §§1, 2, Oct. 13, 1976, 90 Stat. 2358.)

#### AMENDMENTS

1976—Subsec. (a). Pub. L. 94-489, §1(a), struck out “as defined herein” after “use of service employees”.

Subsec. (a)(5). Pub. L. 94-489, §2, inserted “or section 5332” after “section 5341”.

Subsec. (b)(1). Pub. L. 94-489, §1(b), struck out “as defined herein” after “use of service employees”.

1972—Subsec. (a)(1). Pub. L. 92-473, §1(a), provided for minimum monetary wages to be paid service employees where collective-bargaining agreement covers any such service employees in accordance with the rates for such employees provided for in such agreement, including prospective wage increases provided for in such agreement as a result of arm's-length negotiations.

Subsec. (a)(2). Pub. L. 92-473, §1(b), provided for fringe benefits to be furnished service employees where collec-

tive-bargaining agreement covers any such service employees, to be provided for in such agreement, including prospective fringe increases provided for in such agreement as a result of arm's-length negotiations.

Subsec. (a)(5). Pub. L. 92-473, §2, added par. (5).

#### EFFECTIVE DATE

Section 9 of Pub. L. 89-286 provided that: “This Act [enacting this chapter] shall apply to all contracts entered into pursuant to negotiations concluded or invitations for bids issued on or after ninety days from the date of enactment of this Act [Oct. 22, 1965].”

#### SHORT TITLE

Section 1 of Pub. L. 89-286 provided that: “This Act [enacting this chapter] may be cited as the ‘Service Contract Act of 1965’.”

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 352, 353, 357, 358 of this title; title 38 section 1720.

### § 352. Violations

#### (a) Liability of responsible party; withholding payments due on contract; payment of underpaid employees from withheld payments

Any violation of any of the contract stipulations required by section 351(a)(1) or (2) or of section 351(b) of this title shall render the party responsible therefor liable for a sum equal to the amount of any deductions, rebates, refunds, or underpayment of compensation due to any employee engaged in the performance of such contract. So much of the accrued payment due on the contract or any other contract between the same contractor and the Federal Government may be withheld as is necessary to pay such employees. Such withheld sums shall be held in a deposit fund. On order of the Secretary, any compensation which the head of the Federal agency or the Secretary has found to be due pursuant to this chapter shall be paid directly to the underpaid employees from any accrued payments withheld under this chapter.

#### (b) Enforcement of section

In accordance with regulations prescribed pursuant to section 353 of this title, the Federal agency head or the Secretary is hereby authorized to carry out the provisions of this section.

#### (c) Cancellation of contract; contracts for completion of original contract; liability of original contractor for additional cost

In addition, when a violation is found of any contract stipulation, the contract is subject upon written notice to cancellation by the contracting agency. Whereupon, the United States may enter into other contracts or arrangements for the completion of the original contract, charging any additional cost to the original contractor.

(Pub. L. 89-286, §3, Oct. 22, 1965, 79 Stat. 1035.)

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 351 of this title.

### § 353. Law governing authority of Secretary

#### (a) Enforcement of chapter

Sections 38 and 39 of this title shall govern the Secretary's authority to enforce this chapter, make rules, regulations, issue orders, hold hear-

ings, and make decisions based upon findings of fact, and take other appropriate action hereunder.

**(b) Limitations and regulations allowing variations, tolerances, and exemptions**

The Secretary may provide such reasonable limitations and may make such rules and regulations allowing reasonable variation, tolerances, and exemptions to and from any or all provisions of this chapter (other than section 358 of this title), but only in special circumstances where he determines that such limitation, variation, tolerance, or exemption is necessary and proper in the public interest or to avoid the serious impairment of government business, and is in accord with the remedial purpose of this chapter to protect prevailing labor standards.

**(c) Predecessor contracts; employees' wages and fringe benefits**

No contractor or subcontractor under a contract, which succeeds a contract subject to this chapter and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm's-length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract: *Provided*, That in any of the foregoing circumstances such obligations shall not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality.

**(d) Duration of contract**

Subject to limitations in annual appropriation Acts but notwithstanding any other provision of law, contracts to which this chapter applies may, if authorized by the Secretary, be for any term of years not exceeding five, if each such contract provides for the periodic adjustment of wages and fringe benefits pursuant to future determinations, issued in the manner prescribed in section 351 of this title no less often than once every two years during the term of the contract, covering the various classes of service employees.

(Pub. L. 89-286, §4, Oct. 22, 1965, 79 Stat. 1035; Pub. L. 92-473, §3, Oct. 9, 1972, 86 Stat. 789.)

AMENDMENTS

1972—Subsec. (b). Pub. L. 92-473, §3(a), excluded section 358 of this title from being subject to Secretary's authority to provide limitations and to make regulations respecting application of provisions of this chapter, substituted "but only in special circumstances where he determines that such limitation, variation, tolerance, or exemption is necessary and proper" for "as he may find necessary and proper", and authorized administrative action in accord with the remedial purpose of this chapter to protect prevailing labor standards.

Subsecs. (c), (d). Pub. L. 92-473, §3(b), added subsecs. (c) and (d).

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 351, 352 of this title.

**§ 354. List of violators; prohibition of contract award to firms appearing on list; actions to recover underpayments; payment of sums recovered**

(a) The Comptroller General is directed to distribute a list to all agencies of the Government giving the names of persons or firms that the Federal agencies or the Secretary have found to have violated this chapter. Unless the Secretary otherwise recommends because of unusual circumstances, no contract of the United States shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership, or association in which such persons or firms have a substantial interest until three years have elapsed from the date of publication of the list containing the name of such persons or firms. Where the Secretary does not otherwise recommend because of unusual circumstances, he shall, not later than ninety days after a hearing examiner has made a finding of a violation of this chapter, forward to the Comptroller General the name of the individual or firm found to have violated the provisions of this chapter.

(b) If the accrued payments withheld under the terms of the contract are insufficient to reimburse all service employees with respect to whom there has been a failure to pay the compensation required pursuant to this chapter, the United States may bring action against the contractor, subcontractor, or any sureties in any court of competent jurisdiction to recover the remaining amount of underpayments. Any sums thus recovered by the United States shall be held in the deposit fund and shall be paid, on order of the Secretary, directly to the underpaid employee or employees. Any sum not paid to an employee because of inability to do so within three years shall be covered into the Treasury of the United States as miscellaneous receipts.

(Pub. L. 89-286, §5, Oct. 22, 1965, 79 Stat. 1035; Pub. L. 92-473, §4, Oct. 9, 1972, 86 Stat. 790.)

AMENDMENTS

1972—Subsec. (a). Pub. L. 92-473 authorized award of contracts to violators because of unusual circumstances and required the Secretary to forward names of violators to Comptroller General within ninety days of hearing examiner's finding of a violation where the Secretary does not recommend awards because of unusual circumstances.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 351 of this title.

**§ 355. Exclusion of fringe benefit payments in determining overtime pay**

In determining any overtime pay to which such service employees are entitled under any Federal law, the regular or basic hourly rate of pay of such an employee shall not include any fringe benefit payments computed hereunder which are excluded from the regular rate under the Fair Labor Standards Act [29 U.S.C. 201 et seq.] by provisions of section 7(d) thereof [29 U.S.C. 207(d)].

(Pub. L. 89-286, §6, Oct. 22, 1965, 79 Stat. 1035.)

REFERENCES IN TEXT

The Fair Labor Standards Act, referred to in text, is act June 25, 1938, ch. 676, 52 Stat. 1060, as amended,

known as the Fair Labor Standards Act of 1938, which is classified generally to chapter 8 (§201 et seq.) of Title 29, Labor. For complete classification of this Act to the Code, see section 201 of Title 29 and Tables.

### § 356. Exemptions

This chapter shall not apply to—

(1) any contract of the United States or District of Columbia for construction, alteration and/or repair, including painting and decorating of public buildings or public works;

(2) any work required to be done in accordance with the provisions of the Walsh-Healey Public Contracts Act [41 U.S.C. 35 et seq.];

(3) any contract for the carriage of freight or personnel by vessel, airplane, bus, truck, express, railway line or oil or gas pipeline where published tariff rates are in effect;

(4) any contract for the furnishing of services by radio, telephone, telegraph, or cable companies, subject to the Communications Act of 1934 [47 U.S.C. 151 et seq.];

(5) any contract for public utility services, including electric light and power, water, steam, and gas;

(6) any employment contract providing for direct services to a Federal agency by an individual or individuals; and

(7) any contract with the United States Postal Service, the principal purpose of which is the operation of postal contract stations.

(Pub. L. 89-286, §7, Oct. 22, 1965, 79 Stat. 1035; Pub. L. 91-375, §§4(a), 6(o), Aug. 12, 1970, 84 Stat. 773, 783.)

#### REFERENCES IN TEXT

The Walsh-Healey Public Contracts Act, referred to in par. (2), probably means act June 30, 1936, ch. 881, 49 Stat. 2036, as amended, known as the Walsh-Healey Act, which is classified generally to sections 35 to 45 of this title. For complete classification of this Act to the Code, see Short Title note under section 35 of this title and Tables. See also section 262 of Title 29, Labor.

The Communications Act of 1934, as amended, referred to in par. (4), is act June 19, 1934, ch. 652, 48 Stat. 1064, as amended, which is classified principally to chapter 5 (§151 et seq.) of Title 47, Telegraphs, Telephones, 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.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 351, 357 of this title.

### § 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 351<sup>1</sup> 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

<sup>1</sup> So in original. Probably should be section "351(a)".



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".

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 353 of this title.

### CHAPTER 7—OFFICE OF FEDERAL PROCUREMENT POLICY

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CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in sections 405a, 405b, 601, 607, 705 of this title; title 25 sections 450j, 458cc; title 40 sections 474, 481, 487.

§ 401. Declaration of policy

It is the policy of the United States Government to promote economy, efficiency and effectiveness in the procurement of property and services by the executive branch of the Federal Government by—

- (1) promoting full and open competition;
- (2) establishing policies, procedures, and practices which will provide the Government with property and services of the requisite quality, within the time needed, at the lowest reasonable cost;
- (3) promoting the development of simplified uniform procurement processes;
- (4) promoting the participation of small business concerns;
- (5) supporting the continuing development of a competent, professional work force;
- (6) eliminating fraud and waste in the procurement process;
- (7) eliminating redundant administrative requirements placed on contractor and Federal procurement officials;
- (8) promoting fair dealings and equitable relationships with the private sector;
- (9) ensuring that payment is made in a timely manner and only for value received;
- (10) requiring, to the extent practicable, the use of commercial products to meet the Government's needs;
- (11) requiring that personal services are obtained in accordance with applicable personnel procedures and not by contract;
- (12) ensuring the development of procurement policies that will accommodate emergencies and wartime as well as peacetime requirements;
- (13) promoting, whenever feasible, the use of specifications which describe needs in terms of functions to be performed or the performance required; and
- (14) establishing policies and procedures that encourage the consideration of the offerors' past performance in the selection of contractors.

(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.)

## AMENDMENTS

1994—Par. (14). Pub. L. 103-355 added par. (14).

1988—Pub. L. 100-679 substituted “the United States Government” for “the Congress”.

1983—Pub. L. 98-191 amended section generally, retaining language from former provisions stating congressional policy to promote economy, efficiency, and effectiveness in the procurement of property and services, while emphasizing the use of effective competition, the development of simplified procurement processes and small business participation.

1979—Pub. L. 96-83 added cl. (1), redesignated former cl. (1) as (2) and struck out provisions relating to utilization of competitive procurement methods, redesignated former cl. (2) as (3) and inserted provisions relating to elimination of fraud and waste, and redesignated former cls. (3) to (6) as (4) to (7), (7) to (10) as (9) to (12), and (11) as (8).

## 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

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 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 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 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 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 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 Related 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.

## TERMINATION OF WAGE AND PRICE REGULATORY PROGRAM

For provisions relating to the termination of the wage and price regulatory program, see Ex. Ord. No. 12288, Jan. 29, 1981, 46 F.R. 10135, set out as a note under former section 1904 of Title 12, Banks and Banking.

## 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 Administrator 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.

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 Ac-

quisition 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.

EX. ORD. NO. 12969. FEDERAL ACQUISITION AND COMMUNITY RIGHT-TO-KNOW

Ex. Ord. No. 12969, Aug. 8, 1995, 60 F.R. 40989, provided: The Emergency Planning and Community Right-to-Know Act of 1986 (42 U.S.C. 11001-11050) ("EPCRA") and the Pollution Prevention Act of 1990 (42 U.S.C. 13101-13109) ("PPA") established programs to protect public health and the environment by providing the public with important information on the toxic chemicals being released into the air, land, and water in their communities by manufacturing facilities.

The Toxics Release Inventory ("TRI") established pursuant to section 313(j) of EPCRA, 42 U.S.C. 11023(j), based on information required to be reported under section 313 of EPCRA and section 6607 of PPA, 42 U.S.C. 13106, provides the public, industry, and Federal, State, and local governments with a basic tool for making risk-based decisions about management and control of toxic chemicals, that can have significant adverse effects on human health and the environment. TRI data allow the public, industry, and government to gauge the progress of industry and government efforts to reduce toxic chemical wastes.

Sharing vital TRI information with the public has provided a strong incentive for reduction in the generation, and, ultimately, release into the environment, of toxic chemicals. Since the inception of the TRI pro-

gram, reported releases to the environment under TRI have decreased significantly.

The efficiency of the Federal Government is served when it purchases high quality supplies and services that have been produced with a minimum impact on the public health and environment of communities surrounding government contractors. Savings associated with reduced raw materials usage, reduced use of costly, inefficient end-of-pipeline pollution controls, and reduced liability and remediation costs from worker and community claims all serve to increase the economic and efficient provision of essential supplies and services to the government. As a result of TRI reporting, many manufacturers have learned of previously unrecognized significant efficiencies and cost savings in their production processes.

The Federal Government's receipt of timely and quality supplies and services is also served by the general enhancement of relations between government contractors and the communities in which they are situated, as well as the cooperative working relationship between employers and employees who may be subject to exposure to toxic materials.

Information concerning chemical release and transfer can assist the government to purchase efficiently produced, lower cost, and higher quality supplies and services that also have a minimum adverse impact on community health and the environment.

NOW, THEREFORE, to promote economy and efficiency in government procurement of supplies and services, and by the authority vested in me as President by the Constitution and the laws of the United States of America, including EPCRA, 42 U.S.C. 11001 et seq., PPA, 42 U.S.C. 13101 et seq., 40 U.S.C. 471 and 486(a), and 3 U.S.C. 301, it is hereby ordered as follows:

SECTION 1. *Policy.* It is the policy of the executive branch in procuring supplies and services that, to ensure the economical and efficient procurement of Federal Government contracts, Federal agencies, to the greatest extent practicable, shall contract with companies that report in a public manner on toxic chemicals released to the environment.

SEC. 2. *Definitions.* 2-201. All definitions found in EPCRA and PPA and implementing regulations are incorporated into this order by reference, with the following exceptions for purposes of this order.

2-202. "*Federal agency*" means an "Executive agency," as defined in 5 U.S.C. 105. For purposes of this order, military departments, as defined in 5 U.S.C. 102, are covered under the auspices of the Department of Defense.

2-203. "*Acquisition*" means the acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use of the Federal Government through purchase or lease, whether the supplies or services are already in existence or must be created, developed, demonstrated, and evaluated. Acquisition begins at the point when the Federal department or agency needs are established and includes the description of requirements to satisfy agency needs, solicitation and selection of sources, award of contracts, contract financing, contract performance, contract administration, and those technical and management functions directly related to the process of fulfilling agency needs by contract.

2-204. "*Toxic chemical*" means a substance on the list described in section 313(c) of EPCRA, 42 U.S.C. 11023(c), as it exists on the effective date of this order.

2-205. "*Administrator*" means the Administrator of the United States Environmental Protection Agency ("EPA").

2-206. "*Federal contractor*" means an entity that has submitted the successful bid or proposal in response to a competitive acquisition solicitation.

SEC. 3. *Applicability.* 3-301. Each Federal agency shall, to the maximum extent practicable, include in contract solicitations as an eligibility criterion for the award of competitive acquisition contracts expected to equal or exceed \$100,000 with the Federal contractors described in subsection 3-302, the requirement that

such contractors must file (and continue to file for the life of the contract) a Toxic Chemical Release Form ("Form R"), as described in sections 313(a) and (g) of EPCRA, 42 U.S.C. 11023(a) and (g), for each toxic chemical manufactured, processed, or otherwise used by the Federal contractor at a facility, as described in section 313 of EPCRA, 42 U.S.C. 11023, and section 6607 of PPA, 42 U.S.C. 13106.

3-302. The Federal contractors subject to the eligibility criterion described in subsection 3-301 above are those who currently report to the TRI pursuant to section 313(b)(1)(A) of EPCRA, 42 U.S.C. 11023(b)(1)(A), that is, manufacturers having Standard Industrial Classification Code ("SIC") designations of 20 through 39 (as in effect on July 1, 1985).

3-303. Each Federal agency shall find that a prospective Federal contractor has satisfied the requirement in subsection 3-301 if the contractor certifies in a solicitation that it:

(a) Does not manufacture, process, or otherwise use any toxic chemicals listed under section 313(c) of EPCRA, 42 U.S.C. 11023(c);

(b) Does not have 10 or more full-time employees as specified in section 313(b)(1)(A) of EPCRA, 42 U.S.C. 11023(b)(1)(A);

(c) Does not meet the reporting thresholds established under section 313(f) of the EPCRA, 42 U.S.C. 11023(f); or

(d) Has complied fully with the reporting requirements of subsection 4-404.

3-304. Each Federal agency shall require the filings described in subsection 3-301 above to include information on all chemicals identified by the Administrator pursuant to section 313(c) of EPCRA, 42 U.S.C. 11023(c), as of the date of this order.

3-305. Each Federal agency may amend existing contracts, to the extent permitted by law and where practicable, to require the reporting of information specified in subsection 3-301 above.

3-306. As consistent with Title IV of the Federal Acquisition Streamlining Act of 1994 (FASA), Public Law 103-355 [see Tables for classification], and section 4(11) of the Office of Federal Procurement Policy Act, 41 U.S.C. 403(11), the requirements of this order are only applicable to competitive acquisition contracts expected to equal or exceed \$100,000.

SEC. 4. *Implementation.* 4-401. Not later than September 30, 1995, the EPA shall publish in the Federal Register guidance for compliance with this order, including applicability with respect to subcontractors.

4-402. Within 30 days of the issuance of the guidance provided for in subsection 4-401 above, each Federal agency shall include in all acquisition solicitations issued on or after the effective date of this order, the provisions necessary to effect this order.

4-403. For all contracts expected to exceed \$500,000, each Federal agency shall consult with the Administrator or the Administrator's designee when the agency believes it is not practicable to include the eligibility requirement of section 3-301 in the contract solicitation or award.

4-404. Each Federal agency shall require each Federal contractor designated in subsection 3-302 above to:

(a) Have included in its response to the contract solicitation a certification, as specified in the guidelines published pursuant to subsection 4-401 of this order, that it will (if awarded the contract) comply with the requirements of subsection 3-301; and

(b) File with the Administrator and each appropriate State pursuant to section 313(a) of EPCRA, 42 U.S.C. 11023(a), the information required by subsection 3-301, beginning on the next July 1 after the date on which the contract is awarded.

4-405. Information submitted to the EPA pursuant to subsection 4-404(b) above shall be subject to the trade secret protections provided by section 322 of EPCRA, 42 U.S.C. 11042. Information that is not trade secret shall be made available to the public pursuant to sections 313(h) and (j) of EPCRA, 42 U.S.C. 11023(h) and (j). The Administrator is directed to review reports submitted

pursuant to this order to determine the appropriateness of any claims for trade secret protection.

4-406. When the Administrator determines that a Federal contractor has not filed the necessary forms or complete information as required by subsection 3-301 above, the Administrator or the Administrator's designee may recommend termination of the contract for convenience. The Administrator shall transmit that recommendation to the head of the contracting agency, and that agency shall consider the recommendation and determine whether to terminate the contract. In carrying out this responsibility, the Administrator may investigate any subject Federal contractor to determine the adequacy of compliance with the provisions of this order and the Administrator's designee may hold such hearings, public or private, as the Administrator deems advisable to assist in the Administrator's determination of compliance.

4-407. Each contracting agency shall cooperate with the Administrator and provide such information and assistance as the Administrator may require in the performance of the Administrator's functions under this order.

4-408. Upon request and to the extent practicable, the Administrator shall provide technical advice and assistance to Federal agencies in order to assist in full compliance with this order.

SEC. 5. *General Provisions.* 5-501. The requirements of this order shall be implemented and incorporated in acquisition regulations, including the Federal Acquisition Regulations (FAR), within 90 days after the effective date of this order.

5-502. This order is not intended, and should not be construed, to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or its employees. This order is not intended, however, to preclude judicial review of final agency decisions in accordance with the Administrative Procedure Act, 5 U.S.C. 701 et seq.

5-503. This order shall be effective immediately and shall continue to be in effect until revoked.

WILLIAM J. CLINTON.

#### 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.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 405, 413, 421 of this title.

#### § 402. Congressional findings and purpose

(a) The Congress finds that economy, efficiency, and effectiveness in the procurement of property and services by the executive agencies will be improved by establishing an office to exercise responsibility for Government-wide pro-

curement policies, regulations, procedures, and forms.

(b) The purpose of this chapter is to establish an Office of Federal Procurement Policy in the Office of Management and Budget to provide overall direction of procurement policies, regulations, procedures, and forms for executive agencies in accordance with applicable laws.

(Pub. L. 93-400, §3, Aug. 30, 1974, 88 Stat. 796; Pub. L. 100-679, §2(b), Nov. 17, 1988, 102 Stat. 4055.)

#### REFERENCES IN TEXT

This chapter, referred to in subsec. (b), 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.

#### AMENDMENTS

1988—Subsec. (a). Pub. L. 100-679 inserted "Government-wide" before "procurement policies".

### § 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 together 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 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.

(F) Services offered and sold competitively, in substantial quantities, in the commercial marketplace based on established catalog prices for specific tasks performed 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 re-

quirements 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.

(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.)

#### 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

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 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]."

## SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 57, 58, 252a, 254b, 259, 264a, 418a, 701 of this title; title 10 sections 2302, 2302a, 2306a, 2376, 2384, 2393, 2397, 2397b, 2397c, 2402, 2408, 2410, 2410b, 2410i; title 15 sections 632, 637; title 22 section 2679c; title 33 section 1368; title 40 section 334; title 49 section 40118.

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

(a) 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").

(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.)

## SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 31 section 506.

#### § 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,<sup>1</sup> 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—

<sup>1</sup> So in original.

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

(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; and

(C) 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.<sup>2</sup>

(6) 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;

(7) 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;

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

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

(10) developing policies, in consultation with the Administrator of the Small Business Administration, that ensure that small businesses, 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;

(11) developing policies that will promote achievement of goals for participation by small businesses, small businesses owned and controlled by socially and economically disadvantaged individuals, and small business<sup>3</sup> owned and controlled by women; and

(12) 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 exec-

utive 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 the policies set forth in section 401 of this title or 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) Automatic data processing and telecommunications equipment; 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 1949 [41 U.S.C. 251 et seq.] with respect to the procurement of automatic data processing and telecommunications equipment and services or 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.

<sup>2</sup> So in original. The period probably should be a semicolon.

<sup>3</sup> So in original. Probably should be "businesses".

**(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 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.)

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. Provisions of the Act relating to contracts are classified generally to subchapter IV (§ 251 et seq.) of chapter 4 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 471 of Title 40, Public Buildings, Property, and Works, and Tables.

AMENDMENTS

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

Subsec. (d)(8), (9). Pub. L. 103-355, § 5091, redesignated par. (8) as (12) and directed adding pars. (8) and (9) at end which was executed by adding pars. (8) and (9) after par. (7) to reflect probable intent of Congress.

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 par. (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., func-

tions 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 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.

#### 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

Section 7107 of Pub. L. 103-355 provided that:

"(a) REVIEW REQUIRED.—(1) The Administrator for Federal Procurement Policy shall conduct a comprehensive review of Federal laws, as in effect on November 1, 1994, to identify and catalogue all of the provisions in such laws that define (or describe for definitional purposes) the small business concerns set forth in paragraph (2) for purposes of authorizing the participation of such small business concerns as prime contractors or subcontractors in—

"(A) contracts awarded directly by the Federal Government or subcontracts awarded under such contracts; or

"(B) contracts and subcontracts funded, in whole or in part, by Federal financial assistance under grants, cooperative agreements, or other forms of Federal assistance.

"(2) The small business concerns referred to in paragraph (1) are as follows:

"(A) Small business concerns owned and controlled by socially and economically disadvantaged individuals.

"(B) Minority-owned small business concerns.

"(C) Small business concerns owned and controlled by women.

"(D) Woman-owned small business concerns.

"(b) MATTERS TO BE DEVELOPED.—On the basis of the results of the review carried out under subsection (a), the Administrator for Federal Procurement Policy shall develop—

"(1) uniform definitions for the small business concerns referred to in subsection (a)(2);

"(2) uniform agency certification standards and procedures for—

"(A) determinations of whether a small business concern qualifies as a small business concern referred to in subsection (a)(2) under an applicable standard for purposes of contracts and subcontracts referred to in subsection (a)(1); and

"(B) reciprocal recognition by an agency of a decision of another agency regarding whether a small business concern qualifies as a small business concern referred to in subsection (a)(2) for such purposes; and

"(3) such other related recommendations as the Administrator determines appropriate consistent with the review results.

"(c) PROCEDURES AND SCHEDULE.—(1) The Administrator for Federal Procurement Policy shall provide for the participation in the review and activities under subsections (a) and (b) by representatives of—

"(A) the Small Business Administration (including the Office of the Chief Counsel for Advocacy);

"(B) the Minority Business Development Agency of the Department of Commerce;

"(C) the Department of Transportation;

"(D) the Environmental Protection Agency; and

"(E) such other executive departments and agencies as the Administrator considers appropriate.

"(2) In carrying out subsections (a) and (b), the Administrator shall consult with representatives of organizations representing—

"(A) minority-owned business enterprises;

"(B) women-owned business enterprises; and

"(C) other organizations that the Administrator considers appropriate.

"(3) Not later than 60 days after the date of the enactment of this Act [Oct. 13, 1994], the Administrator shall publish in the Federal Register a notice which—

"(A) lists the provisions of law identified in the review carried out under subsection (a);

"(B) describes the matters to be developed on the basis of the results of the review pursuant to subsection (b);

"(C) solicits public comment regarding the matters described in the notice pursuant to subparagraphs (A) and (B) for a period of not less than 60 days; and

"(D) addresses such other matters as the Administrator considers appropriate to ensure the comprehensiveness of the review and activities under subsections (a) and (b).

"(d) REPORT.—Not later than May 1, 1996, the Administrator for Federal Procurement Policy shall submit to the Committees on Small Business of the Senate and the House of Representatives a report on the results of the review carried out under subsection (a) and the actions taken under subsection (b). The report shall include a discussion of the results of the review, a description of the consultations conducted and public comments received, and the Administrator's recommendations with regard to the matters identified under subsection (b)."

#### 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.”

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 407, 408, 417, 421, 422, 423 of this title; title 18 section 4124; title 31 section 6202; title 50 App. 2154.

### § 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 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 sub-

section (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.

**§ 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. Responsiveness to Congress**

**(a) Annual report on activities**

The Administrator shall keep the Congress and its duly authorized committees fully and

currently informed of the major activities of the Office of Federal Procurement Policy, and shall submit a report thereon to the House of Representatives and the Senate annually and at such other times as may be necessary for this purpose.

**(b) Submission of policy matter or regulation to Congressional committees**

At least 30 days prior to the effective date of any policy or regulation prescribed under section 405(a) of this title, the Administrator shall transmit to the Congress a report on the proposed policy or regulation. Such report shall include—

- (1) a full description of the policy or regulation;
- (2) a summary of the reasons for the issuance of such policy or regulation; and
- (3) the names and positions of employees of the Office who will be made available, prior to such effective date, for full consultation with such Committees regarding such policy or regulation.

**(c) Waiver of notice requirement by President**

In the case of an emergency, the President may waive the notice requirement of subsection (b) of this section by submitting in writing to the Congress his reasons therefor at the earliest practicable date on or before the effective date of any policy or regulation.

(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.)

AMENDMENTS

1983—Subsec. (a). Pub. L. 98-191, §8(a)(1), struck out paragraph designation “(1)” before “The Administrator shall keep” and struck out pars. (2), (3), and (4) which related, respectively, to a proposal to congress by the Administrator of a uniform procurement system, a recommendation to congress of changes in legislation relating to procurement by executive agencies, and a proposal to congress for a management system to implement and enforce a uniform procurement system.

Subsec. (b). Pub. L. 98-191, §8(a)(2)(A), substituted “At least 30 days prior to the effective date of any policy or regulation prescribed under section 405(a) of this title, the Administrator shall transmit to the Congress a report on the proposed policy or regulation” for “At least 30 days prior to the effective date of any policy prescribed under section 405(h) of this title, the Administrator shall transmit to the Committees on Government Operations of the House of Representatives and of the Senate a detailed report on the proposed policy”.

Pub. L. 98-191, §8(a)(2)(B), inserted “or regulation” after “policy” wherever appearing in second sentence.

Subsec. (c). Pub. L. 98-191, §8(3), substituted “any policy or regulation” for “any policy”.

1979—Subsec. (a). Pub. L. 96-83, §5(a), designated existing provisions as par. (1), struck out references to President of the Senate and Speaker of the House, and provisions requiring the report to contain appropriate legislative recommendations, and added pars. (2) to (4).

Subsec. (b). Pub. L. 96-83, §5(b)(1), (2), substituted “any policy prescribed under section 405(h)” for “any major policy or regulation prescribed under section 405(a)”, and “policy” for “policy or regulation” wherever appearing.

Subsec. (c). Pub. L. 96-83, §5(b)(3), substituted “policy” for “major policy or regulation”.

## 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.

## PLAN FOR ALTERNATIVES TO INCREASE OPPORTUNITIES TO ACHIEVE FULL AND OPEN COMPETITION; STUDY TO CONGRESS, CRITERIA, ETC.

Pub. L. 98-369, div. B, title VII, §2753, July 18, 1984, 98 Stat. 1203, directed Administrator of Office of Federal Procurement Policy, in consultation with Secretary of Defense, Administrator of General Services and Administrator of the National Aeronautics and Space Administration, not later than Jan. 31, 1985, to complete a study of alternatives and recommend to Congress a plan to increase opportunities to achieve full and open competition on the basis of technical qualifications, quality, and other factors in the procurement of professional, technical, and managerial services.

## SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 421 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. Effect on existing regulations**

Procurement policies, regulations, procedures, or forms in effect on December 1, 1983, shall continue in effect, as modified from time to time, until repealed, amended, or superseded by policies, regulations, procedures, or forms promulgated by the Administrator.

(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.)

## AMENDMENTS

1983—Pub. L. 98-191 substituted “Procurement policies, regulations, procedures, or forms in effect on December 1, 1983, shall continue in effect, as modified from time to time, until repealed, amended, or superseded by policies, regulations, procedures, or forms promulgated by the Administrator” for “Procurement policies, regulations, procedures, or forms in effect as of October 10, 1979, shall continue in effect, as modified from time to time by the issuing offices on their own initiative or in response to policy directives issued under section 405(h) of this title until repealed, amended, or superseded pursuant to the adoption of the uniform procurement system described in section 405 of this title.”

1979—Pub. L. 96-83 substituted provisions setting forth applicability of procurement policies, etc., as of Oct. 10, 1979, for provisions setting forth applicability of procurement policies, etc., as of Aug. 30, 1974.

## 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.

**§ 410. Authorization of appropriations**

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.

(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.)

## AMENDMENTS

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 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 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” for “The Administrator may delegate, and authorize successive redelegations 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 de-

velopment 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. The innovative procurement methods and procedures tested under this subsection shall be consistent with the policies set forth in section 401 of this title. 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.)

PRIOR PROVISIONS

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

CHANGE OF NAME

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.

TEST PROGRAM FOR EXECUTIVE AGENCIES

Pub. L. 103-355, title V, §5061, Oct. 13, 1994, 108 Stat. 3352, 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 (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 Federal acquisition computer network (“FACNET”) capability required by section 30 of the Office of Federal Procurement Policy Act (as added by section 9001) [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 preevaluated 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, or by dissemination through FACNET, 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 Government Reform and Oversight] of the House of Representatives and the Committee on 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.—

(1) The Administrator may not exercise the authority to conduct a test under subsection (a) in an agency and to award contracts under such a test before the date on which the head of the agency certifies to Congress

under section 30A(a)(2) of the Office of Federal Procurement Policy Act [41 U.S.C. 426a(a)(2)] that the agency has implemented a full FACNET capability.

“(2) The authority to conduct a test under subsection (a) in an agency and to award contracts under such a test shall expire 4 years after the date on which the head of the agency makes the certification referred to in paragraph (1). Contracts entered into before such authority expires in an agency pursuant to a test shall remain in effect, notwithstanding the expiration of 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. Executive agency responsibilities

To further achieve effective, efficient, and economic administration of the Federal procurement system, the head of each executive agency shall, in accordance with applicable laws, Government-wide policies and regulations, and good business practices—

(1) 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;

(2) establish clear lines of authority, accountability, and responsibility for procurement decisionmaking within the executive agency, including placing the procurement function at a sufficiently high level in the executive agency to provide—

(A) direct access to the head of the major organizational element of the executive agency served; and

(B) comparative equality with organizational counterparts;

(3) 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; and

(4) develop and maintain a procurement career management program in the executive agency to assure an adequate professional work force.

(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.)

#### AMENDMENTS

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;”.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 252c, 253, 418, 421 of this title; title 10 sections 133, 2302c, 2304, 2435; title 15 section 637; title 49 section 40110.

#### § 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. 393, as amended. Title III of the Federal Property and Administrative Services Act of 1949 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 Short Title note set out under section 471 of Title 40, Public Buildings, Property, and Works, and 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.

#### § 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 furnish for publication by the Secretary of Commerce 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 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 (f)<sup>1</sup> of this section—

(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

(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) The Secretary of Commerce shall publish promptly in the Commerce Business Daily each notice required by paragraph (1).

(3) Whenever an executive agency is required by paragraph (1)(A) to furnish a notice to the Secretary of Commerce, such executive agency may not—

(A) issue the solicitation earlier than 15 days after the date on which the notice is published by the Secretary of Commerce; 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 solicita-

tion 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 submission of bids or proposals for the procurement of commercial items.

**(b) Contents of notice**

Each notice of solicitation required by subparagraph (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;<sup>2</sup>

(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—

(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—

<sup>1</sup> So in original. Probably should be subsection "(b)".

<sup>2</sup> So in original. Probably should be followed by "and".

(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;

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

(D) 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;

(E) the procurement is made against an order placed under a requirements contract;

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

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

(H) 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.

(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.)

CODIFICATION

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

AMENDMENTS

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 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.

#### 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.”

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 253, 253i, 253j, 426a of this title; title 10 sections 2304, 2304b, 2304c.

### § 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 system entry of information

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 section.

(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.)

#### AMENDMENTS

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.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 405, 427 of this title; title 40 section 759.

### § 417a. Procurement data

#### (a) Reporting

Each Federal agency shall report to the Office of Federal Procurement Policy 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.

(Pub. L. 100-533, title V, § 502, Oct. 25, 1988, 102 Stat. 2697.)

#### 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 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) 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) 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; and

(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 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.)

#### 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.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 10 section 2318.

### § 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)<sup>1</sup> of this title. Such regulations

<sup>1</sup> See References in Text note below.

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 necessary 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 subcontractor (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. 393, as amended. Title III of the Federal Property and Administrative Services Act of 1949 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 Short Title note set out under section 471 of Title 40, Public Buildings, Property, and Works, and 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.)

#### AMENDMENTS

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), which directed amendment of subsec. (d) by designating second sentence as par. (3), was executed by designating second sentence of subsec. (d)(2) as par. (3) to reflect the probable intent of Congress.

#### 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].”

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 421 of this title; title 42 section 7256a; title 50 App. section 2159.

### § 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 205(d) of the Federal Property and Administrative Services Act of 1949 [40 U.S.C. 486(d)], 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 and Technology; 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) 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 pro-

cedures 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 the policies set forth in section 401 of this title or 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 or the policies set forth in section 401 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 407 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)<sup>1</sup> 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 of section 401 of this title and the policies prescribed under section 405(a) of this title.

**(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.

**(g) Reports**

The Administrator for Federal Procurement Policy shall—

(1) publish a report within 6 months after November 17, 1988, and every 6 months thereafter relating to the development of procurement regulations to be issued in accordance with subsection (c) of this section;

(2) include in each report published under paragraph (1)—

(A) the status of each such regulation;

(B) a description of those regulations which are required by statute;

(C) a description of the methods by which public comment was sought with regard to each proposed regulation in accordance with section 418b of this title, and to the extent appropriate, sections 3504(h)<sup>1</sup> and 3507 of title 44;

(D) regulatory activities completed and initiated since the last report;

(E) regulations, policies, procedures, practices, and forms that are under consideration or review by the Office of Federal Procurement Policy;

(F) whether the regulations have paperwork requirements;

(G) the progress made in promulgating and implementing the Federal Acquisition Regulation; and

(H) such other matters as the Administrator determines would be useful; and

(3) 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 recordkeeping and reporting requirements necessary to ensure

<sup>1</sup> See References in Text note below.

the integrity and accountability of the system.

(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. 103-160, div. A, title IX, § 904(f), Nov. 30, 1993, 107 Stat. 1729.)

#### REFERENCES IN TEXT

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 Short Title note set out under section 471 of Title 40, Public Buildings, Property, and Works, and 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 generally 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 3502 of title 44, referred to in subsec. (d)(2), which in par. (1) 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".

Section 3504 of title 44, referred to in subsec. (g)(2)(C), which in subsec. (h) related to methods by which public comment was to be sought with regard to proposed regulations, was omitted in the general amendment of chapter 35 of Title 44, by Pub. L. 104-13, § 2, May 22, 1995, 109 Stat. 163. Pub. L. 104-13 enacted a new section 3504 of Title 44 which does not contain provisions relating to methods by which public comment is to be sought with regard to proposed regulations.

#### AMENDMENTS

1993—Subsec. (b)(2). Pub. L. 103-160 substituted "Under Secretary of Defense for Acquisition and Technology" for "Under Secretary of Defense for Acquisition".

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".

#### 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, 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 and Technology."

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 256, 259, 423 of this title; title 10 sections 2302, 2323; title 15 section 638; title 42 section 8287; title 50 App. section 2154.

### § 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 properly 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 \$500,000.

(B) Subparagraph (A) does not apply to the following contracts or subcontracts:

(i) 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.

(ii) Contracts or subcontracts where the price negotiated is based on prices set by law or regulation.

(iii) Any other firm fixed-price contract or subcontract (without cost incentives) for commercial items.

(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.

**(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) Reports to Congress

The Board shall report to the Congress not later than one year after November 17, 1988, and annually thereafter, with respect to the activities and operations of the Board under this section, together with such recommendations as it considers appropriate.

#### (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 2168<sup>1</sup> 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.)

#### 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.

Level IV of the Executive Schedule, referred to in subsec. (e), is set out in section 5315 of Title 5.

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.

<sup>1</sup> See References in Text note below.

The Inspector General Act of 1978, referred to in subsection (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.

#### AMENDMENTS

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, substituted “The Administrator” for “Not later than 180 days after November 17, 1988, the Administrator”.

#### 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. Procurement integrity

#### (a) Prohibited conduct by competing contractors

During the conduct of any Federal agency procurement of property or services, no competing contractor or any officer, employee, representative, agent, or consultant of any competing contractor shall knowingly—

(1) make, directly or indirectly, any offer or promise of future employment or business opportunity to, or engage, directly or indirectly, in any discussion of future employment or business opportunity with, any procurement official of such agency, except as provided in subsection (c) of this section;

(2) offer, give, or promise to offer or give, directly or indirectly, any money, gratuity, or other thing of value to any procurement official of such agency; or

(3) solicit or obtain, directly or indirectly, from any officer or employee of such agency, prior to the award of a contract any proprietary or source selection information regarding such procurement.

#### (b) Prohibited conduct by procurement officials

During the conduct of any Federal agency procurement of property or services, no procurement official of such agency shall knowingly—

(1) solicit or accept, directly or indirectly, any promise of future employment or business opportunity from, or engage, directly or indirectly, in any discussion of future employment or business opportunity with, any officer, employee, representative, agent, or consultant of a competing contractor, except as provided in subsection (c) of this section;

(2) ask for, demand, exact, solicit, seek, accept, receive, or agree to receive, directly or indirectly, any money, gratuity, or other thing of value from any officer, employee, representative, agent, or consultant of any competing contractor for such procurement; or

(3) disclose any proprietary or source selection information regarding such procurement directly or indirectly to any person other than a person authorized by the head of such agency or the contracting officer to receive such information.

#### (c) Recusal

(1) A procurement official may engage in a discussion with a competing contractor that is otherwise prohibited by subsection (b)(1) of this section if, before engaging in such discussion—

(A) the procurement official proposes in writing to disqualify himself from the conduct of any procurement relating to the competing contractor (i) for any period during which future employment or business opportunities for such procurement official with such competing contractor have not been rejected by either the procurement official or the competing contractor, and (ii) if determined to be necessary by the head of such procuring official's procuring activity (or his designee) in accordance with criteria prescribed in implementing regulations, for a reasonable period thereafter; and

(B) the head of that procuring activity of such procurement official (or his designee), after consultation with the appropriate designated agency ethics official, approves in writing the recusal of the procurement official.

(2) A procurement official who, during the period beginning with the issuance of a procurement solicitation and ending with the award of a contract, has participated personally and substantially in the evaluation of bids or proposals, selection of sources, or conduct of negotiations in connection with such solicitation and contract may not be approved for a recusal under paragraph (1) during such period with respect to such procurement.

(3) A procurement official who, during the period beginning with the negotiation of a modification or extension of a contract and ending with—

(A) an agreement to modify or extend the contract, or

(B) a decision not to modify or extend the contract,

has participated personally and substantially in the evaluation of a proposed modification or extension or the conduct of negotiations may not be approved for a recusal under paragraph (1) during such period with respect to such procurement.

(4) A competing contractor may engage in a discussion with a procurement official that is otherwise prohibited by subsection (a)(1) of this section if, before engaging in such discussion, the procurement official has been recused in accordance with this subsection.

(5) Regulations implementing this subsection shall include specific criteria to be used in making determinations and approving recusals under paragraph (1).

#### (d) Disclosure to unauthorized persons

During the conduct of any Federal agency procurement of property or services, no person who is given authorized or unauthorized access to

proprietary or source selection information regarding such procurement, shall knowingly disclose such information, directly or indirectly, to any person other than a person authorized by the head of such agency or the contracting officer to receive such information.

**(e) Certification and enforcement matters**

(1) A Federal agency may not award a contract for the procurement of property or services to any competing contractor, or agree to any modification or extension of a contract, unless the officer or employee of such contractor responsible for the offer or bid for such contract, or the modification or extension of such contract, as the case may be—

(A)(i) certifies in writing to the contracting officer responsible for such contract that such officer or employee of the competing contractor has no information concerning a violation or possible violation of subsection (a), (b), (d), or (f) of this section, or applicable implementing regulations, pertaining to such procurement; or

(ii) discloses to such contracting officer any and all such information and certifies in writing to such contracting officer that any and all such information has been disclosed; and

(B) certifies in writing to such contracting officer, except in the case of a contract for the procurement of commercial items, that each officer, employee, agent, representative, and consultant of such competing contractor who has participated personally and substantially in the preparation or submission of such bid or offer, or in such modification or extension of such contract, as the case may be, has certified to such competing contractor that he or she—

(i) is familiar with, and will comply with, the requirements of subsection (a) of this section and applicable implementing regulations; and

(ii) will report immediately to the officer or employee of the competing contractor responsible for the offer or bid for any contract or the modification or extension of such contract, as the case may be, any information concerning a violation or possible violation of subsection (a), (b), (d), or (f) of this section, or such applicable implementing regulations, pertaining to such procurement.

(2) A Federal agency may not award a contract for the procurement of property or services, or agree to any modification or extension of any such contract, unless the contracting officer responsible for such procurement—

(A) certifies in writing to the head of such agency that the contracting officer has no information concerning a violation or possible violation of subsection (a), (b), (d), or (f) of this section, or applicable implementing regulations, pertaining to such procurement; or

(B) discloses to the head of such agency any and all such information and certifies in writing that any and all such information has been disclosed.

(3) The head of a Federal agency may require any procurement official or any competing con-

tractor, at any time during the conduct of any Federal agency procurement of property or services—

(A) to certify in writing to the head of such agency that such procurement official or the officer or employee of the competing contractor responsible for the offer or bid for such contract or the modification or extension of such contract, as the case may be, has no information concerning a violation or possible violation of subsection (a), (b), (d), or (f) of this section, or applicable implementing regulations, pertaining to such procurement; or

(B) to disclose to the head of such agency any and all such information and to certify in writing that any and all such information has been disclosed.

(4) If a procurement official leaves the Government during the conduct of such a procurement, such official shall certify that he or she understands the continuing obligation not to disclose proprietary or source selection information.

(5) For the purposes of enforcing the requirements of this section, the contracting officer responsible for the conduct of a procurement shall maintain, as part of the procurement file—

(A) all certifications made by procurement officials and competing contractors with regard to such procurement, as required by this subsection; and

(B) a record of all persons who have been authorized by the head of the agency or the contracting officer to have access to proprietary or source selection information regarding such procurement.

(6) Any person making a certification required by this subsection shall be notified of the applicability of section 1001 of title 18 to false, fictitious, or fraudulent statements in such certification.

(7)(A) This subsection applies only to contracts, extensions, and modifications in excess of \$100,000.

(B) This subsection need not be applied to a contract—

(i) with a foreign government or an international organization that is not required to be awarded using competitive procedures pursuant to section 253(c)(4) of this title or section 2304(c)(4) of title 10; or

(ii) in an exceptional case, when the head of the Federal agency concerned determines in writing that this subsection should be waived pursuant to procedures and criteria established in implementing regulations issued pursuant to subsection (o) of this section and notifies the Congress in writing of such determination.

The authority to make determinations under clause (ii) of this subparagraph may not be delegated.

**(f) Restrictions resulting from procurement activities of procurement officials**

(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—

(A) participate in any manner, as an officer, employee, agent, or representative of a com-

peting contractor, in any negotiations leading to the award, modification, or extension of a contract for such procurement, or

(B) participate personally and substantially on behalf of the competing contractor in the performance of such contract,

during the period ending 2 years after the last date such individual participated personally and substantially in the conduct of such procurement or personally reviewed and approved the award, modification, or extension of any contract for such procurement.

(2) This subsection does not apply to any participation referred to in paragraph (1)(A) or (1)(B) with respect to a subcontractor who is a competing contractor unless—

(A) the subcontractor is a first or second tier subcontractor and the subcontract is for an amount that is in excess of \$100,000;

(B) the subcontractor significantly assisted the prime contractor with respect to negotiation of the prime contract;

(C) the procurement official involved in the award, modification, or extension of the prime contract personally directed or recommended the particular subcontractor to the prime contractor as a source for the subcontract; or

(D) the procurement official personally reviewed and approved the award, modification, or extension of the subcontract.

(3)(A)(i) The President may grant a waiver of a restriction imposed by paragraph (1) (relating to post-Government service employment) to an officer or employee described in subparagraph (B) if the President determines and certifies in writing that it is in the public interest to grant the waiver and that the services of the officer or employee are critically needed for the benefit of the Federal Government. Not more than 25 officers and employees currently employed by the Government at any one time may hold waivers under this subparagraph.

(ii) A waiver granted under this subparagraph to any person shall apply only with respect to activities engaged in by that person after that person's Government employment is terminated and only to that person's employment at a Government-owned, contractor operated entity with which the person served as an officer or employee immediately before the person's Government employment began.

(B) Waivers under subparagraph (A) may be granted only to civilian officers and employees of the executive branch, other than officers and employees in the Executive Office of the President.

(C) A certification under subparagraph (A) shall take effect upon its publication in the Federal Register and shall identify—

(i) the officer or employee covered by the waiver by name and by position, and

(ii) the reasons for granting the waiver.

A copy of the certification shall also be provided to the Director of the Office of Government Ethics.

(D) The President may not delegate the authority provided by this paragraph.

(E)(i) Each person granted a waiver under this paragraph shall prepare reports, in accordance with clause (ii), stating whether the person has

engaged in activities otherwise prohibited by this section for each six-month period described in clause (ii), and if so, what those activities were.

(ii) A report under clause (i) shall cover each six-month period beginning on the date of the termination of the person's Government employment (with respect to which the waiver under this paragraph was granted) and ending two years after that date. Such report shall be filed with the President and the Director of the Office of Government Ethics not later than 60 days after the end of the six-month period covered by the report. All reports filed with the Director under this subparagraph shall be made available for public inspection and copying.

(iii) If a person fails to file any report in accordance with clauses (i) and (ii), the President shall revoke the waiver and notify the person of the revocation. The revocation shall take effect upon the person's receipt of the notification and shall remain in effect until the report is filed.

(iv) Any person who is granted a waiver under this paragraph shall be ineligible for appointment in the civil service unless all reports required of such person by clauses (i) and (ii) have been filed.

(F) As used in this paragraph, the term "civil service" has the meaning given that term in section 2101 of title 5.

**(g) Contractual penalties**

(1) Regulations issued pursuant to subsection (o) of this section shall require that each contract awarded by a Federal agency contain a clause specified in such regulation that provides appropriate contractual penalties for conduct of any competing contractor prohibited by subsection (a) of this section and for any such conduct of any officer, employee, agent, representative, or consultant of such contractor.

(2) The following remedies are authorized to be included in, and shall be considered in the development of, such regulations:

(A) Denial of payment of all or any portion of the profit component of amounts otherwise payable to the contractor by the Federal agency under the contract and recovery of all or any portion of the profit component of amounts paid to the contractor by the Federal agency under the contract.

(B) Termination of the contract for default.

(C) Any other appropriate penalty.

**(h) Administrative actions**

(1) If an agency receives a disclosure of information pursuant to subsection (e) of this section or otherwise receives or obtains information providing a reasonable basis to believe that an officer, employee, agent, representative, or consultant of a competing contractor has knowingly violated the requirements of this section—

(A) in the case of a procurement in which a contract has not been awarded, the agency shall determine whether to terminate the procurement or take other appropriate actions;

(B) in the case of a procurement with respect to which a contract has been awarded, the agency shall determine whether to void or rescind the contract, to terminate the contract for default, to impose sanctions upon the contractor, or to permit the contractor to con-



tinue to perform the contract, subject to review in accordance with, and to the extent provided in, the Contract Disputes Act of 1978 [41 U.S.C. 601 et seq.], or to take other appropriate actions; and

(C) if the agency determines that such a knowing violation has occurred, the agency, pursuant to procedures specified in the Federal Acquisition Regulation—

(i) may impose an immediate suspension, and

(ii) shall determine whether to initiate a debarment proceeding,

against the competing contractor or other person who committed such violation.

(2) Any procurement official of a Federal agency who engages in conduct prohibited by subsection (b) or (d) of this section shall be subject to removal or other appropriate adverse personnel action pursuant to the procedures specified in chapter 75 of title 5 or other applicable law or regulation.

(3) The actions taken under paragraph (1) or (2) may be suspended by the agency head upon the request of the Attorney General pending the disposition of any civil or criminal actions pursuant to subsections (i) and (j) of this section.

**(i) Civil penalties**

Any person who engages in conduct prohibited by subsection (a), (b), (d), or (f) of this section shall be subject to the imposition of a civil fine in a civil action brought by the United States in an appropriate district court of the United States. The amount of any such civil fine for such violation may not exceed—

(1) \$100,000 in the case of an individual; or

(2) \$1,000,000 in the case of a competing contractor (other than an individual).

**(j) Criminal penalties**

Whoever, during the conduct of a Federal agency procurement of property or services—

(1) being a competing contractor or an officer, employee, representative, agent, or consultant of a competing contractor, knowingly and willfully solicits or obtains, directly or indirectly, from any officer or employee of such agency any proprietary or source selection information (as such terms are defined in subsection (p) of this section and in regulations prescribed pursuant to subsection (o) of this section), or

(2) being an officer or employee of such agency, knowingly and willfully discloses or promises to disclose, directly or indirectly, to any competing contractor or any officer, employee, representative, agent, or consultant of a competing contractor any proprietary or source selection information,

shall be imprisoned for not more than 5 years, or fined in accordance with title 18, or both.

**(k) Ethics advice**

(1) Regulations implementing this section shall include procedures for a procurement official or former procurement official of a Federal agency to request advice from the appropriate designated agency ethics official regarding whether such procurement official or former procurement official is or would be precluded by

this section from engaging in a specified activity.

(2) A procurement official or former procurement official of an agency who requests advice from a designated agency ethics official pursuant to paragraph (1) shall provide the agency ethics official with all information reasonably available to the procurement official or former procurement official that is relevant to a determination regarding such request.

(3) Not later than 30 days after the date on which the appropriate designated agency ethics official receives a request for advice pursuant to paragraph (1) accompanied by the information required by paragraph (2), or as soon thereafter as practicable, the official shall issue a written opinion regarding whether the requesting procurement official or former procurement official is precluded by this section from engaging in the specified activity.

**(l) Training**

The head of each Federal agency shall establish a procurement ethics program for its procurement officials. The program shall, at a minimum—

(1) provide for the distribution of written explanations of the provisions of subsections (b), (c), and (e) of this section to such procurement officials; and

(2) require each such procurement official, as a condition of serving as a procurement official, to certify that he or she is familiar with the provisions of subsections (b), (c), and (e) of this section, and will not engage in any conduct prohibited by such subsection, and will report immediately to the contracting officer any information concerning a violation or possible violation of subsection (a), (b), (d), or (f) of this section, or applicable implementing regulations.

**(m) Remedies not exclusive**

Nothing in this subsection shall be construed to limit the applicability of the requirements, sanctions, contract penalties, and remedies established under any other law, but no agency shall be relieved of the obligation to carry out the requirements of this section because such agency has also applied such other requirements, sanctions, contract penalties, or remedies.

**(n) No authority to withhold information**

Nothing in this section shall be construed to authorize the withholding of any information from the Congress, any committee or subcommittee thereof, a Federal agency, any board of contract appeals of a Federal agency, the Comptroller General, or an Inspector General of a Federal agency.

**(o) Implementing regulations and guidelines**

(1) Government-wide regulations and guidelines appropriate to carry out this section shall be included in the Federal Acquisition Regulation.

(2) Regulations implementing this section shall—

(A) define the term “thing of value” for the purposes of this section and shall include a single uniform Government-wide exclusion at a specific minimal dollar amount; and

(B) authorize the delegation of the functions assigned to designated agency ethics officials under this section.

(3) Notwithstanding sections 405 and 421 of this title, on and after June 1, 1990, the Director of the Office of Government Ethics shall have the responsibility for issuance, modification, or termination of Government-wide regulations implementing paragraphs (1) and (2) of subsection (a) of this section, paragraphs (1) and (2) of subsection (b) of this section, subsections (c), (f), and (k) of this section, and paragraph (2) of this subsection. The Director shall exercise such responsibility in coordination with the Federal Acquisition Regulatory Council.

**(p) Definitions**

As used in this section:

(1) The term “during the conduct of any Federal agency procurement of property or services” means the period beginning 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), and concluding with the award, modification, or extension of a contract, and includes the evaluation of bids or proposals, selection of sources, and conduct of negotiations.

(2) The term “competing contractor”, with respect to any procurement (including any procurement using procedures other than competitive procedures) of property or services, means any entity that is, or is reasonably likely to become, a competitor for or recipient of a contract or subcontract under such procurement, and includes any other person acting on behalf of such an entity.

(3)(A) The term “procurement official” means, with respect to any procurement (including the modification or extension of a contract), any civilian or military official or employee of an agency who has participated personally and substantially in any of the following, as defined in implementing regulations:

- (i) The drafting of a specification developed for that procurement.
- (ii) The review and approval of a specification developed for that procurement.
- (iii) The preparation or issuance of a procurement solicitation in that procurement.
- (iv) The evaluation of bids or proposals for that procurement.
- (v) The selection of sources for that procurement.
- (vi) The conduct of negotiations in the procurement.
- (vii) The review and approval of the award, modification, or extension of a contract in that procurement.
- (viii) Such other specific procurement actions as may be specified in implementing regulations.

(B) For purposes of subparagraph (A), the term “employee of an agency” includes a contractor, subcontractor, consultant, expert, or adviser (other than a competing contractor) acting on behalf of, or providing advice to, the agency with respect to any phase of the agency procurement concerned.

(4) The term “contracting officer” means any official or employee of a Federal agency who has been authorized by the agency head or his or her designee to enter into, administer, or terminate contracts and make related determinations and findings.

(5) The term “Federal agency” has the meaning provided by section 472(b) of title 40.

(6) The term “proprietary information” means—

(A) information contained in a bid or proposal;

(B) cost or pricing data; or

(C) any other information submitted to the Government by a contractor and designated as proprietary, in accordance with law or regulation, by the contractor, the head of the agency, or the contracting officer.

(7) The term “source selection information” means information determined by the head of the agency or the contracting officer to be information—

(A) the disclosure of which to a competing contractor would jeopardize the integrity or successful completion of the procurement concerned; and

(B) which is required by statute, regulation, or order to be secured in a source selection file or other restricted facility to prevent such disclosure;

as further defined by regulations issued pursuant to subsection (m) of this section.

(8) The term “designated agency ethics official” has the meaning given such term by section 109(3) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(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.)

REFERENCES IN TEXT

The Contract Disputes Act of 1978, referred to in subsec. (h)(1)(B), is 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 109(3) of the Ethics in Government Act of 1978, referred to in subsec. (p)(8), is section 109(3) of Pub. L. 95-521, which is set out in the Appendix to Title 5, Government Organization and Employees.

AMENDMENTS

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 development, 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 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.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 428 of this title; title 43 section 1475a.

### § 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. 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.

(Pub. L. 93-400, §29, as added Pub. L. 103-355, title I, §1093, Oct. 13, 1994, 108 Stat. 3273.)

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.

**§ 426. Federal acquisition computer network (FACNET) architecture**

**(a) In general**

(1) The Administrator shall establish a program for the development and implementation of a Federal acquisition computer network architecture (hereinafter in this section referred to as “FACNET”) that will be Government-wide and provide interoperability among users. The Administrator shall assign a program manager for FACNET and shall provide for overall direction of policy and leadership in the development, coordination, installation, operation, and completion of implementation of FACNET by executive agencies.

(2) In carrying out paragraph (1), the Administrator shall 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.

(3) Government-wide FACNET capability (as defined in section 426a(b) of this title) shall be implemented not later than January 1, 2000.

**(b) Functions of FACNET**

The FACNET architecture shall provide for the following functions:

**(1) Government functions**

Allow executive agencies to do the following electronically:

- (A) Provide widespread public notice of solicitations for contract opportunities issued by an executive agency.
- (B) Receive responses to solicitations and associated requests for information through such system.

(C) Provide public notice of contract awards (including price) through such system.

(D) In cases in which it is practicable, receive questions regarding solicitations through such system.

(E) In cases in which it is practicable, issue orders to be made through such system.

(F) In cases in which it is practicable, make payments to contractors by bank card, electronic funds transfer, or other automated methods.

(G) Archive data relating to each procurement action made using such system.

**(2) Private sector user functions**

Allow private sector users to do the following electronically:

(A) Access notice of solicitations for contract opportunities issued by an executive agency.

(B) Access and review solicitations issued by an executive agency.

(C) Respond to solicitations issued by the executive agency.

(D) In cases in which it is practicable, receive orders from the executive agency.

(E) Access information on contract awards (including price) made by the executive agency.

(F) In cases in which it is practicable, receive payment by bank card, electronic funds transfer, or other automated means.

**(3) General functions**

(A) Allow the electronic interchange of procurement information between the private sector and the Federal Government and among Federal agencies.

(B) Employ nationally and internationally recognized data formats that serve to broaden and ease the electronic interchange of data.

(C) Allow convenient and universal user access through any point of entry.

**(c) Notice and solicitation regulations**

In connection with implementation of the architecture referred to in subsection (a) of this section, the Federal Acquisition Regulatory Council shall ensure that the Federal Acquisition Regulation contains appropriate notice and solicitation provisions applicable to acquisitions conducted through a FACNET capability. The provisions shall specify the required form and content of notices of acquisitions and the minimum periods for notifications of solicitations and for deadlines for the submission of offers under solicitations. Each minimum period specified for a notification of solicitation and each deadline for the submission of offers under a solicitation shall afford potential offerors a reasonable opportunity to respond.

**(d) “Architecture” defined**

For purposes of this section, the term “architecture” means the conceptual framework that—

- (1) uses a combination of commercial hardware and commercial software to enable contractors to conduct business with the Federal Government by electronic means; and

(2) includes a description of the functions to be performed to achieve the mission of streamlining procurement through electronic commerce, the system elements and interfaces needed to perform the functions, and the designation of performance levels of those system elements.

(Pub. L. 93-400, §30, as added Pub. L. 103-355, title IX, §9001(a), Oct. 13, 1994, 108 Stat. 3399.)

#### 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 REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 252c, 426a of this title; title 10 section 2302c.

### § 426a. Federal acquisition computer network implementation

#### (a) Certification of FACNET capability in procuring activities and agencies

(1) When the senior procurement executive of an executive agency or, in the case of the Department of Defense, the Under Secretary of Defense for Acquisition and Technology, determines that a procuring activity of the executive agency has implemented an interim FACNET capability (as defined in subsection (c) of this section), the executive or the Under Secretary shall certify to the Administrator that such activity has implemented an interim FACNET capability.

(2) When the head of an executive agency, with the concurrence of the Administrator for Federal Procurement Policy, determines that the executive agency has implemented a full FACNET capability (as defined in subsection (d) of this section), the head of the executive agency shall certify to Congress that the executive agency has implemented a full FACNET capability.

(3) The head of each executive agency shall provide for implementation of both interim FACNET capability and full FACNET capability, with priority on providing convenient and universal user access as required by section 426(b)(3)(C) of this title, in that executive agency as soon as practicable after October 13, 1994.

#### (b) Certification of Government-wide FACNET capability

When the Administrator for Federal Procurement Policy determines that the Federal Government is making at least 75 percent of eligible contracts in amounts greater than the micro-purchase threshold and not greater than the simplified acquisition threshold entered into by the Government during the preceding fiscal year through a system with full FACNET capability, the Administrator shall certify to Congress that the Government has implemented a Government-wide FACNET capability.

#### (c) Implementation of interim FACNET capability

A procuring activity shall be considered to have implemented an interim FACNET capability if—

(1) with respect to each procurement expected to be in an amount greater than the micro-purchase threshold and not greater than the simplified acquisition threshold, the procuring activity has implemented the FACNET functions described in paragraphs (1)(A), (1)(B), (2)(A), (2)(B), and (2)(C) of section 426(b) of this title; and

(2) for each such procurement (other than a procurement for which notice is not required under section 416(c) of this title or with respect to which the head of the procuring activity determines that it is not cost effective or practicable), the procuring activity issues notices of solicitations and receives responses to solicitations through a system having those functions.

#### (d) Implementation of full FACNET capability

An executive agency shall be considered to have implemented a full FACNET capability if (except in the case of procuring activities (or portions thereof) of the executive agency for which the head of the executive agency determines that implementation is not cost effective or practicable)—

(1) the executive agency has implemented all of the FACNET functions described in section 426(b) of this title; and

(2) more than 75 percent of the eligible contracts in amounts greater than the micro-purchase threshold and not greater than the simplified acquisition threshold entered into by the executive agency during the preceding fiscal year have been made through a system with those functions.

#### (e) Eligible contracts

For purposes of subsections (b) and (d) of this section, a contract is eligible if it is not in any class of contracts determined by the Federal Acquisition Regulatory Council (pursuant to section 9004 of the Federal Acquisition Streamlining Act of 1994) to be unsuitable for acquisition through a system with full FACNET capability.

(Pub. L. 93-400, §30A, as added Pub. L. 103-355, title IX, §9001(a), Oct. 13, 1994, 108 Stat. 3400.)

#### REFERENCES IN TEXT

Section 9004 of the Federal Acquisition Streamlining Act of 1994, referred to in subsec. (e), is section 9004 of Pub. L. 103-355, which is set out below.

#### 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.

#### GAO DETERMINATION OF ELIGIBLE AGENCY CONTRACTS

Section 9004 of Pub. L. 103-355 provided that:

“(a) REPORT ON CONTRACTS NOT SUITABLE FOR ACQUISITION THROUGH FULL FACNET CAPABILITY.—Not later than 3 years after the date of the enactment of this Act [Oct. 13, 1994], the Comptroller General shall submit to the Administrator for Federal Procurement Policy and the congressional committees referred to in subsection (d) a report on the classes of contracts in amounts greater than the micro-purchase threshold and not greater than the simplified acquisition threshold that are not suitable for acquisition through a system with full FACNET capability.

“(b) FAR COUNCIL DETERMINATIONS.—Not earlier than 3 years after the date of the enactment of this Act [Oct.

13, 1994], and after consideration of the report of the Comptroller General required by subsection (a), the Federal Acquisition Regulatory Council (established by section 25 of the Office of Federal Procurement Policy Act [41 U.S.C. 421]) may make a determination that a class or classes of contracts in amounts greater than the micro-purchase threshold and not greater than the simplified acquisition threshold are not suitable for acquisition through a system with full FACNET capability. Any such determination shall be submitted to the congressional committees referred to in subsection (d). Each determination under this subsection shall take effect 60 days after the date on which it is submitted to those committees.

“(C) APPLICABILITY OF DETERMINATIONS.—Each determination under subsection (b) shall apply for purposes of determining eligible contracts under section 30A(e) of the Office of Federal Procurement Policy Act, as added by section 9001 [41 U.S.C. 426a(e)].

“(d) COMMITTEES.—The report required by subsection (a), and any determination made under subsection (b), shall be submitted to the Committees on Governmental Affairs, on Armed Services, and on Small Business of the Senate and the Committees on Government Operations [now Government Reform and Oversight], on Armed Services [now National Security], and on Small Business of the House of Representatives.

“(e) DEFINITIONS.—In this section:

“(1) The term ‘simplified acquisition threshold’ has the meaning provided by section 4(11) of the Office of Federal Procurement Policy Act [41 U.S.C. 403(11)], as amended by section 4001.

“(2) The term ‘micro-purchase threshold’ has the meaning provided by section 32(g) of the Office of Federal Procurement Policy Act [41 U.S.C. 428(g)], as added by section 4301.

“(3) The term ‘full FACNET capability’ has the meaning described in section 30A(d) of the Office of Federal Procurement Policy Act [41 U.S.C. 426a(d)], as added by section 9001(a).”

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 416, 426, 427 of this title; title 15 section 637.

### § 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 special simplified procedures for contracts for acquisition of property and services that are not greater than the simplified acquisition threshold.

#### (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) Special rules for use of simplified acquisition procedures

#### (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.

(B) The simplified acquisition procedures provided in the Federal Acquisition Regulation pursuant to 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.

#### (f) Interim reporting rule

Until October 1, 1999, 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.

(Pub. L. 93-400, §31, as added Pub. L. 103-355, title IV, §4201(a), Oct. 13, 1994, 108 Stat. 3342.)

#### 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 REFERRED TO IN OTHER SECTIONS

This section is referred to in section 252b of this title; title 10 section 2302b.

### § 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) Applicability of certain provisions**

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<sup>1</sup> 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.

**(d) Purchases without competitive quotations**

A purchase not greater than \$2,500 may be made without obtaining competitive quotations if the contracting officer determines that the price for the purchase is reasonable.

**(e) Equitable distribution**

Purchases not greater than \$2,500 shall be distributed equitably among qualified suppliers.

**(f) Implementation through FAR**

This section shall be implemented through the Federal Acquisition Regulation.

**(g) 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.)

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 enacted sections 10a, 10b, 10b-1, and 10c of this title, and enacted provisions set out as notes under section 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.

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.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 10a of this title.

**§ 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.)

<sup>1</sup> So in original. Probably should be "it is".

## 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 REFERRED TO IN OTHER SECTIONS

This section is referred to in section 252a of this title; title 10 section 2302a.

**§ 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 on 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 pursuant 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].”

## SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 264 of this title; title 10 section 2375.

**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 excepted 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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#### CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in sections 56, 253d, 422 of this title; title 15 section 637; title 10 sections 2321, 2836; title 25 sections 450k, 450m-1; title 28 sections 2401, 2412, 2414, 2517; title 31 section 3907; title 35 section 203; title 40 section 759.

### § 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 General Accounting 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, the United States Postal Service, and the Postal Rate Commission;

(3) The<sup>1</sup> term “contracting officer” means any person who, by appointment in accordance with applicable regulations, has the authority to enter into and administer contracts and make determinations and findings with respect thereto. The term also includes the authorized representative of the contracting officer, acting within the limits of his authority;

(4) the term “contractor” means a party to a Government contract other than the Government;

(5) The<sup>1</sup> term “Administrator” means the Administrator for Federal Procurement Policy appointed pursuant to the Office of Federal Procurement Policy Act [41 U.S.C. 401 et seq.];

(6) The<sup>1</sup> term “agency board” means an agency board of contract appeals established under section 607 of this title; and

(7) The<sup>1</sup> term “misrepresentation of fact” means a false statement of substantive fact, or any conduct which leads to a belief of a substantive fact material to proper understanding of the matter in hand, made with intent to deceive or mislead.

(Pub. L. 95-563, §2, Nov. 1, 1978, 92 Stat. 2383.)

#### REFERENCES IN TEXT

This chapter, referred to in text preceding par. (1), was in the original “this Act”, meaning Pub. L. 95-563, which enacted this chapter, amended section 5108 of Title 5, Government Organization and Employees, sections 1346, 1491, 2401, 2414, 2510, and 2517 of Title 28, Judi-

<sup>1</sup> So in original. Probably should not be capitalized.

ciary and Judicial Procedure, and section 724a of former Title 31, Money and Finance, and enacted provisions set out as notes under this section. For complete classification of this Act to the Code, see Short Title note below and Tables.

The Office of Federal Procurement Policy Act, referred to in par. (5), is Pub. L. 93-400, Aug. 30, 1974, 88 Stat. 796, as amended, which is classified principally to chapter 7 (§401 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 401 of this title and Tables.

#### CODIFICATION

In par. (2), “section 9101(3) of title 31” substituted for “section 846 of title 31, United States Code” on authority of Pub. L. 97-258, §4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

#### EFFECTIVE DATE

Section 16 of Pub. L. 95-563 provided that: “This Act [see Short Title note below] shall apply to contracts entered into one hundred twenty days after the date of enactment [Nov. 1, 1978]. Notwithstanding any provision in a contract made before the effective date of this Act, the contractor may elect to proceed under this Act with respect to any claim pending then before the contracting officer or initiated thereafter.”

#### SHORT TITLE

Section 1 of Pub. L. 95-563 provided: “That this Act [enacting this chapter, amending section 5108 of Title 5, Government Organization and Employees, sections 1346, 1491, 2401, 2414, 2510, and 2517 of Title 28, Judiciary and Judicial Procedure, and section 724a of former Title 31, Money and Finance, and enacting provisions set out above] may be cited as the ‘Contract Disputes Act of 1978’.”

### § 602. Applicability of law

#### (a) Executive agency contracts

Unless otherwise specifically provided herein, this chapter applies to any express or implied contract (including those of the nonappropriated fund activities described in sections 1346 and 1491 of title 28) entered into by an executive agency for—

- (1) the procurement of property, other than real property in being;
- (2) the procurement of services;
- (3) the procurement of construction, alteration, repair or maintenance of real property; or,
- (4) the disposal of personal property.

#### (b) Tennessee Valley Authority contracts

With respect to contracts of the Tennessee Valley Authority, the provisions of this chapter shall apply only to those contracts which contain a disputes clause requiring that a contract dispute be resolved through an agency administrative process. Notwithstanding any other provision of this chapter, contracts of the Tennessee Valley Authority for the sale of fertilizer or electric power or related to the conduct or operation of the electric power system shall be excluded from the chapter.

#### (c) Foreign government or international organization contracts

This chapter does not apply to a contract with a foreign government, or agency thereof, or international organization, or subsidiary body thereof, if the head of the agency determines that the application of the chapter to the contract would not be in the public interest.

(Pub. L. 95-563, §3, Nov. 1, 1978, 92 Stat. 2383.)

### § 603. Maritime contracts

Appeals under paragraph (g) of section 607 of this title and suits under section 609 of this title, arising out of maritime contracts, shall be governed by chapter 20 or 22 of title 46, Appendix, as applicable, to the extent that those chapters are not inconsistent with this chapter.

(Pub. L. 95-563, §4, Nov. 1, 1978, 92 Stat. 2384.)

#### REFERENCES IN TEXT

Chapter 20 of title 46, Appendix, referred to in text, was in the original a reference to the Act of Mar. 9, 1920 (41 Stat. 525, as amended), known as the Suits in Admiralty Act, which is classified generally to chapter 20 (§741 et seq.) of Title 46, Appendix, Shipping. For complete classification of this Act to the Code, see Short Title note set out under section 741 of Title 46, Appendix, and Tables.

Chapter 22 of title 46, Appendix, referred to in text, was in the original a reference to the Act of Mar. 3, 1925 (43 Stat. 1112, as amended), known as the Public Vessels Act, which is classified generally to chapter 22 (§781 et seq.) of Title 46, Appendix. For complete classification of this Act to the Code, see Short Title note set out under section 781 of Title 46, Appendix, and Tables.

### § 604. Fraudulent claims

If a contractor is unable to support any part of his claim and it is determined that such inability is attributable to misrepresentation of fact or fraud on the part of the contractor, he shall be liable to the Government for an amount equal to such unsupported part of the claim in addition to all costs to the Government attributable to the cost of reviewing said part of his claim. Liability under this subsection<sup>1</sup> shall be determined within six years of the commission of such misrepresentation of fact or fraud.

(Pub. L. 95-563, §5, Nov. 1, 1978, 92 Stat. 2384.)

### § 605. Decision by contracting officer

#### (a) Contractor claims

All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. All claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer. Each claim by a contractor against the government relating to a contract and each claim by the government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim. The preceding sentence does not apply to a claim by the government against a contractor that is based on a claim by the contractor involving fraud. The contracting officer shall issue his decisions in writing, and shall mail or otherwise furnish a copy of the decision to the contractor. The decision shall state the reasons for the decision reached, and shall inform the contractor of his rights as provided in this chapter. Specific findings of fact are not required, but, if made, shall not be binding in any subsequent proceeding. The authority of this subsection shall not extend to a claim or dispute for penalties or for-

<sup>1</sup> So in original. Probably should be “section”.

feitures prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle, or determine. This section shall not authorize any agency head to settle, compromise, pay, or otherwise adjust any claim involving fraud.

**(b) Review; performance of contract pending appeal**

The contracting officer's decision on the claim shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is timely commenced as authorized by this chapter. Nothing in this chapter shall prohibit executive agencies from including a clause in government contracts requiring that pending final decision of an appeal, action, or final settlement, a contractor shall proceed diligently with performance of the contract in accordance with the contracting officer's decision.

**(c) Amount of claim; certification; notification; time of issuance; presumption**

(1) A contracting officer shall issue a decision on any submitted claim of \$100,000 or less within sixty days from his receipt of a written request from the contractor that a decision be rendered within that period. For claims of more than \$100,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable, and that the certifier is duly authorized to certify the claim on behalf of the contractor.

(2) A contracting officer shall, within sixty days of receipt of a submitted certified claim over \$100,000—

(A) issue a decision; or

(B) notify the contractor of the time within which a decision will be issued.

(3) The decision of a contracting officer on submitted claims shall be issued within a reasonable time, in accordance with regulations promulgated by the agency, taking into account such factors as the size and complexity of the claim and the adequacy of the information in support of the claim provided by the contractor.

(4) A contractor may request the tribunal concerned to direct a contracting officer to issue a decision in a specified period of time, as determined by the tribunal concerned, in the event of undue delay on the part of the contracting officer.

(5) Any failure by the contracting officer to issue a decision on a contract claim within the period required will be deemed to be a decision by the contracting officer denying the claim and will authorize the commencement of the appeal or suit on the claim as otherwise provided in this chapter. However, in the event an appeal or suit is so commenced in the absence of a prior decision by the contracting officer, the tribunal concerned may, at its option, stay the proceedings to obtain a decision on the claim by the contracting officer.

(6) The contracting officer shall have no obligation to render a final decision on any claim of

more than \$100,000 that is not certified in accordance with paragraph (1) if, within 60 days after receipt of the claim, the contracting officer notifies the contractor in writing of the reasons why any attempted certification was found to be defective. A defect in the certification of a claim shall not deprive a court or an agency board of contract appeals of jurisdiction over that claim. Prior to the entry of a final judgment by a court or a decision by an agency board of contract appeals, the court or agency board shall require a defective certification to be corrected.

(7) The certification required by paragraph (1) may be executed by any person duly authorized to bind the contractor with respect to the claim.

**(d) Alternative means of dispute resolution**

Notwithstanding any other provision of this chapter, a contractor and a contracting officer may use any alternative means of dispute resolution under subchapter IV of chapter 5 of title 5, or other mutually agreeable procedures, for resolving claims. In a case in which such alternative means of dispute resolution or other mutually agreeable procedures are used, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his or her knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable. All provisions of subchapter IV of chapter 5 of title 5, shall apply to such alternative means of dispute resolution.

**(e) Termination of authority to engage in alternative means of dispute resolution; savings provision**

The authority of agencies to engage in alternative means of dispute resolution proceedings under subsection (d) of this section shall cease to be effective on October 1, 1999, except that such authority shall continue in effect with respect to then pending dispute resolution proceedings which, in the judgment of the agencies that are parties to such proceedings, require such continuation, until such proceedings terminate. In any case in which the contracting officer rejects a contractor's request for alternative dispute resolution proceedings, the contracting officer shall provide the contractor with a written explanation, citing one or more of the conditions in section 572(b) of title 5 or such other specific reasons that alternative dispute resolution procedures are inappropriate for the resolution of the dispute. In any case in which a contractor rejects a request of an agency for alternative dispute resolution proceedings, the contractor shall inform the agency in writing of the contractor's specific reasons for rejecting the request.

(Pub. L. 95-563, §6, Nov. 1, 1978, 92 Stat. 2384; Pub. L. 101-552, §6(a), Nov. 15, 1990, 104 Stat. 2745; Pub. L. 102-572, title IX, §907(a)(1), Oct. 29, 1992, 106 Stat. 4518; Pub. L. 103-355, title II, §§2351(a)[(1)], (b), (e), 2352, Oct. 13, 1994, 108 Stat. 3322.)

AMENDMENTS

1994—Subsec. (a). Pub. L. 103-355, §2351(a)[(1)], inserted after second sentence "Each claim by a contrac-

tor against the government relating to a contract and each claim by the government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim. The preceding sentence does not apply to a claim by the government against a contractor that is based on a claim by the contractor involving fraud.”

Subsec. (c). Pub. L. 103-355, § 2351(b), substituted “\$100,000” for “\$50,000” wherever appearing.

Subsec. (c)(4). Pub. L. 103-355, § 2351(e), substituted “tribunal concerned” for “agency board of contract appeals” and “tribunal concerned,” for “board.”

Subsec. (e). Pub. L. 103-355, § 2352, substituted “October 1, 1999” for “October 1, 1995” and inserted after first sentence “In any case in which the contracting officer rejects a contractor’s request for alternative dispute resolution proceedings, the contracting officer shall provide the contractor with a written explanation, citing one or more of the conditions in section 572(b) of title 5 or such other specific reasons that alternative dispute resolution procedures are inappropriate for the resolution of the dispute. In any case in which a contractor rejects a request of an agency for alternative dispute resolution proceedings, the contractor shall inform the agency in writing of the contractor’s specific reasons for rejecting the request.”

1992—Subsec. (c)(1). Pub. L. 102-572, § 907(a)(1)(A), struck out “and” after “belief,” and inserted before period at end “, and that the certifier is duly authorized to certify the claim on behalf of the contractor”.

Subsec. (c)(6), (7). Pub. L. 102-572, § 907(a)(1)(B), added pars. (6) and (7).

1990—Subsecs. (d), (e). Pub. L. 101-552 added subsecs. (d) and (e).

#### 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 1992 AMENDMENT

Section 907(a)(2) of Pub. L. 102-572 provided that: “The amendment made by paragraph (1)(B) [amending this section] shall be effective with respect to all claims filed before, on, or after the date of the enactment of this Act [Oct. 29, 1992], except for those claims which, before such date of enactment, have been the subject of an appeal to an agency board of contract appeals or a suit in the United States Claims Court.”

Section 907(a)(4) of Pub. L. 102-572 provided that: “The amendments made by paragraph (1)(A) [amending this section] shall be effective with respect to certifications executed more than 60 days after the effective date of amendments to the Federal Acquisition Regulation implementing the amendments made by paragraph (1)(A) with respect to the certification of claims.” [For effective date of implementing regulations, see 59 F.R. 11368, Mar. 10, 1994.]

#### TERMINATION DATE OF 1990 AMENDMENT; SAVINGS PROVISION

For termination Oct. 1, 1995, of authority of agencies to use dispute resolution proceedings, with exceptions, under amendments by Pub. L. 101-552, see section 11 of Pub. L. 101-552, set out as a Termination Date; Savings Provision note under section 571 of Title 5, Government Organization and Employees.

#### EFFECT OF CONTRACT PROVISIONS PROVIDING FOR SUBMISSION OF CLAIMS EARLIER THAN SIX YEARS AFTER ACCRUAL

Section 2351(a)(2) of Pub. L. 103-355 provided that: “Notwithstanding the third sentence of section 6(a) of the Contract Disputes Act of 1978 [41 U.S.C. 605(a)], as added by paragraph (1), if a contract in existence on the date of the enactment of this Act [Oct. 13, 1994] requires that a claim referred to in that sentence be submitted earlier than 6 years after the accrual of the claim, then the claim shall be submitted within the period required

by the contract. The preceding sentence does not apply to a claim by the Federal Government against a contractor that is based on a claim by the contractor involving fraud.”

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 256, 606, 609, 611 of this title; title 5 section 504; title 10 sections 2324, 2405; title 28 section 1491; title 31 section 3907.

### § 606. Contractor’s right of appeal to board of contract appeals

Within ninety days from the date of receipt of a contracting officer’s decision under section 605 of this title, the contractor may appeal such decision to an agency board of contract appeals, as provided in section 607 of this title.

(Pub. L. 95-563, § 7, Nov. 1, 1978, 92 Stat. 2385.)

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 256 of this title; title 10 section 2324.

### § 607. Agency boards of contracts appeals

#### (a) Establishment; consultation; Tennessee Valley Authority

(1) Except as provided in paragraph (2) an agency board of contract appeals may be established within an executive agency when the agency head, after consultation with the Administrator, determines from a workload study that the volume of contract claims justifies the establishment of a full-time agency board of at least three members who shall have no other inconsistent duties. Workload studies will be updated at least once every three years and submitted to the Administrator.

(2) The Board of Directors of the Tennessee Valley Authority may establish a board of contract appeals for the Authority of an indeterminate number of members.

#### (b) Appointment of members; chairman; compensation

(1) Except as provided in paragraph (2), the members of agency boards 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’ experience in public contract law. Full-time members of agency boards serving as such on the effective date of this chapter shall be considered qualified. The chairman and vice chairman of each board shall be designated by the agency head from members so appointed. Compensation for the chairman, the vice chairman, and all other members of an agency board shall be determined under section 5372a of title 5.

(2) The Board of Directors of the Tennessee Valley Authority shall establish criteria for the appointment of members to its agency board of contract appeals established in subsection (a)(2) of this section, and shall designate a chairman of such board. The chairman and all other members of such board shall receive compensation, at the daily equivalent of the rates determined under section 5372a of title 5, for each day they are engaged in the actual performance of their duties as members of the board.

**(c) Appeals; inter-agency arrangements**

If the volume of contract claims is not sufficient to justify an agency board under subsection (a) of this section or if he otherwise considers it appropriate, any agency head shall arrange for appeals from decisions by contracting officers of his agency to be decided by a board of contract appeals of another executive agency. In the event an agency head is unable to make such an arrangement with another agency, he shall submit the case to the Administrator for placement with an agency board. The provisions of this subsection shall not apply to the Tennessee Valley Authority.

**(d) Jurisdiction**

Each agency board shall have jurisdiction to decide any appeal from a decision of a contracting officer (1) relative to a contract made by its agency, and (2) relative to a contract made by any other agency when such agency or the Administrator has designated the agency board to decide the appeal. In exercising this jurisdiction, the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the United States Court of Federal Claims.

**(e) Decisions**

An agency board shall provide to the fullest extent practicable, informal, expeditious, and inexpensive resolution of disputes, and shall issue a decision in writing or take other appropriate action on each appeal submitted, and shall mail or otherwise furnish a copy of the decision to the contractor and the contracting officer.

**(f) Accelerated appeal disposition**

The rules of each agency board shall include a procedure for the accelerated disposition of any appeal from a decision of a contracting officer where the amount in dispute is \$100,000 or less. The accelerated procedure shall be applicable at the sole election of only the contractor. Appeals under the accelerated procedure shall be resolved, whenever possible, within one hundred and eighty days from the date the contractor elects to utilize such procedure.

**(g) Review**

(1) The decision of an agency board of contract appeals shall be final, except that—

(A) a contractor may appeal such a decision to the United States Court of Appeals for the Federal Circuit within one hundred twenty days after the date of receipt of a copy of such decision, or

(B) the agency head, if he determines that an appeal should be taken, and with the prior approval of the Attorney General, transmits the decision of the board of contract appeals to the Court of Appeals for the Federal Circuit for judicial review under section 1295 of title 28, within one hundred and twenty days from the date of the agency's receipt of a copy of the board's decision.

(2) Notwithstanding the provisions of paragraph (1), the decision of the board of contract appeals of the Tennessee Valley Authority shall be final, except that—

(A) a contractor may appeal such a decision to a United States district court pursuant to

the provisions of section 1337 of title 28, within one hundred twenty days after the date of receipt of a copy of such decision, or

(B) The Tennessee Valley Authority may appeal the decision to a United States district court pursuant to the provisions of section 1337 of title 28, within one hundred twenty days after the date of the decision in any case.

(3) An award by an arbitrator under this chapter shall be reviewed pursuant to sections 9 through 13 of title 9, except that the court may set aside or limit any award that is found to violate limitations imposed by Federal statute.

**(h) Procedural guidelines**

Pursuant to the authority conferred under the Office of Federal Procurement Policy Act [41 U.S.C. 401 et seq.], the Administrator is authorized and directed, as may be necessary or desirable to carry out the provisions of this chapter, to issue guidelines with respect to criteria for the establishment, functions, and procedures of the agency boards (except for a board established by the Tennessee Valley Authority).

(Pub. L. 95-563, § 8, Nov. 1, 1978, 92 Stat. 2385; Pub. L. 97-164, title I, §§ 156, 160(a)(15), Apr. 2, 1982, 96 Stat. 47, 48; Pub. L. 101-509, title V, § 529 [title I, § 104(d)(4)], Nov. 5, 1990, 104 Stat. 1427, 1447; Pub. L. 101-552, § 6(b), Nov. 15, 1990, 104 Stat. 2746; Pub. L. 102-572, title IX, § 902(b)(1), Oct. 29, 1992, 106 Stat. 4516; Pub. L. 103-355, title II, § 2351(c), Oct. 13, 1994, 108 Stat. 3322.)

## REFERENCES IN TEXT

For the effective date of this chapter, referred to in subsec. (b)(1), see section 16 of Pub. L. 95-563, set out as an Effective Date note under section 601 of this title.

The Office of Federal Procurement Policy Act, referred to in subsec. (h), is Pub. L. 93-400, Aug. 30, 1974, 88 Stat. 796, as amended, which is classified principally to chapter 7 (§ 401 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 401 of this title and Tables.

## CODIFICATION

In subsec. (b)(1), "administrative law judges" substituted for "hearing examiners" on authority of section 3 of Pub. L. 95-251, Mar. 27, 1978, 92 Stat. 184, which is set out as a note under section 3105 of Title 5, Government Organization and Employees.

Subsec. (i), which required all agency boards of three or more full time members, except that of the Tennessee Valley Authority, within one hundred and twenty days after Nov. 1, 1978, to develop workload studies for approval by the agency head specified in subsec. (a)(1), was omitted.

## AMENDMENTS

1994—Subsec. (f). Pub. L. 103-355 substituted "\$100,000" for "\$50,000".

1992—Subsec. (d). Pub. L. 102-572 substituted "United States Court of Federal Claims" for "United States Claims Court".

1990—Subsec. (b)(1). Pub. L. 101-509, § 529 [title I, § 104(d)(4)(A)], substituted "Compensation for the chairman, the vice chairman, and all other members of an agency board shall be determined under section 5372a of title 5." for "The chairman of each agency board shall receive compensation at a rate equal to that paid a GS-18 under the General Schedule contained in section 5332, of title 5, the vice chairman shall receive compensation at a rate equal to that paid a GS-17 under such General Schedule, and all other members shall receive compensation at a rate equal to that paid a GS-16

under such General Schedule. Such positions shall be in addition to the number of positions which may be placed in GS-16, GS-17, and GS-18 of such General Schedule under existing law.”

Subsec. (b)(2). Pub. L. 101-509, §529 [title I, §104(d)(4)(B)], substituted “The chairman and all other members of such board shall receive compensation, at the daily equivalent of the rates determined under section 5372a of title 5, for each day they are engaged in the actual performance of their duties as members of the board.” for “The chairman of such board shall receive compensation at a rate equal to the daily rate paid a GS-18 under the General Schedule contained in section 5332, of title 5, for each day he is engaged in the actual performance of his duties as a member of such board. All other members of such board shall receive compensation at a rate equal to the daily rate paid a GS-16 under such General Schedule for each day they are engaged in the actual performance of their duties as members of such board.”

Subsec. (g)(3). Pub. L. 101-552 added par. (3).

1982—Subsec. (d). Pub. L. 97-164, §160(a)(15), substituted “United States Claims Court” for “Court of Claims”.

Subsec. (g)(1)(A). Pub. L. 97-164, §156(1), substituted “United States Court of Appeals for the Federal Circuit” for “Court of Claims”.

Subsec. (g)(1)(B). Pub. L. 97-164, §156(2), substituted “Court of Appeals for the Federal Circuit for judicial review under section 1295 of title 28” for “United States Court of Claims for judicial review, under section 2510 of title 28”.

#### 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 1992 AMENDMENT

Amendment by Pub. L. 102-572 effective Oct. 29, 1992, see section 911 of Pub. L. 102-572, set out as a note under section 171 of Title 28, Judiciary and Judicial Procedure.

#### EFFECTIVE AND TERMINATION DATES OF 1990 AMENDMENTS

For termination Oct. 1, 1995, of authority of agencies to use dispute resolution proceedings, with exceptions, under amendments by Pub. L. 101-552, see section 11 of Pub. L. 101-552, set out as a Termination Date; Savings Provision note under section 571 of Title 5, Government Organization and Employees.

Amendment by Pub. L. 101-509 effective on such date as the President shall determine, but not earlier than 90 days, and not later than 180 days, after Nov. 5, 1990, see section 529 [title III, §305] of Pub. L. 101-509, set out as an Effective Date of 1990 Amendment note under section 5301 of Title 5.

#### EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97-164 effective Oct. 1, 1982, see section 402 of Pub. L. 97-164, set out as a note under section 171 of Title 28, Judiciary and Judicial Procedure.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 601, 603, 606, 609 of this title; title 5 sections 504, 5102, 5372a; title 25 section 450m-1; title 28 sections 1295, 1346.

### § 608. Small claims

#### (a) Accelerated disposition of appeals

The rules of each agency board shall include a procedure for the expedited disposition of any appeal from a decision of a contracting officer where the amount in dispute is \$50,000 or less. The small claims procedure shall be applicable at the sole election of the contractor.

#### (b) Simplified rules of procedure

The small claims procedure shall provide for simplified rules of procedure to facilitate the decision of any appeal thereunder. Such appeals may be decided by a single member of the agency board with such concurrences as may be provided by rule or regulation.

#### (c) Time of decision

Appeals under the small claims procedure shall be resolved, whenever possible, within one hundred twenty days from the date on which the contractor elects to utilize such procedure.

#### (d) Finality of decision

A decision against the Government or the contractor reached under the small claims procedure shall be final and conclusive and shall not be set aside except in cases of fraud.

#### (e) Effect of decision

Administrative determinations and final decisions under this section shall have no value as precedent for future cases under this chapter.

#### (f) Review of requisite amount in controversy

The Administrator is authorized to review at least every three years, beginning with the third year after November 1, 1978, the dollar amount defined in subsection (a) of this section as a small claim, and based upon economic indexes selected by the Administrator adjust that level accordingly.

(Pub. L. 95-563, §9, Nov. 1, 1978, 92 Stat. 2387; Pub. L. 103-355, title II, §2351(d), Oct. 13, 1994, 108 Stat. 3322.)

#### AMENDMENTS

1994—Subsec. (a). Pub. L. 103-355 substituted “\$50,000” for “\$10,000”.

#### 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.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 40 section 759.

### § 609. Judicial review of board decisions

#### (a) Actions in United States Court of Federal Claims; district court actions; time for filing

(1) Except as provided in paragraph (2), and in lieu of appealing the decision of the contracting officer under section 605 of this title to an agency board, a contractor may bring an action directly on the claim in the United States Court of Federal Claims, notwithstanding any contract provision, regulation, or rule of law to the contrary.

(2) In the case of an action against the Tennessee Valley Authority, the contractor may only bring an action directly on the claim in a United States district court pursuant to section 1337 of title 28, notwithstanding any contract provision, regulation, or rule of law to the contrary.

(3) Any action under paragraph (1) or (2) shall be filed within twelve months from the date of the receipt by the contractor of the decision of the contracting officer concerning the claim, and shall proceed de novo in accordance with the rules of the appropriate court.

**(b) Finality of board decision**

In the event of an appeal by a contractor or the Government from a decision of any agency board pursuant to section 607 of this title, notwithstanding any contract provision, regulation, or rules of law to the contrary, the decision of the agency board on any question of law shall not be final or conclusive, but the decision on any question of fact shall be final and conclusive and shall not be set aside unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence.

**(c) Remand or retention of case**

In any appeal by a contractor or the Government from a decision of an agency board pursuant to section 607 of this title, the court may render an opinion and judgement and remand the case for further action by the agency board or by the executive agency as appropriate, with such direction as the court considers just and proper.

**(d) Consolidation**

If two or more suits arising from one contract are filed in the United States Court of Federal Claims and one or more agency boards, for the convenience of parties or witnesses or in the interest of justice, the United States Court of Federal Claims may order the consolidation of such suits in that court or transfer any suits to or among the agency boards involved.

**(e) Judgments as to fewer than all claims**

In any suit filed pursuant to this chapter involving two or more claims, counterclaims, cross-claims, or third-party claims, and where a portion of one such claim can be divided for purposes of decision or judgment, and in any such suit where multiple parties are involved, the court, whenever such action is appropriate, may enter a judgment as to one or more but fewer than all of the claims, portions thereof, or parties.

**(f) Advisory opinions**

(1) Whenever an action involving an issue described in paragraph (2) is pending in a district court of the United States, the district court may request a board of contract appeals to provide the court with an advisory opinion on the matters of contract interpretation at issue.

(2) An issue referred to in paragraph (1) is any issue that could be the proper subject of a final decision of a contracting officer appealable under this chapter.

(3) A district court shall direct any request under paragraph (1) to the board of contract appeals having jurisdiction under this chapter to adjudicate appeals of contract claims under the contract or contracts being interpreted by the court.

(4) After receiving a request for an advisory opinion under paragraph (1), a board of contract appeals shall provide the advisory opinion in a timely manner to the district court making the request.

(Pub. L. 95-563, §10, Nov. 1, 1978, 92 Stat. 2388; Pub. L. 97-164, title I, §§157, 160(a)(15), 161(10), Apr. 2, 1982, 96 Stat. 47-49; Pub. L. 102-572, title

IX, §902(b)(1), Oct. 29, 1992, 106 Stat. 4516; Pub. L. 103-355, title II, §2354, Oct. 13, 1994, 108 Stat. 3323.)

## AMENDMENTS

1994—Subsec. (f). Pub. L. 103-355 added subsec. (f).

1992—Subsecs. (a)(1), (d). Pub. L. 102-572 substituted “United States Court of Federal Claims” for “United States Claims Court” wherever appearing.

1982—Subsec. (a)(1). Pub. L. 97-164, §161(10), substituted “Claims Court” for “Court of Claims”.

Subsec. (c). Pub. L. 97-164, §157, struck out “, or, in its discretion and in lieu of remand it may retain the case and take such additional evidence or action as may be necessary for final disposition of the case” after “with such direction as the court considers just and proper”.

Subsec. (d). Pub. L. 97-164, §160(a)(15), substituted “United States Claims Court” for “Court of Claims” in two places.

## 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 1992 AMENDMENT

Amendment by Pub. L. 102-572 effective Oct. 29, 1992, see section 911 of Pub. L. 102-572, set out as a note under section 171 of Title 28, Judiciary and Judicial Procedure.

## EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97-164 effective Oct. 1, 1982, see section 402 of Pub. L. 97-164, set out as a note under section 171 of Title 28, Judiciary and Judicial Procedure.

## SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 603 of this title; title 28 sections 1295, 1346, 1491.

**§ 610. Subpena, discovery, and deposition**

A member of an agency board of contract appeals may administer oaths to witnesses, authorize depositions and discovery proceedings, and require by subpoena the attendance of witnesses, and production of books and papers, for the taking of testimony or evidence by deposition or in the hearing of an appeal by the agency board. In case of contumacy or refusal to obey a subpoena by a person who resides, is found, or transacts business within the jurisdiction of a United States district court, the court, upon application of the agency board through the Attorney General; or upon application by the board of contract appeals of the Tennessee Valley Authority, shall have jurisdiction to issue the person an order requiring him to appear before the agency board or a member thereof, to produce evidence or to give testimony, or both. Any failure of any such person to obey the order of the court may be punished by the court as a contempt thereof.

(Pub. L. 95-563, §11, Nov. 1, 1978, 92 Stat. 2388.)

**§ 611. Interest**

Interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim pursuant to section 605(a) of this title from the contractor until payment thereof. The interest provided for in this section shall be paid at the

rate established by the Secretary of the Treasury pursuant to Public Law 92-41 (85 Stat. 97) for the Renegotiation Board.

(Pub. L. 95-563, §12, Nov. 1, 1978, 92 Stat. 2389.)

#### REFERENCES IN TEXT

Provisions of Public Law 92-41, referred to in text, which authorized the Secretary of the Treasury to fix interest rates for the Renegotiation Board, were contained in section 2(a)(3) of Pub. L. 92-41, which was classified to section 1215(b)(2) of Title 50, Appendix, War and National Defense, and was omitted from the Code. See note preceding section 1211 of Title 50, Appendix.

#### INTEREST DUE ON CLAIMS WITH DEFECTIVE CERTIFICATIONS

Pub. L. 102-572, title IX, §907(a)(3), Oct. 29, 1992, 106 Stat. 4518, provided that: "If any interest is due under section 12 of the Contract Disputes Act of 1978 [41 U.S.C. 611] on a claim for which the certification under section 6(c)(1) [41 U.S.C. 605(c)(1)] is, on or after the date of the enactment of this Act [Oct. 29, 1992], found to be defective shall be paid from the later of the date on which the contracting officer initially received the claim or the date of the enactment of this Act."

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 31 sections 3902, 3907.

### § 612. Payment of claims

#### (a) Judgments

Any judgment against the United States on a claim under this chapter shall be paid promptly in accordance with the procedures provided by section 1304 of title 31.

#### (b) Monetary awards

Any monetary award to a contractor by an agency board of contract appeals shall be paid promptly in accordance with the procedures contained in subsection (a) of this section.

#### (c) Reimbursement

Payments made pursuant to subsections (a) and (b) of this section shall be reimbursed to the fund provided by section 1304 of title 31 by the agency whose appropriations were used for the contract out of available funds or by obtaining additional appropriations for such purposes.

#### (d) Tennessee Valley Authority

(1) Notwithstanding the provisions of subsection (a) through (c) of this section, any judgment against the Tennessee Valley Authority on a claim under this chapter shall be paid promptly in accordance with the provisions of section 831h(b) of title 16.

(2) Notwithstanding the provisions of subsection (a) through (c), any monetary award to a contractor by the board of contract appeals for the Tennessee Valley Authority shall be paid in accordance with the provisions of section 831h(b) of title 16.

(Pub. L. 95-563, §13, Nov. 1, 1978, 92 Stat. 2389.)

#### CODIFICATION

In subsecs. (a) and (c), "section 1304 of title 31" substituted for "section 1302 of the Act of July 27, 1956, (70 Stat. 694, as amended; 31 U.S.C. 724a)" on authority of Pub. L. 97-258, §4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

### § 613. Separability

If any provision of this chapter, or the application of such provision to any persons or circumstances, is held invalid, the remainder of this chapter, or the application of such provision to persons or circumstances other than those to which it is held invalid, shall not be affected thereby.

(Pub. L. 95-563, §15, Nov. 1, 1978, 92 Stat. 2391.)

## CHAPTER 10—DRUG-FREE WORKPLACE

Sec.

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|------|---|
| 701. | Drug-free workplace requirements for Federal contractors.<br>(a) Drug-free workplace requirement.<br>(b) Suspension, termination, or debarment of contractor.   |
| 702. | Drug-free workplace requirements for Federal grant recipients.<br>(a) Drug-free workplace requirement.<br>(b) Suspension, termination, or debarment of grantee. |
| 703. | Employee sanctions and remedies.  |
| 704. | Waiver.<br>(a) In general.<br>(b) Exclusive authority.  |
| 705. | Regulations.  |
| 706. | Definitions.  |
| 707. | Construction of chapter.  |

#### CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in title 20 section 1070a; title 42 section 12114.

### § 701. Drug-free workplace requirements for Federal contractors

#### (a) Drug-free workplace requirement

##### (1) Requirement for persons other than individuals

No person, other than an individual, shall be considered a responsible source, under the meaning of such term as defined in section 403(8) of this title, for the purposes of being awarded a contract for the procurement of any property or services of a value greater than the simplified acquisition threshold (as defined in section 403(11) of this title) by any Federal agency, other than a contract for the procurement of commercial items as defined in section 403 of this title, unless such person has certified to the contracting agency that it will provide a drug-free workplace by—

(A) publishing a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the person's workplace and specifying the actions that will be taken against employees for violations of such prohibition;

(B) establishing a drug-free awareness program to inform employees about—

(i) the dangers of drug abuse in the workplace;

(ii) the person's policy of maintaining a drug-free workplace;

(iii) any available drug counseling, rehabilitation, and employee assistance programs; and

(iv) the penalties that may be imposed upon employees for drug abuse violations;

(C) making it a requirement that each employee to be engaged in the performance of



such contract be given a copy of the statement required by subparagraph (A);

(D) notifying the employee in the statement required by subparagraph (A), that as a condition of employment on such contract, the employee will—

(i) abide by the terms of the statement; and

(ii) notify the employer of any criminal drug statute conviction for a violation occurring in the workplace no later than 5 days after such conviction;

(E) notifying the contracting agency within 10 days after receiving notice under subparagraph (D)(ii) from an employee or otherwise receiving actual notice of such conviction;

(F) imposing a sanction on, or requiring the satisfactory participation in a drug abuse assistance or rehabilitation program by, any employee who is so convicted, as required by section 703 of this title; and

(G) making a good faith effort to continue to maintain a drug-free workplace through implementation of subparagraphs (A), (B), (C), (D), (E), and (F).

## (2) Requirement for individuals

No Federal agency shall enter into a contract with an individual unless such contract includes a certification by the individual that the individual will not engage in the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance in the performance of the contract.

## (b) Suspension, termination, or debarment of contractor

### (1) Grounds for suspension, termination, or debarment

Each contract awarded by a Federal agency shall be subject to suspension of payments under the contract or termination of the contract, or both, and the contractor thereunder or the individual who entered the contract with the Federal agency, as applicable, shall be subject to suspension or debarment in accordance with the requirements of this section if the head of the agency determines that—

(A) the contractor or individual has made a false certification under subsection (a) of this section;

(B) the contractor violates such certification by failing to carry out the requirements of subparagraph (A), (B), (C), (D), (E), or (F) of subsection (a)(1) of this section; or

(C) such a number of employees of such contractor have been convicted of violations of criminal drug statutes for violations occurring in the workplace as to indicate that the contractor has failed to make a good faith effort to provide a drug-free workplace as required by subsection (a) of this section.

### (2) Conduct of suspension, termination, and debarment proceedings

(A) If a contracting officer determines, in writing, that cause for suspension of payments, termination, or suspension or debarment exists, an appropriate action shall be initiated by a contracting officer of the agency,

to be conducted by the agency concerned in accordance with the Federal Acquisition Regulation and applicable agency procedures.

(B) The Federal Acquisition Regulation shall be revised to include rules for conducting suspension and debarment proceedings under this subsection, including rules providing notice, opportunity to respond in writing or in person, and such other procedures as may be necessary to provide a full and fair proceeding to a contractor or individual in such proceeding.

### (3) Effect of debarment

Upon issuance of any final decision under this subsection requiring debarment of a contractor or individual, such contractor or individual shall be ineligible for award of any contract by any Federal agency, and for participation in any future procurement by any Federal agency, for a period specified in the decision, not to exceed 5 years.

(Pub. L. 100-690, title V, §5152, Nov. 18, 1988, 102 Stat. 4304; Pub. L. 103-355, title IV, §4104(d), title VIII, §8301(f), Oct. 13, 1994, 108 Stat. 3342, 3397.)

#### AMENDMENTS

1994—Subsec. (a)(1). Pub. L. 103-355 substituted “greater than the simplified acquisition threshold (as defined in section 403(11) of this title) by any Federal agency, other than a contract for the procurement of commercial items as defined in section 403 of this title,” for “of \$25,000 or more from any Federal agency” in introductory provisions.

#### 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 5160 of Pub. L. 100-690 provided that: “Sections 5152 and 5153 [enacting this section and section 702 of this title] shall be effective 120 days after the date of the enactment of this subtitle [Nov. 18, 1988].”

#### SHORT TITLE

Section 5151 of Pub. L. 100-690 provided that: “This subtitle [subtitle D (§§5151-5160) of title V of Pub. L. 100-690, enacting this chapter] may be cited as the ‘Drug-Free Workplace Act of 1988’.”

#### CONSISTENCY OF REGULATIONS WITH INTERNATIONAL OBLIGATIONS OF UNITED STATES; EXTRATERRITORIAL APPLICATION

Section 4804 of Pub. L. 100-690 required that regulations promulgated by agency heads be consistent with international obligations of United States, prior to repeal by Pub. L. 103-447, title I, §103(b), Nov. 2, 1994, 108 Stat. 4693.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 703, 704, 706 of this title.

## § 702. Drug-free workplace requirements for Federal grant recipients

### (a) Drug-free workplace requirement

#### (1) Persons other than individuals

No person, other than an individual, shall receive a grant from any Federal agency unless such person has certified to the granting agency that it will provide a drug-free workplace by—

(A) publishing a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violations of such prohibition;

(B) establishing a drug-free awareness program to inform employees about—

(i) the dangers of drug abuse in the workplace;

(ii) the grantee's policy of maintaining a drug-free workplace;

(iii) any available drug counseling, rehabilitation, and employee assistance programs; and

(iv) the penalties that may be imposed upon employees for drug abuse violations;

(C) making it a requirement that each employee to be engaged in the performance of such grant be given a copy of the statement required by subparagraph (A);

(D) notifying the employee in the statement required by subparagraph (A), that as a condition of employment in such grant, the employee will—

(i) abide by the terms of the statement; and

(ii) notify the employer of any criminal drug statute conviction for a violation occurring in the workplace no later than 5 days after such conviction;

(E) notifying the granting agency within 10 days after receiving notice of a conviction under subparagraph (D)(ii) from an employee or otherwise receiving actual notice of such conviction;

(F) imposing a sanction on, or requiring the satisfactory participation in a drug abuse assistance or rehabilitation program by, any employee who is so convicted, as required by section 703 of this title; and

(G) making a good faith effort to continue to maintain a drug-free workplace through implementation of subparagraphs (A), (B), (C), (D), (E), and (F).

## (2) Individuals

No Federal agency shall make a grant to any individual unless such individual certifies to the agency as a condition of such grant that the individual will not engage in the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance in conducting any activity with such grant.

## (b) Suspension, termination, or debarment of grantee

### (1) Grounds for suspension, termination, or debarment

Each grant awarded by a Federal agency shall be subject to suspension of payments under the grant or termination of the grant, or both, and the grantee thereunder shall be subject to suspension or debarment, in accordance with the requirements of this section if the agency head of the granting agency or his official designee determines, in writing, that—

(A) the grantee has made a false certification under subsection (a) of this section;

(B) the grantee violates such certification by failing to carry out the requirements of subparagraph (A), (B), (C), (D), (E), (F), or (G) of subsection (a)(1) of this section; or

(C) such a number of employees of such grantee have been convicted of violations of criminal drug statutes for violations occurring in the workplace as to indicate that the grantee has failed to make a good faith effort to provide a drug-free workplace as required by subsection (a)(1) of this section.

### (2) Conduct of suspension, termination, and debarment proceedings

A suspension of payments, termination, or suspension or debarment proceeding subject to this subsection shall be conducted in accordance with applicable law, including Executive Order 12549 or any superseding Executive order and any regulations promulgated to implement such law or Executive order.

### (3) Effect of debarment

Upon issuance of any final decision under this subsection requiring debarment of a grantee, such grantee shall be ineligible for award of any grant from any Federal agency and for participation in any future grant from any Federal agency for a period specified in the decision, not to exceed 5 years.

(Pub. L. 100-690, title V, §5153, Nov. 18, 1988, 102 Stat. 4306.)

#### REFERENCES IN TEXT

Executive Order 12549, referred to in subsec. (b)(2), is set out as a note under section 6101 of Title 31, Money and Finance.

#### EFFECTIVE DATE

Section effective 120 days after Nov. 18, 1988, see section 5160 of Pub. L. 100-690, set out as a note under section 701 of this title.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 703, 706 of this title; title 42 section 12644.

## § 703. Employee sanctions and remedies

A grantee or contractor shall, within 30 days after receiving notice from an employee of a conviction pursuant to section 701(a)(1)(D)(ii) or 702(a)(1)(D)(ii) of this title—

(1) take appropriate personnel action against such employee up to and including termination; or

(2) require such employee to satisfactorily participate in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency.

(Pub. L. 100-690, title V, §5154, Nov. 18, 1988, 102 Stat. 4307.)

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 701, 702 of this title; title 42 section 12644.

## § 704. Waiver

### (a) In general

A termination, suspension of payments, or suspension or debarment under this chapter may

be waived by the head of an agency with respect to a particular contract or grant if—

(1) in the case of a waiver with respect to a contract, the head of the agency determines under section 701(b)(1) of this title, after the issuance of a final determination under such section, that suspension of payments, or termination of the contract, or suspension or debarment of the contractor, or refusal to permit a person to be treated as a responsible source for a contract, as the case may be, would severely disrupt the operation of such agency to the detriment of the Federal Government or the general public; or

(2) in the case of a waiver with respect to a grant, the head of the agency determines that suspension of payments, termination of the grant, or suspension or debarment of the grantee would not be in the public interest.

**(b) Exclusive authority**

The authority of the head of an agency under this section to waive a termination, suspension, or debarment shall not be delegated.

(Pub. L. 100-690, title V, §5155, Nov. 18, 1988, 102 Stat. 4307.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 42 section 12644.

**§ 705. Regulations**

Not later than 90 days after November 18, 1988, the governmentwide regulations governing actions under this chapter shall be issued pursuant to the Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.).

(Pub. L. 100-690, title V, §5156, Nov. 18, 1988, 102 Stat. 4308.)

REFERENCES IN TEXT

The Office of Federal Procurement Policy Act, referred to in text, is Pub. L. 93-400, Aug. 30, 1974, 88 Stat. 796, as amended, which is classified principally to chapter 7 (§401 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 401 of this title and Tables.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 42 section 12644.

**§ 706. Definitions**

For purposes of this chapter—

(1) the term “drug-free workplace” means a site for the performance of work done in connection with a specific grant or contract described in section 701 or 702 of this title of an entity at which employees of such entity are prohibited from engaging in the unlawful man-

ufacture, distribution, dispensation, possession, or use of a controlled substance in accordance with the requirements of this Act;

(2) the term “employee” means the employee of a grantee or contractor directly engaged in the performance of work pursuant to the provisions of the grant or contract described in section 701 or 702 of this title;

(3) the term “controlled substance” means a controlled substance in schedules I through V of section 812 of title 21;

(4) the term “conviction” means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes;

(5) the term “criminal drug statute” means a criminal statute involving manufacture, distribution, dispensation, use, or possession of any controlled substance;

(6) the term “grantee” means the department, division, or other unit of a person responsible for the performance under the grant;

(7) the term “contractor” means the department, division, or other unit of a person responsible for the performance under the contract; and

(8) the term “Federal agency” means an agency as that term is defined in section 552(f) of title 5.

(Pub. L. 100-690, title V, §5157, Nov. 18, 1988, 102 Stat. 4308.)

REFERENCES IN TEXT

This Act, referred to in par. (1), is Pub. L. 100-690, Nov. 18, 1988, 102 Stat. 4181, known as the Anti-Drug Abuse Act of 1988. For complete classification of this Act to the Code, see Short Title note set out under section 1501 of Title 21, Food and Drugs, and Tables.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 42 section 12644.

**§ 707. Construction of chapter**

Nothing in this chapter shall be construed to require law enforcement agencies, if the head of the agency determines it would be inappropriate in connection with the agency’s undercover operations, to comply with the provisions of this chapter.

(Pub. L. 100-690, title V, §5158, Nov. 18, 1988, 102 Stat. 4308.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 42 section 12644.