

TITLE 41--PUBLIC CONTRACTS

CHAPTER 4--PROCUREMENT PROCEDURES

SUBCHAPTER IV--PROCUREMENT PROVISIONS

Sec. 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, Sec. 304, 63 Stat. 395; Oct. 31, 1951, ch. 652, 65 Stat. 700; July 12, 1952, ch. 703, Sec. 1(m), 66 Stat. 594; Pub. L. 89-607, Sec. 2, Sept. 27, 1966, 80 Stat. 850; Pub. L. 98-369, div. B, title VII, Secs. 2712, 2714(a)(2), (3), July 18, 1984, 98 Stat. 1181, 1184; Pub. L. 103-355, title I, Secs. 1071, 1251(a)(1),

title II, Sec. 2251(b), title IV, Secs. 4103(c), 4402(c),
title VIII,
Sec. 8204(b), title X, Sec. 10005(e), Oct. 13, 1994, 108 Stat.
3270,
3278, 3320, 3341, 3349, 3396, 3408.)

Amendments

1994--Subsec. (a). Pub. L. 103-355, Secs. 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, Secs. 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, Sec. 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, Sec. 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, Sec. 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, Sec. 2714(a)(2), amended section catchline
generally.

Subsec. (a). Pub. L. 98-369, Sec. 2714(a)(3)(A), (B), 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, Sec. 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, Sec. 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, formerly section

505, of act June 30, 1949, ch. 288, 63 Stat. 403; renumbered by act Sept. 5, 1950, ch. 849, Sec. 6(a), (b), 64 Stat. 583.

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, Sec. 1, Feb. 1, 1993, 58 F.R. 7045, which was itself revoked as it relates to notification of employee rights concerning payment of union dues or fees by Ex. Ord. No. 13201, Sec. 11, Feb. 17, 2001, 66 F.R. 11221, and as it relates to project agreements by Ex. Ord. No. 13202, Sec. 8, Feb. 17, 2001, 66 F.R. 11226.

Ex. Ord. No. 13201. Notification of Employee Rights
Concerning Payment

of Union Dues or Fees

Ex. Ord. No. 13201, Feb. 17, 2001, 66 F.R. 11221, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 471 et seq. [now chapters 1 to 11 of Title 40, Public Buildings, Property, and Works, and title III of the Act of June 30, 1949 (41 U.S.C. 251 et seq.)], and in order to

ensure the economical and efficient administration and completion of

Government contracts, it is hereby ordered that:

Section 1. (a) This order is designed to promote economy and efficiency in Government procurement. When workers are better informed

of their rights, including their rights under the Federal labor laws,

their productivity is enhanced. The availability of such a workforce

from which the United States may draw facilitates the efficient and

economical completion of its procurement contracts.

(b) The Secretary of Labor (Secretary) shall be responsible for the

administration and enforcement of this order. The Secretary shall adopt

such rules and regulations and issue such orders as are deemed necessary

and appropriate to achieve the purposes of this order.

Sec. 2. (a) Except in contracts exempted in accordance with section

3 of this order, all Government contracting departments and agencies

shall, to the extent consistent with law, include the following

provisions in every Government contract, other than collective bargaining agreements as defined in 5 U.S.C. 7103(a)(8) and purchases

under the ``Simplified Acquisition Threshold'' as defined in the Office

of Federal Procurement Policy Act (41 U.S.C. 403).

``1. During the term of this contract, the contractor agrees to post

a notice, of such size and in such form as the Secretary of Labor shall prescribe, in conspicuous places in and about its plants and offices, including all places where notices to employees are customarily posted. The notice shall include the following information (except that the last sentence shall not be included in notices posted in the plants or offices of carriers subject to the Railway Labor Act, as amended (45 U.S.C. 151-188)):

``NOTICE TO EMPLOYEES

Under Federal law, employees cannot be required to join a union or maintain membership in a union in order to retain their jobs. Under certain conditions, the law permits a union and an employer to enter into a union-security agreement requiring employees to pay uniform periodic dues and initiation fees. However, employees who are not union members can object to the use of their payments for certain purposes and can only be required to pay their share of union costs relating to collective bargaining, contract administration, and grievance adjustment.

``If you do not want to pay that portion of dues or fees used to support activities not related to collective bargaining, contract

administration, or grievance adjustment, you are entitled to an appropriate reduction in your payment. If you believe that you have been required to pay dues or fees used in part to support activities not related to collective bargaining, contract administration, or grievance adjustment, you may be entitled to a refund and to an appropriate reduction in future payments.

``For further information concerning your rights, you may wish to contact the National Labor Relations Board (NLRB) either at one of its Regional offices or at the following address:

National Labor Relations Board
Division of Information
1099 14th Street, N.W.
Washington, D.C. 20570

``To locate the nearest NLRB office, see NLRB's website at www.nlr.gov.''

``2. The contractor will comply with all provisions of Executive Order 13201 of February 17, 2001, and related rules, regulations, and orders of the Secretary of Labor.

``3. In the event that the contractor does not comply with any of the requirements set forth in paragraphs (1) or (2) above, this contract may be cancelled, terminated, or suspended in whole or in part, and the contractor may be declared ineligible for further Government contracts

in accordance with procedures authorized in or adopted pursuant to Executive Order 13201 of February 17, 2001. Such other sanctions or remedies may be imposed as are provided in Executive Order 13201 of February 17, 2001, or by rule, regulation, or order of the Secretary of Labor, or as are otherwise provided by law.

4. The contractor will include the provisions of paragraphs (1) through (3) herein in every subcontract or purchase order entered into in connect