§ 2306. Kinds of contracts

(a) The cost-plus-a-percentage-of-cost system of contracting may not be used. Subject to the limitation in the preceding sentence, the other provisions of this section, and other applicable provisions of law, the head of an agency, in awarding contracts under this chapter after using procedures other than sealed-bid procedures, may enter into any kind of contract that he considers will promote the best interests of the United States.

(b) Each contract awarded under this chapter after using procedures other than sealed-bid procedures shall contain a warranty, determined to be suitable by the head of the agency, that the contractor has employed or retained no person or selling agency to solicit or obtain the contract under an understanding or agreement for a commission, percentage, brokerage, or contingent fee, except a bona fide employee or established commercial or selling agency maintained by him to obtain business. If a contractor breaks such a warranty the United States may annul the contract without liability or may deduct the commission, percentage, brokerage, or contingent fee from the contract price or consideration. This subsection does not apply to a contract that is for an amount not greater than the simplified acquisition threshold or to a contract for the acquisition of commercial items.

(c) A contract entered into by the United States in connection with a military construction project or a military family housing project may not use any form of cost-plus contracting. This prohibition is in addition to the prohibition specified in subsection (a) on the use of the cost-plus-a-percentage-of-cost system of contracting and applies notwithstanding a declaration of war or the declaration by the President of a national emergency under section 201 of the National Emergencies Act (50 U.S.C. 1621) that includes the use of the armed forces.

(d) The fee for performing a cost-plus-a-fixed-fee contract for experimental, developmental, or research work may not be more than 15 percent of the estimated cost of the contract, not including the fee. The fee for performing a cost-plus-a-fixed-fee contract for architectural or engineering services for a public work or utility plus the cost of those services to the contractor may not be more than 6 percent of the estimated cost of that work or project, not including fees. The fee for performing any other cost-plus-a-fixed-fee contract may not be more than 10 percent of the estimated cost of the contract, not including the fee. Determinations under this subsection of the estimated costs of a contract or project shall be made by the head of the agency at the time the contract is made.

(e) (1) Except as provided in paragraph (2), each cost contract and each cost-plus-a-fixed-fee contract shall provide for notice to the agency by the contractor before the making, under the prime contract, of—

(A) a cost-plus-a-fixed-fee subcontract; or

(B) a fixed-price subcontract or purchase order involving more than the greater of
   i) the simplified acquisition threshold, or
   ii) 5 percent of the estimated cost of the prime contract.

(2) Paragraph (1) shall not apply to a prime contract with a contractor that maintains a purchasing system approved by the contracting officer for the contract.

(f) So-called “truth-in-negotiations” provisions relating to cost or pricing data to be submitted by certain contractors and subcontractors are provided in section 2306a of this title.

(g) Multiyear contracting authority for the acquisition of services is provided in section 2306c of this title.

(h) Multiyear contracting authority for the purchase of property is provided in section 2306b of this title.
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Historical and Revision Notes

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In subsection (a), the words “subject to subsections (b)–(e)” are substituted for the words “Except as provided in subsection (b) of this section”. The words “United States” are substituted for the word “Government”.

In subsection (b), the words “under section 2304 of this title” are substituted for the words “pursuant to section 151 (c) of this title”. The words “full amount of such” and “violation” are omitted as surplusage.

In subsection (c), the words “under section 2304 of this title” are inserted for clarity.

Codification


Prior Provisions

Provisions similar to those in subsec. (h)(11) of this section were contained in Pub. L. 100–526, title I, § 104(a), Oct. 24, 1988, 102 Stat. 2624, which was set out below, prior to repeal by Pub. L. 101–189, § 805(b).

Amendments

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NB: This unofficial compilation of the U.S. Code is current as of Jan. 4, 2012 (see http://www.law.cornell.edu/uscode/uscprint.html).

2003—Subsec. (e). Pub. L. 108–136 substituted “(1) Except as provided in paragraph (2), each” for “Each”, redesignated former pars. (1) and (2) as subpars. (A) and (B) of par. (1), respectively, redesignated cls. (A) and (B) of former par. (2) as cls. (i) and (ii) of subpar. (B) of par. (1), respectively, and added par. (2).

2000—Subsec. (g). Pub. L. 106–398 amended subsec. (g) generally. Prior to amendment, subsec. (g) consisted of pars. (1) to (3) authorizing the head of an agency to enter into contracts for periods of not more than five years for certain types of services.


1994—Subsec. (b). Pub. L. 103–355, §§ 4102(b), 8105 (a), inserted at end “This subsection does not apply to a contract that is for an amount not greater than the simplified acquisition threshold or to a contract for the acquisition of commercial items.”

Subsec. (c). Pub. L. 103–355, § 1021, struck out subsec. (c) which read as follows: “No cost contract, cost-plus-a-fixed-fee contract, or incentive contract may be made under this chapter unless the head of the agency determines that such a contract is likely to be less costly to the United States than any other kind of contract or that it is impracticable to obtain property or services of the kind or quality required except under such a contract.”

Subsec. (e)(2)(A). Pub. L. 103–355, § 4401(c), substituted “simplified acquisition threshold” for “small purchase amount under section 2304 (g) of this title”.

Subsec. (h). Pub. L. 103–355, § 1022(b), amended subsec. (h) generally. Prior to amendment, subsec. (h) related to requirements for multiyear contracts for purchase of property, including weapon systems and items and services associated with weapons systems.

1991—Subsec. (e)(2)(A). Pub. L. 102–25 substituted “the small purchase threshold” for “the small purchase amount under section 2304 (g) of this title”.

1990—Subsec. (h)(1). Pub. L. 101–510, § 808(a), struck out “(other than contracts described in paragraph (6))” after “multiyear contracts” in introductory provisions and substituted “substantial savings of the total anticipated costs of carrying out the program through annual contracts” for “reduced total costs under the contract” in subpar. (A).

Subsec. (h)(6). Pub. L. 101–510, § 808(b), struck out “contracts for the construction, alteration, or major repair of improvements to real property or” after “not apply to”.

Subsec. (h)(9). Pub. L. 101–510, § 808(c)(1), inserted “for a defense acquisition program that has been specifically authorized by law to be carried out using multiyear contract authority” after “under this subsection” in introductory provisions.

Subsec. (h)(9)(C). Pub. L. 101–510, § 808(c)(2), struck out subpar. (C) which read as follows: “The proposed multiyear contract—

“(i) achieves a 10 percent savings as compared to the cost of current negotiated contracts, adjusted for changes in quantity and for inflation; or

“(ii) achieves a 10 percent savings as compared to annual contracts if no recent contract experience exists.”


Subsec. (f). Pub. L. 99–500 and Pub. L. 99–591, § 101(c) [§ 952(b)(1)], Pub. L. 99–661, § 952(b)(1), amended generally subsec. (f) identically, substituting provision that “truth-in-negotiations” provisions relating to cost and pricing data for contractors and subcontractors are provided in section 2306a of this title for provision relating to certification by contractors and subcontractors on cost and pricing data, circumstances under which such certification will be required, circumstances under which such certification, although not required, may be requested, and evaluation of the accuracy of the data submitted.


1984—Pub. L. 98–369, § 2724(f), substituted “Kinds of contracts; cost or pricing data: truth in negotiation” for “Kinds of contracts” in section catchline.

Subsec. (a). Pub. L. 98–369, § 2724(a), substituted “the limitation in the preceding sentence, the other provisions of this section, and other applicable provisions of law, the head of an agency, in awarding contracts under this chapter after using procedures other than sealed-bid procedures, may enter into” for “this limitation and subject to subsections (b)–(f), the head of any agency may, in negotiating contracts under section 2304 of this title, make”.

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Subsec. (b). Pub. L. 98–369, § 2724(b), substituted “awarded under this chapter after using procedures other than sealed-bid procedures” for “negotiated under section 2304”.

Subsec. (c). Pub. L. 98–369, § 2724(c), substituted “this chapter” for “section 2304 of this title,“.

Subsec. (e)(2). Pub. L. 98–369, § 2724(d), substituted “the greater of (A) the small purchase amount under section 2304 (g) of this title, or (B)” for “$25,000 or”.

Subsec. (f)(1). Pub. L. 98–369, § 2724(e)(A)(i), (ii), substituted “such contractor’s or subcontractor’s” for “his” and struck out “he” before “submitted was accurate” in provisions preceding subpar. (A).

Subsec. (f)(1)(A). Pub. L. 98–369, § 2724(3)(A)(iii), (vi), (vii), substituted “prime contract under this chapter entered into after using procedures other than sealed-bid procedures, if” for “negotiated prime contract under this title where”, “$100,000” for “$500,000”, and “before” for “prior to”.

Subsec. (f)(1)(B). Pub. L. 98–369, § 2724(e)(A)(iv), (vi), (vii), substituted “if” for “for which”, “$100,000” for “$500,000”, and “before” for “prior to”.

Subsec. (f)(1)(C). Pub. L. 98–369, § 2724(e)(A)(v)–(vii), substituted “when” for “where”, “$100,000” for “$500,000”, and “before” for “prior to”.

Subsec. (f)(1)(D). Pub. L. 98–369, § 2724(e)(A)(iv), (vi), (vii), substituted “if” for “for which”, “$100,000” for “$500,000”, and “before” for “prior to”.

Subsec. (f)(2). Pub. L. 98–369, § 2724(e)(B), (D), (E), struck out “negotiated” before “price as is practicable” and before “is based on adequate price competition”, redesignated as par. (3) the proviso formerly set out in this par., and as part of the redesignation substituted a period for “: Provided, That” after “or noncurrent”.

Subsec. (f)(3). Pub. L. 98–369, § 2724(e)(E), designated as par. (3) the proviso formerly set out in par. (2). Former par. (3) redesignated (5).


Subsec. (f)(5). Pub. L. 98–369, § 2724(e)(C), redesignated former par. (3) as (5) and substituted “proposal for the contract, the discussions conducted on the proposal” for “negotiation”.

1981—Subsec. (f)(1). Pub. L. 97–86, § 907(b), substituted “$500,000” for “$100,000” in subpars. (A) to (D).

Subsec. (g)(1). Pub. L. 97–86, § 909(b)(1), struck out “to be performed outside the forty-eight contiguous States and the District of Columbia” after “(and items of supply related to such services)” in provisions preceding subpar. (A).


1980—Subsec. (f). Pub. L. 96–513, § 511(77)(A), designated existing provisions as pars. (1) to (3) and in par. (1), as so designated, substituted “((A))” to “((D))” for “(1)” to “(4)”, respectively, “prior” for “Prior” wherever appearing, and “clause (C)” for “(3) above”.

Subsec. (g). Pub. L. 96–513, § 511(77)(B), in par. (1) substituted “that—” for “that:”, in par. (2) substituted “(A) the” for “(A) the”, “(B) Consideration” for “(B) consideration”, and “(C) Consideration” for “(C) consideration”, and in par. (3) substituted “from—” for “from:”.


Subsec. (g). Pub. L. 90–378 added subsec. (g).

1962—Subsec. (a). Pub. L. 87–653, § 1(d), substituted “subsections (b)–(f)” for “subsections (b)–(e)”.


**Effective Date of 2011 Amendment**

Pub. L. 112–81, div. B, title XXVIII, § 2801(b), Dec. 31, 2011, 125 Stat. 1684, provided that: “Subsection (c) of section 2306 of title 10, United States Code, as added by subsection (a), shall apply with respect to any contract entered into by the United States in connection with a military construction project or a military family housing project after the date of the enactment of this Act [Dec. 31, 2011].”

**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 2302 of this title.
Effective Date of 1986 Amendment


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 2302 of this title.

Effective Date of 1980 Amendment


Effective Date of 1962 Amendment

For effective date of amendment by Pub. L. 87–653 see section 1(h) of Pub. L. 87–653, set out as a note under section 2304 of this title.

Transition Provision

Section 805(c) of Pub. L. 101–189 provided that: “Subparagraph (C) of paragraph (9) of section 2306 (h) of title 10, United States Code, as added by subsection (a), does not apply to programs that are under a multiyear contract on the date of the enactment of this Act [Nov. 29, 1989].”

Determination of Contract Type for Development Programs


“(b) Modification of Regulations.—Not later than 120 days after the date of the enactment of this Act [Oct. 17, 2006], the Secretary of Defense shall modify the regulations of the Department of Defense regarding the determination of contract type for development programs.

“(c) Elements.—As modified under subsection (b), the regulations shall require the Milestone Decision Authority for a major defense acquisition program to select the contract type for a development program at the time of a decision on Milestone B approval (or Key Decision Point B approval in the case of a space program) that is consistent with the level of program risk for the program. The Milestone Decision Authority may select—

“(1) a fixed-price type contract (including a fixed price incentive contract); or

“(2) a cost type contract.

“(d) Conditions With Respect to Authorization of Cost Type Contract.—As modified under subsection (b), the regulations shall provide that the Milestone Decision Authority may authorize the use of a cost type contract under subsection (c) for a development program only upon a written determination that—

“(1) the program is so complex and technically challenging that it would not be practicable to reduce program risk to a level that would permit the use of a fixed-price type contract; and

“(2) the complexity and technical challenge of the program is not the result of a failure to meet the requirements established in section 2366a of title 10, United States Code.

“(c) Justification for Selection of Contract Type.—As modified under subsection (b), the regulations shall require the Milestone Decision Authority to document the basis for the contract type selected for a program. The documentation shall include an explanation of the level of program risk for the program and, if the Milestone Decision Authority determines that the level of program risk is high, the steps that have been taken to reduce program risk and reasons for proceeding with Milestone B approval despite the high level of program risk.”

Multiyear Procurement Authority; Requests for Relief

Pub. L. 100–526, title I, § 104(a), Oct. 24, 1988, 102 Stat. 2624, which provided that if for any fiscal year a multiyear contract was to be entered into under 10 U.S.C. 2306 (h) was authorized by law for a particular procurement program and that authorization was subject to certain conditions established by law (including a condition as to cost savings to be achieved under the multiyear contract in comparison to specified other contracts) and if it appeared (after negotiations with contractors) that such savings could not be achieved, but that substantial savings could nevertheless be achieved through the use of a multiyear contract rather than specified other contracts, the President was to submit to Congress a request for relief from the specified cost savings that was to be achieved through multiyear contracting for that program.
and that any such request by the President was to include details about the request for a multiyear contract, including
details about the negotiated contract terms and conditions, was repealed and restated as subsec. (h)(11) of this section
by Pub. L. 101–189, § 805(b), (c).

Technical Data and Computer Software Packages; Procurement; Contracting
Period; Deferred Ordering Clause; Exemptions; Report to Congressional
Committees; Definitions

Oct. 1, 1976 to Sept. 30, 1978 for development or procurement of a major system include a deferred ordering clause
with an option to purchase from the contractor technical data and computer software packages relating to the system,
directed that such clause require such packages to be sufficiently detailed so as to enable procurement of such system or
subsystem from another contractor, authorized that a particular contract may be exempted from the deferred ordering
clause if the procuring authority reports to the House and Senate Committees on Armed Services his intent to so
contract with an explanation for the exemption, and set out definitions for “major system”, “deferred ordering”, and
“technical data”.

NB: This unofficial compilation of the U.S. Code is current as of Jan. 4, 2012 (see http://www.law.cornell.edu/uscode/uscprint.html).