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Competition in Federal Contracting: Legal Overview

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January 21, 2015

Congressional Research Service
7-....
www.crs.gov
R40516

CRS REPORT
Prepared for Members and
Committees of Congress

Summary

Competition in federal procurement contracting has long been of interest to Congress and the executive branch, in part because of the belief that increased competition among potential vendors results in lower prices for the government. President Obama issued a memorandum calling for increased competition in federal contracting on March 4, 2009, shortly after taking office, and his Administration has sought to reduce the number of "noncompetitive" contracts by various means, including by issuing guidance on "Increasing Competition and Structuring Contracts for Best Results" in October 2009. Subsequently, in 2012, the Department of Defense (DOD), which accounts for 60% to 70% of federal procurement spending per year, amended its regulations to require that contracting officers re-solicit agency requirements if a solicitation allowed fewer than 30 days for the receipt of proposals and resulted in only one bid or offer. Further guidance was issued in 2014.

The Competition in Contracting Act (CICA) of 1984 generally governs competition in federal procurement contracting. Any procurement contract not entered into through the use of procurement procedures expressly authorized by a particular statute is subject to CICA. CICA requires that contracts be entered into after "full and open competition through the use of competitive procedures" unless certain circumstances exist that would permit agencies to use noncompetitive procedures. Full and open competition can be obtained through the use of sealed bids, competitive proposals, or other procures defined as competitive under CICA (e.g., procurement of architectural or engineering services under the Brooks Act). Full and open competition under CICA also encompasses "full and open competition after exclusion of sources," such as results when agencies engage in dual sourcing or "set aside" acquisitions for small businesses (i.e., conduct competitions in which only small businesses may participate).

Any contract entered into without full and open competition is noncompetitive, but noncompetitive contracts can still be in compliance with CICA when circumstances permitting other than full and open competition exist. CICA recognizes seven such circumstances, including (1) single source for goods or services; (2) unusual and compelling urgency; (3) maintenance of the industrial base; (4) requirements of international agreements; (5) statutory authorization or acquisition of brand-name items for resale; (6) national security; and (7) contracts necessary in the public interest. CICA also allows agencies to use "special simplified procedures" when acquiring goods or services whose expected value is less than $150,000, or commercial goods or services whose expected value is less than $6.5 million ($12 million in certain circumstances).

Issuance of orders under task order and delivery order (TO/DO) contracts is not subject to CICA, although award of TO/DO contracts is. However, the Federal Acquisition Streamlining Act (FASA) of 1994 established a preference for multiple-award TO/DO contracts; required that agencies provide contractors "a fair opportunity" to compete for orders in excess of $3,000 under multiple-award contracts; and authorized the Government Accountability Office (GAO) to hear protests challenging the issuance of task or delivery orders that increase the scope, period, or maximum value of the underlying contract. The National Defense Authorization Act (NDAA) for FY2008 further limited the use of single-award TO/DO contracts. It also specified what constitutes a "fair opportunity to be considered" for orders in excess of $5.5 million under multiple-award contracts and granted GAO exclusive jurisdiction to hear protests of orders valued in excess of $10 million that do not increase the scope, period, or maximum value of the contract. This jurisdiction is permanent as to protests of defense agency contracts (P.L. 112-239), but only lasts through September 30, 2016, for protests of civilian agency contracts (P.L. 112-81).

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The term "procurement" describes the process whereby government agencies acquire supplies or services for their own "direct benefit or use."[1] Competition in government procurement means that the government determines from whom to buy supplies or services—and thus with whom to contract—by "solicit[ing] or entertain[ing] offers from two or more competitors, compar[ing] them, and accept[ing] one based on its relative value."[2]

Competition in federal procurement contracting has long been of interest to Congress and the executive branch, in part because of the belief that increased competition among potential vendors results in lower prices for the government.[3] President Obama issued a memorandum calling for increased competition in federal contracting on March 4, 2009, shortly after taking office,[4] and his Administration has sought to reduce the number of "noncompetitive" contracts by various means, including by issuing guidance on "Increasing Competition and Structuring Contracts for Best Results" in October 2009.[5] Subsequently, in 2012, the Department of Defense (DOD), which accounts for 60% to 70% of federal procurement spending per year,[6] amended its regulations to require that contracting officers re-solicit agency requirements if a solicitation allowed fewer than 30 days for the receipt of proposals and resulted in only one bid or offer.[7] Most recently, in 2014, DOD issued guidance that calls for contracting officers to take additional steps, including issuing requests for information (RFIs) prior to soliciting sole-source acquisitions.[8]

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[1] 31 U.S.C. §6303. *See also* CRS Legal Sidebar WSLG905, Procurement Contract or Cooperative Agreement?: Recent Federal Circuit Decision Explores the Difference between the Two, by (name redacted).

[2] Ralph C. Nash, Jr., Steve L. Schooner, Karen R. O'Brien-DeBakey, and Vernon J. Edwards, THE GOVERNMENT CONTRACTS REFERENCE BOOK: A COMPREHENSIVE GUIDE TO THE LANGUAGE OF PROCUREMENT 109-110 (2d ed. 2007).

[3] *See, e.g.*, *Gates Cites Acquisition Reform as One of Defense Department's Greatest Challenges*, 91 FED. CONT. R. 71 (February 3, 2009) (then-Secretary of Defense Robert Gates emphasizing increased competition as a potential source of savings for the Department).

[4] The White House, Office of the Press Secretary, Government Contracting: Memorandum for the Heads of Executive Departments and Agencies, March 4, 2009, available at http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-Subject-Government/.

[5] Executive Office of the President, Office of Management and Budget, Increasing Competition and Structuring Contracts for Best Results, October 27, 2009 (copy on file with the author) (also calling for agencies to focus on requirements development and outreach to potential vendors, use performance-based acquisitions and commercial solutions, and engage in strategic sourcing, among other things).

[6] Prime Award Spending Data, Federal Spending, FY2013, Contracts, available at http://usaspending.gov/index.php?q=node%2F3&fiscal_year=2013&tab=By+Agency.

[7] *See* 48 C.F.R. §214.201-6 (sealed bidding); 48 C.F.R. §§215.371-1—215.371-6 (negotiated procurement). *See also* Office of the Under Secretary of Defense for Acquisition, Technology and Logistics, Review Criteria for the Acquisition of Services: Memorandum, February 18, 2009, available *at* http://www.acq.osd.mil/dpap/policy/policyvault/USA002735-08-DPAP.pdf (stating that the requirements of service contracts should be articulated in such a way as to provide for "maximum competition," in general, and for "meaningful competition" for orders under multiple award contracts).

[8] Dep't of Defense, Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics, Guidelines for Creating and Maintaining a Competitive Environment for Supplies and Services in the Department of Defense, August 2014, available at http://bbp.dau.mil/docs/BBP%202-0%20Competition%20Guidelines%20(Published%2022%20Aug%202014).pdf. These guidelines also call for contracting officers to solicit feedback from contractors who dropped out of the competitive bidding process during the market research phase in order to understand why these contractors did not submit officers. Contracting officers must also include the justifications and approvals for earlier sole-source awards in the approval packages for any follow-on acquisitions, and explain what, if any steps, have been taken to overcome barriers to competition in the follow-on acquisition.

Recent Congresses have also sought to promote competition in federal contracting by enacting legislation that

- limits the use of appropriated funds to procure certain items until the procuring agency certifies to Congress that its acquisition strategy meets certain requirements pertaining to competition;[9]
- requires agencies to establish goals for competition for certain contracts,[10] plans for competing certain acquisitions,[11] processes for measuring competition for certain contracts,[12] and/or annual reviews of certain contracts;[13]
- precludes defense agencies from awarding noncompetitive contracts based on unsolicited research proposals;[14]
- requires DOD to take further steps to foster competition in the procurement of "major defense acquisition programs";[15] and
- requires that certain recipients of federal grants or financial assistance obtain competition when awarding contracts.[16]

[9] *See, e.g.*, National Defense Authorization Act for FY2012, P.L. 112-81, §141, 125 Stat. 1324 (December 31, 2011) ("Of the funds authorized to be appropriated by this Act or otherwise made available for fiscal year 2012 for other procurement, for covered programs of the joint tactical radio system, not more than 70 percent may be obligated or expended until the date on which the Secretary of the Army submits to the congressional defense committees written certification that the acquisition strategy for the full-rate production of covered programs of such radio system includes full and open competition ... that includes commercially developed systems that the Secretary determines are qualified with respect to successful testing by the Army and certification by the National Security Agency."); *id*., §215, 125 Stat. 1333 (similar requirements as to research and development for the F-35 Lightning II aircraft program); *id*., §353, 125 Stat. 1376-77 (similar requirements as to the Army's migration to enterprise email systems).

[10] *See, e.g., id.*, §844, 125 Stat. 1515 (requiring the Secretary of Defense to establish goals for competition in contracts for goods or services to be used outside the United States in support of a contingency operation).

[11] National Defense Authorization Act for FY2014, §145, 127 Stat. 699-70 (December 26, 2013).

[12] *See, e.g.*, P.L. 112-81, §844, 125 Stat. 1515

[13] *See, e.g.*, *id*. (requiring a DOD competition advocate to report annually on the Logistics Civil Augmentation Program (LOGCAP) contract or any "similar omnibus contract" awarded by the Department for goods or services to be used outside the United States in support of a contingency operation); Consolidated Appropriations Act, 2012, P.L. 112-74, §520, 125 Stat. 972-73 (December 23, 2011) (requiring the Inspector General of the Department of Homeland Security to review selected contracts awarded in the previous year through means other than full and open competition and report to Congress).

[14] P.L. 112-74, §8036, 125 Stat. 813. *See also* P.L. 112-81, §222, 125 Stat. 1336 (authorizing the Secretary of the Army to conduct a program for flight research and demonstration of advanced rotocraft technology, but requiring that the Secretary comply with the Competition in Contracting Act (CICA) when awarding a contract under this authority).

[15] *See, e.g.,* P.L. 112-81, §837, 125 Stat. 1509 (amending the Weapon Systems Acquisition Reform Act (WSARA) of 2009 to incorporate operation, as well as sustainment of major weapon systems, subsystems of major weapons systems, and components needed for maintenance and sustainment of such systems). WSARA called for the Secretary of Defense to "ensure that the acquisition strategy for each major defense acquisition program includes … measures to ensure competition, or the option of competition, … throughout the life-cycle of [the] program as a means to improve contractor performance." *See* P.L. 111-23, §202(a)(1), 123 Stat. 1720-21 (May 22, 2009).

[16] *See, e.g.*, P.L. 112-74, §7082, 125 Stat. 1261-62 (prohibiting the disbursement of funds appropriated under this act for a U.S. contribution to the general capital increases of the International Bank for Reconstruction and Development, the African Development Bank, or the Inter-American Development Bank until the Secretary of the Treasury reports to Congress that these entities are making "substantial progress" toward certain reforms, including "implementing procurement guidelines that maximize international competitive bidding in accordance with sound procurement practices, including transparency, competition, and cost-effective results for borrowers").

This report describes the competition requirements currently governing the procurement activities of federal agencies. Specifically, it addresses (1) what contracts are subject to competition requirements; (2) what constitutes full and open competition for government contracts; (3) what is meant by "full and open competition after exclusion of sources"; (4) the circumstances permitting agencies to award contracts on the basis of other than full and open competition; (5) the "special simplified procedures for small purchases"; and (6) the competition requirements for task order and delivery order (TO/DO) contracts. The report does not address so-called "public-private competitions" or "competitive sourcing targets" under the Federal Activities Inventory Reform (FAIR) Act or Office of Management and Budget (OMB) Circular A-76.[17] Public-private competitions are conducted to determine whether government employees or private contractors will perform functions formerly performed by the government that have been identified as commercial and suitable for contracting out.[18]

Background

The federal government has promoted competition between offerors seeking to meet its needs since at least 1781, when the Superintendent of Finance advertised in a local newspaper for proposals from potential suppliers of food for federal employees in Philadelphia.[19] Then, as now, the government encouraged competition because of its reported benefits to the government and the general public. Among other things, an argument can be made that, when multiple offerors compete for the government's business, the government can acquire higher quality goods and services at lower prices than it would acquire if it awarded contracts without competition. An argument can also be made that competition helps to curb fraud because it allows for periodic changes in the vendors from which the government acquires goods and services, thereby limiting opportunities for government employees to enter into collusive agreements with their regular suppliers. Competition can similarly be said to promote accountability by ensuring that contracts are entered into on their merits and not upon any other basis (e.g., familial or other relationships between contracting officers and contractors). Further, because the government is said to acquire the highest quality goods and services at the lowest prices, competition can be said to help government officials reassure citizens that their tax dollars are not spent wastefully. Finally, an argument can be made that citizens are less likely to perceive contracts as being awarded because of favoritism when there is competition.

Competition is not considered an unmitigated good by all, however, as is noted by those who suggest that not all procurements need to be competed to the maximum extent possible. An argument can be made that agency operations can be delayed by the time it takes to solicit and evaluate offers from eligible suppliers. These delays are reportedly especially harmful when agencies are contracting for goods or services for disaster responses or military operations. Moreover, because there are costs involved in agencies' soliciting and evaluating offers, an argument can also be made that there comes a point when the government's costs in competing contracts are greater than the savings it realizes from the lower price, higher quality goods it may

[17] *See* FAIR Act, P.L. 105-270, 112 Stat. 2382 (1998) (codified at 31 U.S.C. §501 note); Executive Office of the President, OMB, Performance of Commercial Activities: Circular A-76 Revised, May 29, 2003, available at http://www.whitehouse.gov/omb/circulars_a076_a76_incl_tech_correction.

[18] For more on public-private competitions generally, see archived CRS Report RL32079, *Federal Contracting of Commercial Activities: Competitive Sourcing Targets*, by (name redacted).

[19] James F. Nagle, A HISTORY OF GOVERNMENT CONTRACTING 49 (2d ed. 1999).

obtain through competition. It was, in part, for this reason that the drafters of the Competition in Contracting Act (CICA) of 1984[20] opted to require full and open competition rather than maximum competition. They reportedly considered language calling for "maximum competition,"[21] but rejected it, in part, because "there is a point of diminishing return" with competition.[22] Competition could also be said to increase the risk that government contractors will be unable to perform by allowing new contractors—who may not have experience meeting agencies' needs or complying with the accounting and paperwork requirements imposed on federal contractors—to win government contracts. Agencies reportedly would prefer to deal with their incumbent contractors, assuming these contractors are competent, because they represent "known quantities" for the agencies.[23]

As the accompanying chronology illustrates, the federal government's requirements for competition in contracting have periodically shifted as the government has variously sought to realize the benefits of competition or further other goals—such as the protection of national security in times of war or efficiency in agency operations—in its procurement activities. Armed conflicts, in particular, typically lead to relaxation of competition requirements, but often result in alleged abuses (e.g., "war profiteering" by contractors and waste of money on overpriced goods and services).[24] These abuses, in turn, can lead to the enactment of competition requirements.

Chronology

1809	Congress passes the first law requiring competition in federal procurement contracting. This law established what came to be known as "formal advertising" as the preferred method for federal procurements by specifying that "all purchases and contracts for supplies or services … shall be made by open purchases, or by previously advertising for proposals." (2 Stat. 536 (1809)).
1861	Congress reaffirms its commitment to formal advertising by passing a statute stating that "all purchases and contracts for supplies and services, ... except for personal services, ... shall be made by advertising a sufficient time previously for proposals respecting the same" unless immediate delivery is required due to "public exigencies." (12 Stat. 220 (1861)).
1914-1918	The War Industries Board authorizes negotiated procurements, or procurements involving bargaining with the offerors after receipt of proposals. Such procurements

[20] CICA was enacted as part of the Deficit Reduction Act of 1984, P.L. 98-369, §§2701-2753, 98 Stat. 1175 (1984). It amended the Armed Services Procurement Act of 1947; Federal Property and Administrative Services Act of 1949; Office of Federal Procurement Policy Act of 1974; and Truth in Negotiation Act (TINA) of 1962. It also created a statutory basis for the bid-protest function of the GAO. CICA's competition requirements took effect on April 1, 1985.

[21] COMPETITION IN CONTRACTING ACT OF 1983: HEARINGS BEFORE THE SENATE COMM. ON ARMED SERVICES, 98TH CONG., 1ST SESS. 260-61 (1983). The guidelines for implementing some of President Obama's recently proposed procurement reforms similarly call for "maximum practicable competition," rather than "maximum competition." *See* Executive Office of the President, Office of Management and Budget, Updated Implementing Guidance for the American Recovery and Reinvestment Act of 2009, at 52 (April 3, 2009), available at http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m09-15.pdf.

[22] COMPETITION IN CONTRACTING ACT OF 1983, *supra* note 22, at 304 (testimony of John Cibinic, Jr., Government Contracts Program, National Law Center, The George Washington University).

[23] William S. Cohen, *The Competition in Contracting Act*, 14 PUB. CONT. L.J. 1, 20-21 (1983/1984) ("Generally, agency officials have an easier time if they stay with the same contractor throughout the procurement process.").

[24] *See id.* at 6 (describing allegations of "war profiteering" in the aftermath of WWI); COMPETITION IN CONTRACTING ACT OF 1984: HEARINGS ON H.R. 5184 BEFORE THE SUBCOMM. ON LEGIS. & NAT'L SECURITY OF THE HOUSE COMM. ON GOV'T OPERATIONS, 98TH CONG., at 2 (1984) (statement by Representative Brooks) (describing how DOD spent $435 for "an ordinary claw hammer").

	are classified as noncompetitive.
1930	The War Policies Commission recommends that formal advertising be replaced by negotiated procurement during times of war. Congress does not enact this proposed change, but does recognize additional exceptions allowing use of negotiated procurement instead of formal advertising.
1939-1945	In December 1941, Congress passes the First War Powers Act, which authorizes the President to grant agencies that are "involved in the war" authority to enter into contracts "without regard to the provision of law relating to the making, performance, amendment, or modifications of contracts." (55 Stat. 838 (1941)). Later in the war, the War Production Board prohibits agencies from using formal advertising without specific authorization to do so.
1945	A task force of the Procurement Policy Board, consisting of officers from the federal procuring agencies, recommends relaxing competition requirements to support the growth and sustainability of the industrial base.
1947	Congress passes the Armed Services Procurement Act (ASPA), which generally requires use of formal advertising but allows use of negotiated procurements when any of 17 exceptions apply. These exceptions address things such as medicines or medical property; property purchased for authorized resale; perishable or nonperishable subsistence supplies; and property or services for which it is impracticable to secure competition. ASPA only applies to the procurement contracts of defense agencies.
1949	Congress passes the Federal Property and Administrative Services Act (FPASA), subjecting civilian agencies to requirements like those in ASPA. FPASA recognizes 15 exceptions to formal advertising.
1982	Senators William V. Roth, Jr., Carl Levin, and William S. Cohen first introduce the Competition in Contracting Act (CICA) (S. 2127). Increased competition in contracting is also among the "Carlucci Initiatives," 32 steps for reforming defense acquisitions announced by then Deputy Secretary of Defense Frank Carlucci.
1984	Congress passes CICA, requiring agencies to obtain "full and open competition through the use of competitive procedures" in their procurement activities unless otherwise authorized by law.
1990-1991	Military agencies reportedly experience difficulties in procuring commercial items for use during the Gulf War.
1994	Congress passes the Federal Acquisition Streamlining Act (FASA), which establishes a "preference" for the acquisition of commercial items in meeting agencies' procurement needs. FASA also articulates competition requirements for task order and delivery order (TO/DO) contracts.
1996	Congress passes the Federal Acquisition Reform Act (FARA), which requires that agencies "obtain full and open competition ... in a manner that is consistent with the need to efficiently fulfill the Government's requirements." FARA also relaxes the rules imposed on agencies' purchases of commercial items.
2003	Congress passes the Services Acquisition Reform Act (SARA). SARA further relaxes the rules imposed upon procurement of commercial services.
2008	Section 843 of the National Defense Authorization Act for FY2008 limits the use of single-award task order/delivery order (TO/DO) contracts in excess of $100 million; grants GAO temporary jurisdiction over protests involving orders of $10 million or more; and specifies what constitutes a "fair opportunity to be considered" for orders in excess of $5 million.[25]

[25] The values contained in this chronology are those given in the statute as it was enacted. They do not reflect any subsequent adjustments made for inflation.

The current interest in competition in contracting is perhaps to be expected given developments in the 25 years since the enactment of CICA. CICA itself requires that agencies "obtain full and open competition through the use of competitive procedures" in all procurements not involving the use of procedures expressly authorized by a particular statute.[26] CICA remains the foundation for the current competition requirements, but has been amended or supplemented by later laws that place efficiency in agency operations or other public benefits on par with competition, or expand agencies' ability to use "special simplified methods" for contracting for commercial items. The Federal Acquisition Streamlining Act (FASA) of 1994, for example, establishes a "preference" for the procurement of commercial items, which generally may be acquired using simplified methods, as opposed to full and open competition.[27] FASA was followed by the Federal Acquisition Reform Act (FARA) of 1996, which placed increasing emphasis on efficiency in agency operations by requiring that the Federal Acquisition Regulation (FAR) be amended to "ensure that the requirement to obtain full and open competition is implemented in a manner that is consistent with the need to efficiently fulfill the Government's requirements."[28] FARA and the Services Acquisition Reform Act (SARA) of 2003[29] also relaxed the rules governing agencies' acquisition of commercial items. More recently, the Emergency Economic Stabilization Act (EESA) of 2008 authorized the Secretary of the Treasury to use other than full and open competition upon determining "that urgent and compelling circumstances make compliance with [the competition] provisions contrary to the public interest."[30] This provision was designed to ensure that competition requirements, among other things, did not slow the Treasury Department's contracting for services that would help stabilize U.S. financial markets and the banking system.[31]

Contracts Not Subject to CICA

Not all contracts—or even all procurement contracts—that agencies lawfully enter into are the result of full and open competition under CICA or an "exception" to it.[32] Non-procurement contracts, such as those resulting from agencies' use of other transaction authority (OTA) or

[26] 10 U.S.C. §2304(a)(1)(A) & 41 U.S.C. §3301(a)(1). Citations to CICA's codification generally reference two titles of the United States Code: Title 10 governing procurements by defense agencies, NASA, and the Coast Guard, and Title 41 governing procurements by civilian agencies. The numbering and language of these sections are often—but not always—identical.

[27] P.L. 103-355, §8104, 108 Stat. 3391 (codified at 10 U.S.C. §2377(a)-(b)); P.L. 103-355, §8203, 108 Stat. 3391 (codified at 41 U.S.C. §3307(c)(1) ("The head of each executive agency shall ensure that procurement officials in that executive agency, to the maximum extent practicable, acquire commercial items or nondevelopmental items other than commercial items to meet the needs of the executive agency.").

[28] P.L. 104-106, §4101, 110 Stat. 642 (February 10, 1996) (codified, in part, at 41 U.S.C. §3301(c)).

[29] P.L. 108-136, §§1401-1433, 117 Stat. 1664-1676 (November 23, 2003).

[30] P.L. 110-343, Title I, §107(a), 122 Stat. 3773 (October 3, 2008). The Secretary must transmit his or her determination, and its accompanying justification, to several congressional committees within 7 days.

[31] Some contracts entered into without full and open competition under the EESA have been of types traditionally "considered high risk for the government." Gov't Accountability Office, *Troubled Asset Relief Program: Additional Actions Needed to Better Ensure Integrity, Accountability, and Transparency* 38 (December 2008), available at http://www.gao.gov/products/GAO-09-161.

[32] In introducing the circumstances permitting use of noncompetitive procedures, CICA does not speak of "exceptions" to its competition requirements. *See* 10 U.S.C. §2304(c) & 41 U.S.C. §3304(a). However, it uses the term "exception" in reference to these circumstances in its requirement for justifications and approvals of contracts awarded using other than full and open competition, and commentators commonly refer to the "CICA exceptions" when describing these circumstances. *See* 10 U.S.C. §2304(f)(3)(B) & 41 U.S.C. §3304(e)(2)(B).

similar authorities, are not subject to CICA because they are not procurement contracts, and CICA only applies to "procurement procedures."[33] OTA refers to agencies' authority to enter into an "other transaction," or "a form of contract ... that is not a procurement contract, grant, or cooperative agreement."[34] Only certain agencies, most notably the Departments of Defense, Transportation, Homeland Security, Health and Human Services, and Energy have, at various times, been granted OTA so that they can contract for research and development (R&D) or prototypes of promising new technologies without being subject to the requirements as to full and open competition.[35] Contracting for R&D or prototypes can be difficult because the uncertainties inherent in the development of new technologies make it hard to establish contract prices. Additionally, the companies best able to perform such contracts are often not regular government vendors and may be unwilling or unable to comply with the government's procurement regulations. OTA helps to avoid these difficulties.

Also not subject to the requirement for full and open competition under CICA are those procurement contracts entered into through the "use of procurement procedures ... expressly authorized by statute."[36] There are numerous statutory provisions that allow agencies to use specific procurement procedures in certain circumstances, or otherwise allow them to limit competition for procurement contracts. One provision of the Consolidated Appropriations Act for FY2005, for example, allowed the U.S. Agency for International Development (USAID) to place task orders with small businesses or small disadvantaged businesses (SDBs) in lieu of providing a "fair opportunity" for all eligible firms to compete.[37] Other provisions of this law allowed agencies to limit competition to certain groups or entities, notwithstanding CICA, or to enter into contracts without competition. For example, the Bureau of Land Management is expressly authorized to limit competition for contracts for hazardous fuel reduction activities to specified groups or entities, while the National Gallery of Art may contract for restoration and repair without competition.[38]

Contracts Subject to CICA

Any procurement contract not entered into through the use of procedures expressly authorized by a particular statute, such as those described above, is subject to CICA.[39] CICA requires that these contracts be entered into after "full and open competition through the use of competitive procedures" unless certain circumstances exist that would permit agencies to use noncompetitive procedures.[40]

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[33] 10 U.S.C. §2304(a)(1)(A) & 41 U.S.C. §3301(a).

[34] GOVERNMENT CONTRACTS REFERENCE BOOK, *supra* note 2, at 414.

[35] For more on OTA generally, see CRS Report RL34760, *Other Transaction (OT) Authority*, by (name redacted).

[36] 10 U.S.C. §2304(a)(1)(A); 41 U.S.C. §3301(a). CICA also does not apply to contract modifications (including the exercise of price options evaluated as part of the initial competition), which are within the scope of existing contracts, or orders under requirements contracts or definite-quantity contracts. 48 C.F.R. §6.001(a)-(f).

[37] P.L. 108-447, Division D, §534(e), 118 Stat. 2809, 3006 (December 8, 2004). Congress later enacted permanent legislation that gives USAID and other agencies similar authority. *See* Small Business Jobs Act of 2010, P.L. 111-240, §1331, 124 Stat. 2541 (September 27, 2010) (codified at 15 U.S.C. §644(r)).

[38] P.L. 108-447, at Division E, Title I, 118 Stat. 3040; *id*. at Division E, Title II, 118 Stat. 3089.

[39] 10 U.S.C. §2304(a)(1)(A) & 41 U.S.C. §3301(a)(1).

[40] 10 U.S.C. §2304(a)(1)(A) & 41 U.S.C. §3301(a)(1) (requirement for full and open competition); 10 U.S.C. §2304(c) & 41 U.S.C. §3304(a) (circumstances allowing use of other than competitive procedures).

"Full and Open Competition" Defined

Under CICA, "full and open competition" results when "all responsible sources are permitted to submit sealed bids or competitive proposals."[41] A "responsible source" is a prospective contractor who (1) has adequate financial resources to perform the contract, or the ability to acquire such resources; (2) is able to comply with the required or proposed delivery or performance schedule; (3) has a satisfactory performance record; (4) has a satisfactory record of integrity and business ethics; (5) has the necessary organization, experience, technical skills, and accounting and operational controls, or the ability to obtain them; (6) has the necessary production, construction, and technical equipment and facilities, or the ability to obtain them; and (7) is otherwise qualified and eligible to receive an award under applicable laws and regulations.[42]

Competitive Procedures Resulting in Full and Open Competition

Agencies meet CICA's requirement for full and open competition by using one of the "competitive procedures" recognized under the act.[43] CICA recognizes the following procedures as competitive:

1. ***Sealed bids***. Sealed bids are offers submitted in response to invitations for bids (IFBs); opened publicly at a specified time and place; and evaluated without discussions with the bidders, with the contract being awarded to the lowest-priced responsible bidder.[44] CICA requires that agencies solicit sealed bids if (1) time permits their solicitation, submission, and evaluation; (2) the award will be made on the basis of price and other price-related factors; (3) it is not necessary to conduct discussions with bidders about their bids; and (4) there is a reasonable expectation of receiving more than one sealed bid.[45]
2. ***Competitive Proposals***. Agencies are to use competitive proposals whenever "sealed bids are not appropriate" in light of the previous four factors.[46] Competitive proposals are offers received in response to requests for proposals (RFPs). RFPs generally provide for discussion or negotiation between the government and at least those offerors within the "competitive range," with the contract being awarded to the responsible offeror whose proposal represents the "best value" for the government.[47]

[41] 41 U.S.C. §107.

[42] 41 U.S.C. §113(1)-(7). For more information on the "responsibility" requirements applicable to prospective federal contractors, see CRS Report R40633, *Responsibility Determinations Under the Federal Acquisition Regulation: Legal Standards and Procedures*, by (name redacted).

[43] CICA defines "competitive procedures" as those under which an agency enters into a contract pursuant to full and open competition. 41 U.S.C. §§152, 3301.

[44] 48 C.F.R. §14.101(a)-(e).

[45] 10 U.S.C. §2304(a)(2)(A)(i)-(iv) & 41 U.S.C. §3301(b)(1)(A)(i)-(iv).

[46] 10 U.S.C. §2304(a)(2)(B) & 41 U.S.C. §3301(b)(1)(B).

[47] 48 C.F.R. §§15.000-15.102. "Best value" is determined by considering price and other factors included in the solicitation. The "competitive range" consists of those proposals having the greatest likelihood of award based on the factors and significant sub-factors of the solicitation. FARA allows agencies to limit the competitive range to those offerors rated most highly based upon the solicitation's criteria when "the number of offers that would otherwise be included in the competitive range ... exceeds the number at which an efficient competition can be conducted." P.L. 104-106, §4103, 110 Stat. 643-44 (February 10, 1996) (codified at 10 U.S.C. §2305(b) & 41 U.S.C. §3703(b)).

3. ***Combinations of competitive procedures***. These include procedures like two-step sealed bidding. With two-step sealed bidding, the first step consists of the submission, evaluation and, potentially, discussion of technical proposals from each bidder with no pricing involved. In the second step, sealed bids are submitted only by those who submitted technically acceptable proposals during the first step.
4. ***Procurement of architectural or engineering services*** conducted in accordance with the requirements of the Brooks Act (40 U.S.C. §§541-559). The Brooks Act allows the selection of architects and engineers based upon their qualifications without consideration of the proposed price for the work. Awards must be made to the highest-ranked offeror unless a reasonable price cannot be agreed upon.
5. ***Competitive selection of basic research proposals*** resulting from a general solicitation and peer or scientific review of proposals, or from a solicitation conducted pursuant to 15 U.S.C. Section 638 (research and development contracts for small businesses).
6. ***Procedures established by the General Services Administration (GSA) for its multiple awards schedule program***. Such procedures are recognized as competitive so long as participation in the GSA program is open to all responsible sources, and orders and contracts under GSA's procedures result in the lowest overall cost alternative to meet the government's needs.
7. ***Procurements conducted pursuant to 15 U.S.C. Section 644***. Section 644 addresses set-asides for small businesses, among other things. Such set-asides are competitive so long as all responsible businesses entitled to submit offers under Section 644 are permitted to compete.[48]

The sixth of these provisions is particularly significant because it allows agencies to use the so-called "Federal Supply Schedules" (FSS) or "GSA schedules." These schedules enable agencies to take advantage of a "simplified process" for obtaining commercial supplies and services by issuing task or delivery orders directly to contractors listed on the schedules without issuing IFBs or RFPs.[49] The seventh provision is also significant because it authorizes "set-asides" for small businesses, which constitute "full and open competition after exclusion of sources" and are discussed below.[50]

"Full and Open Competition After Exclusion of Sources"

Some competitions in which only certain contractors can compete nonetheless meet CICA's requirement for full and open competition because CICA provides for "full and open competition after exclusion of sources."[51] "Full and open competition after exclusion of sources" occurs in two contexts: agencies' "dual sourcing" initiatives and set-asides for small businesses.[52]

[48] 41 U.S.C. §152(4).

[49] 48 C.F.R. §8.402(a).

[50] For more on small business set-asides, see generally CRS Report R41945, *Small Business Set-Aside Programs: An Overview and Recent Developments in the Law*, by (name redacted) and (name redacted), available upon request.

[51] 10 U.S.C. §2304(b) & 41 U.S.C. §3303.

[52] 10 U.S.C. §2304(b)(1)-(2) & 41 U.S.C. §3303(a)-(b). In practice, there is one important distinction between "full and open competition after exclusion of sources" for purposes of dual sourcing and for small business set-asides. Agencies (continued...)

The defense agencies, in particular, have a lengthy history of dual sourcing, or distributing their contracts for particular goods or services among multiple manufacturers or suppliers in order to ensure that their operations are not vulnerable to the fortunes of individual companies.[53] CICA recognizes this history, and the agency concerns underlying it, by stating that agencies:

> 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 and 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 the 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.[54]

Recently, Congress has sometimes mandated dual sourcing, especially by the Department of Defense (DOD), in order to ensure competition in future procurements.[55]

CICA similarly recognizes the history of setting aside acquisitions for competitions limited to small businesses in general, or to specific subcategories of small businesses, by allowing "procurement of property or services ... using competitive procedures, but excluding other than small business concerns."[56] The Small Business Act provides for such set-aides for small

(...continued)

engaged in dual sourcing need justifications and approvals for their awards, which are discussed in more detail below, while those setting aside procurements for small businesses generally do not. *Compare* 48 C.F.R. §6.202(b)(1) (dual sourcing) *with* 48 C.F.R. §6.203(b), §6.204(b), §6.205(b), §6.206(b), and §6.207(b) (small business set-asides). Only when agencies make sole-source awards in excess of $20 million under the authority of Section 8(a) of the Small Business Act are justifications and approvals required. *See* P.L. 111-84, §811, 123 Stat. 2405-06 (October 28, 2009).

[53] *See, e.g.*, *Competition in Contracting Act*, *supra* note 24, at 25-26.

[54] 10 U.S.C. §2304(b)(1)(A)-(F) & 41 U.S.C. §3303(a)(1)(A)-(F). CICA added the provisions currently in subsections (A)-(C) of these statutes, while FARA added those in (D)-(F).

[55] *See, e.g.,* P.L. 110-181, §213, 122 Stat. 36 (October 14, 2008) (requiring DOD to "ensure the obligation and expenditure in each such fiscal year of sufficient annual amounts for the continued development and procurement of 2 options for the propulsion system for the Joint Strike Fighter in order to ensure the development and competitive production for the propulsion system for the Joint Strike Fighter."); *Gates Says Tanker Competition May Resume in Late Spring; Murtha Endorses "Split Buy,"* 91 FED. CONTR. R. 75 (February 3, 2009).

[56] 10 U.S.C. §2304(b)(2) & 41 U.S.C. §3303(b).

businesses generally; women-owned, service-disabled veteran-owned and Historically Underutilized Business Zone (HUBZone) small businesses; and small businesses owned and controlled by socially and economically disadvantaged individuals that are participating in the Business Development Program under Section 8(a) of the act.[57] Set-asides can also be made for local firms during major disasters or emergencies under the authority of the Stafford Act (42 U.S.C. §5150).[58]

Circumstances Permitting Other Than Full and Open Competition

By definition, under CICA, any procurement contract entered into without full and open competition is noncompetitive.[59] This is not to say, however, that every procurement contract entered into without using competitive procedures is in violation of CICA. To the contrary, CICA recognizes seven circumstances wherein agencies can use other than competitive procedures without violating the act's competition requirements.[60] Such circumstances involve the following:

1. ***Single source for goods or services***: The property or services needed by the agency are available from only one responsible source and no other type of property or service satisfies the agency's needs.
2. ***Unusual and compelling circumstances***: The agency's need for property or services is of such an unusual and compelling urgency that the government would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals.[61]
3. ***Maintenance of the industrial base***: It is necessary to award the contract to a particular source or sources in order (1) to maintain a facility, producer, manufacturer, or other supplier so that the maintained entity will be available to furnish property or services in the case of a national emergency or to achieve industrial mobilization; or (2) 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.

[57] *See* 15 U.S.C. §637(a) (set-asides for small disadvantaged businesses participating in the 8(a) Business Development Program); 15 U.S.C. §637(m) (set-asides for women-owned small businesses); 15 U.S.C. §644 (set-asides for small businesses generally); 15 U.S.C. §657a (set-asides for HUBZone small businesses); 15 U.S.C. §657f (set-asides for service-disabled veteran-owned small businesses). The foregoing authorities apply government-wide. However, the Department of Veterans Affairs has additional authority to set aside contracts for small businesses owned by service-disabled and other veterans, and to make sole-source awards to such firms. *See generally* 38 U.S.C. §§8127-8128.

[58] The Stafford Act provides that "[i]n the expenditure of Federal funds for debris clearance, distribution of supplies, reconstruction, and other major disaster or emergency assistance activities ... carried out by contract or agreement with private [entities], preference shall be given, to the extent feasible and practicable, to those organizations, firms, and individuals residing or doing business primarily in the area affected by such major disaster or emergency." 42 U.S.C. §5150(a)(1).

[59] 10 U.S.C. §2304(c) & 41 U.S.C. §§152, 3301(a).

[60] 10 U.S.C. §2304(c) & 41 U.S.C. §3304(c).

[61] An amendment made to CICA by Section 862 of the Duncan Hunter National Defense Authorization Act for FY2009 limits the duration of contracts awarded in reliance on this exception. The term of such contracts may not exceed the time necessary (1) to meet the unusual and compelling requirements of the work to be performed under the contract and (2) for the executive agency to enter into another contract for the required goods and services through the use of competitive procedures. At the maximum, such contracts may not last longer than one year *unless* the head of the agency entering into the contract determines that exceptional circumstances apply. P.L. 110-417, §862, 122 Stat. 4546 (October 14, 2008).

4. ***Requirements of international agreements***: The terms of an international agreement or treaty between the United States and a foreign government or international organization, or the written directions of a foreign government reimbursing a federal agency for the cost of procuring property or services, effectively require the use of procedures other than competitive procedures.
5. ***Statutory authorization or acquisition of brand-name items for resale***: 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 brand-name commercial items for authorized resale.
6. ***National security***: Disclosure of the agency's procurement needs would compromise national security unless the agency is permitted to limit the number of sources from which it solicits bids or proposals.
7. ***Necessary in the public interest***: The head of an executive agency determines that it is necessary in the public interest to use other than competitive procedures in the procurement and notifies Congress in writing of this determination no less than 30 days before the award of the contract.[62]

These "exceptions" cover common situations where competition is not possible, or where the government values other objectives (e.g., maintaining the industrial base) more highly than full and open competition. The first exception, for example, allows what are commonly known as "sole-source awards." By law, sole-source awards can be used only when there is a single responsible source and no other supplies or services will satisfy agency requirements. Although sole-source awards have been reported to be the subject of much concern recently, especially among those worried about the reported increase in their use since FY2000,[63] they can help agencies to efficiently meet their needs for goods and services when circumstances suggest there is little or no possibility of competition. The first exception also encompasses agencies' acceptance of unsolicited research proposals, as well as follow-on contracts for continued development or production of major systems.[64] The second exception covers many so-called contingency contracting situations, when the government needs to enter into contracts quickly in response to natural disasters or combat operations. The third exception addresses situations akin to dual sourcing, when the government attempts to manage the industrial base by ensuring that companies receive enough orders to stay in business. The fifth exception includes purchases that agencies are required to make through Federal Prison Industries or qualified nonprofit agencies for the blind or "severely disabled."[65]

[62] 10 U.S.C. §2304(c)(1)-(7) & 41 U.S.C. §3304(1)(1)-(7).

[63] *See, e.g.*, Katherine McIntire Peters, One Chart Shows One Big Problem with Defense Contracting: Competition Is Declining, *Gov't Exec.*, July 8, 2014, available at http://www.govexec.com/contracting/2014/07/one-chart-shows-one-big-problem-defense-contracting-competition-declining/88069/ (noting that the percentage of DOD contract dollars "spent through competitive awards" fell from 64% in FY2008 to 57% in FY2013). Earlier reports had noted similar decreases in the earlier part of the 2000s. *See, e.g.*, U.S. House of Representatives, Comm. on Gov't Reform—Minority Staff, Special Investigations Division, *Dollars, Not Sense: Government Contracting Under the Bush Administration* 9 (2006), available at http://oversight-archive.waxman.house.gov/documents/20061211100757-98364.pdf.

[64] 10 U.S.C. §2304(d)(1)(A)-(B) & 41 U.S.C. §3304(b)(1)-(2). A follow-on contract is a new contract awarded on a sole-source basis to a contractor that previously had a design or manufacturing contract for the same item, or previously performed the services being procured. It differs from an option under an existing contract, which gives the government a unilateral right to purchase additional supplies or services under a contract, or otherwise extend a contract.

[65] *See generally* 48 C.F.R. §§8.601-8.716.

Despite covering many common situations, CICA's exceptions do not grant agencies unfettered discretion to contract for goods and services without using competitive procedures. This is because other provisions of CICA impose several conditions on agencies' ability to rely on the exceptions permitting other than full and open competition. What is arguably the most important of these conditions—the requirement that agency contracting officials justify and obtain approval for their use of other than competitive procedures—is discussed in more detail in the following section. Other conditions (1) specify that poor agency planning cannot give rise to unusual and compelling urgency;[66] (2) bar agencies from obtaining through other agencies goods or services that were not obtained in compliance with CICA;[67] (3) prohibit agency heads from delegating their authority to determine that use of other than competitive procedures is necessary in the public interest;[68] and (4) require agencies to "request offers from as many potential sources as is practicable under the circumstances" whenever relying on the exceptions for unusual and compelling urgency or national security.[69] The first condition is especially important because it precludes agencies from waiting until near the end of the fiscal year to procure items and then claiming unusual and compelling urgency because annual appropriations are about to expire.[70]

Justifications & Approvals

CICA's requirement that contracting officers provide justifications of, and obtain approvals for, all noncompetitive procurements conducted in reliance on a CICA exception further checks agencies' discretion in using noncompetitive procedures.[71] Agencies can rely on the CICA exceptions only when contracting officers justify the use of other than competitive procedures in writing and certify the accuracy and completeness of their justifications.[72] These justifications must then be approved by agency officials of a higher rank than the contracting officer, with the identity of the approving official determined by the expected value of the contract,[73] as **Table 1** illustrates.

Table 1. Approving Officials for Noncompetitive Contracts in General

Contract Value	Approving Official
Under $650,000	Contracting officer's certification suffices unless higher approval is required under agency procedures

[66] 10 U.S.C. §2304(f)(5)(A) & 41 U.S.C. §3304(f)(5)(A)(i). *See, e.g.*, RBC Bearings Inc., Comp. Gen. Dec. B-401661 (October 27, 2009) (sustaining a protest of sole-source contract award because the procuring agency's own poor planning resulted in the need to limit competition).

[67] 10 U.S.C. §2304(f)(5)(B) & 41 U.S.C. §3304(f)(5)(A)(ii).

[68] 10 U.S.C. §2304(d)(2) & 41 U.S.C. §3304(a)(7).

[69] 10 U.S.C. §2304(e) & 41 U.S.C. §3304(d). Under the FAR, similar requirements apply to all the CICA exceptions. *See* 48 C.F.R. §6.301(d).

[70] *See, e.g.*, *Competition in Contracting Act*, *supra* note 24, at 16-17 (describing how agencies reportedly abused their authority, under the pre-CICA competition requirements, to make noncompetitive procurements when "competition is impracticable" in similar situations).

[71] 10 U.S.C. §2304(f) & 41 U.S.C. §3304(e).

[72] 10 U.S.C. §2304(f)(1)(A) & 41 U.S.C. §3304(e)(1)(A).

[73] 10 U.S.C. §2304(f)(1)(B) & 41 U.S.C. §3304(e)(1)(B)(i)-(iii).

Contract Value	Approving Official
Over $650,000 and below $12.5 million	Competition advocate for the procuring activity or another official as provided under 48 C.F.R. §6.304(a)(3) or (4) (authority cannot be delegated)
Over $12.5 million and below $62.5 million (all agencies other than DOD, NASA, and the Coast Guard) Over $12.5 million and below $85.5 million (DOD, NASA, and the Coast Guard)	Head of the procuring activity or a delegate who, if a member of the armed services, is a general or flag officer or, if a civilian, is serving in a GS-16 or higher position or a comparable position under another schedule
Over $62.5 million (all agencies other than DOD, NASA, and the Coast Guard) Over $85.5 million (DOD, NASA, and the Coast Guard)	Senior procurement executive of the agency designated pursuant to Section 16(3) of the Office of Federal Procurement Policy Act (cannot be delegated, other than in the case of the Under Secretary of Defense for Acquisition, Technology & Logistics acting as the senior procurement executive of DOD)

Source: Congressional Research Service, based on 48 C.F.R. §6.304.

Written justifications and approvals must normally precede the contract award.[74] They may follow the award only when the agency relies on the exception for unusual and compelling urgency, and, even then, the agency must have determined the existence of unusual and compelling urgency prior to making the award.[75] Justifications can be omitted only when an agency (1) relies upon an agency head's determination that it is necessary, in the public interest, to use other than competitive procedures; (2) conducts a procurement under the authority of the Javits-Wagner-O'Day Act, or makes competitive or certain noncompetitive awards under the authority of Section 8(a) of the Small Business Act;[76] or (3) purchases brand-name items for authorized resale.[77] The omission of justifications when the agency relies upon the agency head's determination that it is necessary, in the public interest, to use other than competitive procedures can be explained, in part, by the requirement that agency heads must themselves document the existence of such circumstances in writing and notify Congress. Purchase of brand-name items for authorized resale involves purchases for use in commissaries or similar facilities, where the purchased articles are "desired or preferred by customers of the selling activities."[78] It does not include agencies' purchase of brand-name commercial items for their own use.[79]

Justifications must include (1) a description of agency needs; (2) an identification of the statutory exception upon which the agency relied and a demonstration of the reasons for using the exception that is based upon the proposed contractor's qualifications or the nature of the procurement; (3) a determination that the anticipated cost will be fair and reasonable; (4) a description of any market survey conducted, or a statement of the reasons for not conducting a

[74] 10 U.S.C. §2304(f)(2) & 41 U.S.C. §3304(e)(3).

[75] 48 C.F.R. §6.303-1(e).

[76] Justifications, approvals, and notices are, however, required when agencies make sole-source awards valued in excess of $20 million under the authority of Section 8(a) of the Small Business Act. *See* P.L. 111-84, §811, 123 Stat. 2405-06 (October 28, 2009).

[77] 10 U.S.C. §2304(f)(2)(A)-(E) & 41 U.S.C. §3304(e)(4)(A)-(D).

[78] 48 C.F.R. §6.302-5(c)(3).

[79] Such purchases are governed by other authorities. *See* 48 C.F.R. §11.105.

market survey; (5) a listing of any sources that expressed interest in the procurement in writing; and (6) a statement of any actions that the agency may take to remove or overcome barriers to competition before subsequent procurements.[80]

CICA originally required agencies to make their justifications for noncompetitive awards, as well as "any related information," available to the general public under the Freedom of Information Act (FOIA).[81] However, it has since been amended to require that justifications and approvals be posted on FedBizOpps (http://www.fedbizopps.gov) within 14 days of contract award.[82] Agencies are also required, under CICA, to publish notices regarding certain noncompetitive contracts that they propose to award on FedBizOpps prior to their award.[83] These notices identify the intended recipient of the noncompetitive contract award and state the agencies' reasons for making a noncompetitive award.[84] Because notice of these proposed awards precedes the awards, other contractors could submit proposals to the agency or protest the proposed award.

"Special Simplified Procedures for Small Purchases"

In addition to authorizing the use of noncompetitive procedures in certain circumstances, CICA authorizes the use of "special simplified procedures" when agencies make "small purchases."[85] CICA's drafters included this provision because they recognized that the costs of conducting competitions can exceed the savings resulting from competition when agencies procure items with low prices.[86] CICA itself defined a "small purchase" as one whose expected value was less than $25,000,[87] but was later amended to include purchases whose expected value was below the simplified acquisition threshold (currently, generally $150,000).[88] Moreover, since 1996, under an amendment to CICA, agencies have also had authority to use simplified acquisition procedures in purchasing commercial items whose expected value exceeds the simplified acquisition threshold but is below $6.5 million (or $12 million in the case of goods or services purchased in support of contingency operations, or for defense against or recovery from nuclear, biological, chemical, or radiological attack).[89] Agencies can rely on this latter authority only when their contracting officers reasonably expect, based upon market research and the nature of the goods or services sought, that offers will include only commercial items.[90] CICA prohibits agencies from dividing

[80] 10 U.S.C. §2304(f)(3)(A)-(F) & 41 U.S.C. §3304(e)(2)(A)-(F).

[81] P.L. 98-369, §2711, 98 Stat. 1178 (civilian agencies); *id*., at §2723, 98 Stat. 1190 (defense agencies).

[82] P.L. 110-181, §844, 122 Stat. 236-39 (October 14, 2008). When the noncompetitive award is made on the basis of unusual and compelling urgency, agencies have up to 30 days after the award to post it on FedBizOpps.

[83] 10 U.S.C. §2304(f)(1)(C) & 41 U.S.C. §3304(e)(1)(C). *See generally* 41 U.S.C. §1708(b)(2) (notice requirements).

[84] *Id*.

[85] 10 U.S.C. §2304(g)(1)(A) & 41 U.S.C. §3305.

[86] *See, e.g.,* COMPETITION IN CONTRACTING ACT OF 1984, *supra* note 25, at 226. For example, spending $50 to achieve full and open competition saves money when the competition reduces by 10% the price of goods or services costing $100,000, but not when it reduces by 10% the price of goods or services costing $10.

[87] P.L. 98-369 at §2711 and §2723.

[88] 10 U.S.C. §2304(g)(1)(A) & 41 U.S.C. §3305(a)(1). The simplified acquisition threshold is presently set at $150,000 unless there is an emergency. *See* 48 C.F.R. §2.101 (increasing the threshold to $300,000, for contracts to be awarded or performed within the United States, and $1 million for contracts to be awarded or performed outside the United States, in certain emergencies).

[89] 48 C.F.R. §13.500(a) & (e).

[90] 10 U.S.C. §2304(g)(1)(B) & 41 U.S.C. §3305(a)(2). The authority to use simplified procedures in purchases of (continued...)

proposed purchases in excess of the "small purchase" threshold into several purchases in order to take advantage of the simplified procedures, and it requires agencies to promote competition "to the maximum extent practicable" when using simplified procedures.[91]

CICA otherwise leaves the articulation of the simplified acquisition procedures to the FAR, which prescribes somewhat different regulations for acquiring different prices and types of goods and services (i.e., commercial or noncommercial). See **Figure 1**. Under the FAR, purchases whose expected value is below the simplified acquisition threshold ($150,000) are further subdivided into (1) those below the micropurchase threshold (generally $3,000) and (2) those above it.[92] When making "micropurchases," or purchases at or below $3,000, agencies are to promote competition, to at least a limited degree, by distributing their purchases "equitably" among qualified suppliers "[t]o the extent practicable."[93] They may make micropurchases without soliciting competitive quotations only if the contracting officer, or other duly appointed official, considers the price to be reasonable.[94] When purchases are above the micropurchase threshold but below the simplified acquisition threshold, agencies "shall use simplified acquisition procedures to the maximum extent practicable."[95] These purchases are "reserved exclusively" for small businesses,[96] making them "competitive procedures" under CICA. In such purchases, and in purchases of commercial items whose expected value exceeds the simplified acquisition threshold but is below $6.5 million (or $12 million in emergencies), agencies "must promote competition to the maximum extent practicable to obtain supplies and services from the source whose offer is the

(...continued)

commercial items valued at between $150,000 and $6.5 million was initially temporary, under what the Federal Acquisition Regulation (FAR) called a "test program." *See* 48 C.F.R. §13.500(d) (2010). However, the 113th Congress enacted legislation which deleted the "sunset date" from the provision of law authorizing the use of simplified acquisition procedures when procuring commercial items, thereby making this authority permanent. *See* P.L. 104-106, at §4202 (establishing the authority); National Defense Authorization Act for FY2000, P.L. 106-65, §806 (extension through January 1, 2002); National Defense Authorization Act for FY2002, P.L. 107-107, §823 (extension through January 1, 2003); Bob Stump National Defense Authorization Act for FY2003, P.L. 107-314, §812 (extension through January 1, 2004); National Defense Authorization Act for FY2004, P.L. 108-136, §1442 (extension through January 1, 2006); and Ronald W. Reagan National Defense Authorization Act for FY2005, P.L. 108-375, §817 (extension through January 1, 2008); National Defense Authorization Act for FY2008, P.L. 110-181, §822 (extension through January 1, 2010); National Defense Authorization Act for FY2010, P.L. 111-84, §816 (extension through January 1, 2012); National Defense Authorization Act for FY2013, P.L. 112-239, §822, 126 Stat. 1830 (January 2, 2013) (extension through January 1, 2015); Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for FY2015, P.L. 113-291, §815,—Stat.—(December 19, 2014) (making the authority permanent).

[91] 10 U.S.C. §2304(g)(3) & 41 U.S.C. §3305(c).

[92] The micropurchase threshold can be lower or higher than $3,000, depending on the goods or services acquired and the circumstances of the acquisition. Micropurchases for construction services subject to the Davis-Bacon Act or other services subject to the Service Contract Act have lower limits: $2,000 and $2,500, respectively. Those for goods or services that the agency head has determined will be used to support a contingency operation or facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack have higher limits: $15,000 in the case of contracts to be awarded or performed, or purchases to be made, inside the United States and $30,000 in the case of contracts to be awarded or performed, or purchases to be made, outside the United States. 48 C.F.R. §13.201(g)(1)(i)-(ii).

[93] 48 C.F.R. §13.203(a)(1).

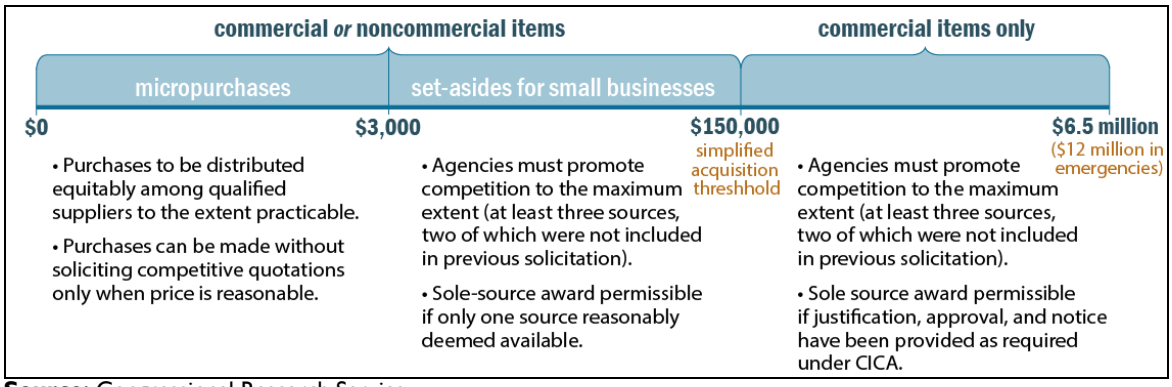
[94] 48 C.F.R. §13.203(a)(2).

[95] 48 C.F.R. §13.003(a). This provision does not apply if agencies can meet their requirements using (1) required sources of supply under Part 8 of the FAR (addressing Federal Prison Industries; the Committee for Purchase from People Who Are Blind or Severely Disabled, and FSS contracts); (2) existing indefinite delivery/indefinite quantity contracts; or (3) other existing contracts. 48 C.F.R. §13.003(a)(1)-(3).

[96] 48 C.F.R. §13.003(b)(1).

most advantageous to the Government, considering the administrative cost of the purchase."[97] This generally means that agencies "must consider solicitation of at least three sources," two of which were not included in the previous solicitation.[98] Contracting officers are prohibited from soliciting quotations based on personal preferences or restricting solicitations to suppliers of well-known and widely distributed makes or brands.[99]

Figure 1. Simplified Acquisition Procedures: Competition Requirements at Various Price Thresholds



Source: Congressional Research Service.

Sole-source solicitations for purchases below the simplified acquisition threshold are permissible only if contracting officers determine that the circumstances of the contract action are such that only one source can be reasonably deemed available (e.g., urgency, exclusive licensing agreements, brand-name goods, industrial mobilization).[100] Sole-source solicitations for purchases of commercial items whose expected costs exceed the simplified acquisition threshold are permissible only if (1) they are justified in writing; (2) they are approved at the levels specified in **Table 2**; and (3) notice of the proposed award is provided at the government-wide point of entry, FedBizOpps.[101]

Table 2. Approving Officials for Noncompetitive Contracts Under the Simplified Acquisition Procedures

Contract Value	Approving Official
Over $150,000 and below $650,000	Contracting officer's certification serves as approval unless agency regulations require higher-level approval
Over $650,000 and below $12.5 million	Competition advocate for the procuring activity, or an official described in 48 C.F.R. §6.304(a)(3)-(4) (cannot be delegated)

[97] 48 C.F.R. §13.104.

[98] 48 C.F.R. §13.104(b). When not providing notice of proposed contract actions and solicitation information through the government-wide point of entry, FedBizOpps, agencies can "ordinarily" obtain the "maximum practicable competition ... by soliciting quotations or offers from sources within the local trade area."

[99] 48 C.F.R. §13.104(a)(1)-(2).

[100] 48 C.F.R. §13.106-1(b)(1)(i).

[101] 48 C.F.R. §13.106-1(b)(2).

Contract Value	Approving Official
Over $12.5 million and below $62.5 million (all agencies other than DOD, NASA, and the Coast Guard) Over $12.5 million and below $85.5 million (DOD, NASA, and the Coast Guard)	Head of the procuring activity, or an official described in 48 C.F.R. §6.304(a)(3)-(4) (cannot be delegated)
Over $62.5 million (all agencies other than DOD, NASA, and the Coast Guard) Over $85.5 million (DOD, NASA, and the Coast Guard)	Official described in 48 C.F.R. §6.304(a)(4) (cannot be delegated other than as provided in 48 C.F.R. §6.304(a)(4))

Source: Congressional Research Service, based on 48 C.F.R. §13.501(a)(2).

Table 3. Types of Competition Under CICA

Competition Type	Includes
Full and Open Competition	Sealed bids
	Competitive proposals
	Other competitive procedures (e.g., GSA's Federal Supply Schedule)
	Full and open competition after the exclusion of sources
	Dual sourcing Set-asides for small businesses[a]
Permissibly Noncompetitive	Sole source (including sole-source awards to small businesses)[a]
	Unusual and compelling urgency
	Maintenance of the industrial base
	International agreements
	Statutory requirements or brand-name items for resale
	National security
	Necessary in the public interest
Special Simplified Procedures	Micropurchases (noncommercial or commercial items)
	Purchases above the micropurchase threshold but below the simplified acquisition threshold ($150,000) (noncommercial or commercial items) → reserved for small businesses
	Purchases of commercial items whose prices are between $150,000 and $6.5 million (or $12 million in emergencies)

Source: Congressional Research Service.

a. CICA generally classifies contracts with small businesses in two different ways, depending upon whether the contract is a sole-source award. Under CICA, sole-source awards to small businesses are generally permissible in light of the circumstances permitting other than full and open competition, while other awards to small businesses result from "full and open competition after exclusion of sources." However, sole-source awards to small businesses owned by Alaska Native Corporations or Indian Tribes participating in the Small Business Administration's Minority Small Business and Capital Ownership Development Program (commonly known as the "8(a) Program") are a bit different in that they are noncompetitive procedures expressly authorized by statute.

Other Competition Requirements

In keeping with its drafters' belief that effective competition in government procurement involves more than just the mechanisms that agencies use to solicit offers, CICA also contains other provisions that promote competition by, among other things, barring agencies from using restrictive specifications and requiring them to give advance notice of upcoming solicitations.[102] These provisions are not the primary focus of this report, but are briefly summarized below in order to provide a more comprehensive picture of CICA's competition requirements.

1. ***Planning and solicitation requirements***: Under CICA, agencies must specify their needs and solicit bids or offers "in a manner designed to achieve full and open competition"; use advanced procurement planning and market research; and "develop specifications in such a manner as is necessary to obtain full and open competition."[103] Specifications may be stated in terms of function, performance, or design requirements, but can include restrictive provisions or conditions only to the extent necessary to satisfy agency needs or as authorized by law.[104] These requirements derive from the fact that competitive mechanisms for submitting bids or offers are of limited effectiveness if agencies can craft their procurement specifications in such a way as to effectively exclude contractors from the pool of potential offerors.[105]
2. ***Evaluation and award requirements***: Agencies must evaluate sealed bids and competitive proposals based solely on the factors specified in the solicitation.[106] This requirement supports the competitive mechanisms for submitting bids and offers by ensuring that agencies properly consider bids and offers once they are received, rather than award contracts to favored companies on the basis of factors not disclosed to other competitors.
3. ***Competition advocates***: CICA requires the head of each executive agency to designate, both for the agency as a whole and for each procuring activity within the agency, one officer or employee to serve as the "advocate for competition."[107] Agency competition advocates are responsible, among other things, for challenging barriers to full and open competition, and promoting the use of full and open competition, in agency procurement activities.[108] CICA initially required agency competition advocates to make annual reports to each chamber of Congress identifying actions the agency intended to take to increase competition for contracts and reduce the number and value of noncompetitive contracts.[109] However, FASA removed this reporting requirement.[110]

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[102] *See, e.g.*, *Competition in Contracting Act*, *supra* note 24, at 2 ("It is important to understand ... that competition is not a procurement procedure, but an objective which a procedure is designed to attain.").

[103] 10 U.S.C. §2305(a)(1)(A)(i)-(iii) & 41 U.S.C. §3306(a)(1)(A)-(C).

[104] 10 U.S.C. §2305(a)(1)(B)(i)-(ii) & 41 U.S.C. §3306(a)(2)(B) & (3)(A)-(C).

[105] *See, e.g.*, *Competition in Contracting Act*, *supra* note 24, at 19 (describing specifications as the "cornerstone of competitive procurement" because they "serve initially as the fundamental expression of the agency's need and, in the contract award, as the baseline for the evaluation of offers.").

[106] 10 U.S.C. §2305(b); 41 U.S.C. §3306.

[107] 41 U.S.C. §1705(a)(2)(A).

[108] 41 U.S.C. §1705(b)(1)-(6).

[109] Agency competition advocates are, however, still required to complete an annual report for the agency's senior (continued...)

4. ***Procurement notices***: Under CICA, agencies are generally required to publish "procurement notices" announcing upcoming IFBs and RFPs for contracts exceeding $25,000 and for likely subcontracts on awarded contracts exceeding $25,000.[111] CICA also specifies that agencies may not issue solicitations earlier than 15 days after the notice is published, or establish a deadline for submission of bids or offers earlier than 30 days after the solicitation is issued.[112] These requirements promote competition by ensuring that would-be offerors have ample notice of proposed agency procurement actions and adequate time to prepare their offers. Notices were originally published in *Commerce Business Daily*, but are now posted online at FedBizOpps.[113]

Competition Requirements for Task and Delivery Order Contracts

FASA supplemented CICA by, among other things, articulating competition requirements for task order and delivery order (TO/DO) contracts. TO/DO contracts are contracts for services or goods, respectively, that do not "procure or specify a firm quantity of supplies (other than a minimum or maximum quantity)," but rather "provide[] for the issuance of orders for the delivery of supplies during the period of the contract."[114] Because the time of delivery and the quantity of goods or services to be delivered are not specified (outside of stated maximums or minimums) in TO/DO contracts, such contracts are sometimes referred to as indefinite delivery/indefinite quantity (ID/IQ) contracts.[115] TO/DO contracts can also be described as "single-award" or "multiple-award" contracts, depending upon the number of firms—one or more than one, respectively—able to compete for task or delivery orders under the contract.[116] Some commentators further refer to single-award TO/DO contracts as "monopoly contracts,"[117] but such usage could obscure the fact that single-award TO/DO contracts are themselves awarded competitively, even if task or delivery orders under them are not, and are of limited duration.[118]

(...continued)

procurement executive. *See* 41 U.S.C. §1705(b)(4)(A)-(C).

[110] P.L. 103-355 §1031 (repealing subsection (c) of 10 U.S.C. §2318 and of 41 U.S.C. §419, which required annual reports on competition from defense and civilian agencies, respectively).

[111] 41 U.S.C. §1708.

[112] *See* 48 C.F.R. §5.203(a) & (d).

[113] *See* 48 C.F.R. §2.101 (defining "governmentwide point of entry" as the "single point where Government business opportunities greater than $25,000, including synopses of proposed contract actions, solicitations, and associated information, can be accessed electronically by the public. The GPE is located at http://www.fedbizopps.gov.").

[114] 48 C.F.R. §16.501-1.

[115] *See* 48 C.F.R. §16.501-2(a).

[116] Multiple-award task order contracts are sometimes also referred to as MATOCs.

[117] *See, e.g.*, *Dollars, Not Sense*, *supra* note 64, at 13.

[118] The prototypical federal contract is for one year, but can be extended to five years through agencies' use of options. 48 C.F.R. §17.204(e) ("Unless otherwise approved in accordance with agency procedures, the total of the basic and option periods shall not exceed 5 years in the case of services, and the total of the basic and option quantities shall not exceed the requirement for 5 years in the case of supplies.").

Under FASA, agencies are effectively subject to CICA when awarding TO/DO contracts and can use other than competitive procedures only when one of the seven exceptions to full and open competition applies and there are the requisite justifications and approvals.[119] FASA also establishes "a preference" for multiple-award contracts by requiring agencies to use them, as opposed to single-award contracts, "to the maximum extent practicable."[120] Moreover, FASA requires agencies using multiple-award contracts to provide contractors "a fair opportunity to be considered" when issuing task or delivery orders in excess of $3,000 unless

> (1) the agency's need for the services or property 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.[121]

FASA did not, however, subject the issuance of task or delivery orders under TO/DO contracts to CICA, and, even today, such orders remain outside the CICA framework.[122] FASA further requires each agency issuing TO/DO contracts to designate a "task and delivery order ombudsman" to review contractors' complaints regarding TO/DO contracts and ensure that all contractors holding a multiple-award TO/DO contract have a "fair opportunity to be considered" for orders.[123] Finally, FASA grants the Government Accountability Office (GAO) jurisdiction over protests alleging that the orders increase the scope, period, or maximum value of the contract.[124]

The National Defense Authorization Act for FY2008 (NDAA '08) further strengthened the competition requirements for TO/DO contracts established by FASA. See **Figure 2**. The NDAA '08 limits agencies' ability to use single-award TO/DO contracts by requiring that agency heads make the following determinations, in writing, before awarding a single-award TO/DO contract whose expected value would exceed $103 million, including options:

> (i) the task or delivery orders expected under the contract are so integrally related that only a single source can reasonably perform the work;

[119] 10 U.S.C. §2304a(c) & 41 U.S.C. §3304(a).

[120] 10 U.S.C. §2304a(d)(3) & 41 U.S.C. §4103(d)(4)(A).

[121] 10 U.S.C. §2304c(b)(1)-(4) & 41 U.S.C. §4106(c)(1)-(4).

[122] 48 C.F.R. §6.001(e)-(f).

[123] 10 U.S.C. §2304c(e) & 41 U.S.C. §4106(g).

[124] 10 U.S.C. §2304c(d) & 41 U.S.C. §4106(f).

> (ii) the contract provides only for firm, fixed-price task or delivery orders for (I) products for which unit prices are established in the contract or (II) services for which prices are established in the contract for the specific tasks to be performed;
>
> (iii) only one source is qualified and capable of performing the work at a reasonable price to the government; or
>
> (iv) because of exceptional circumstances, it is necessary in the public interest to award the contract to a single source.[125]

The NDAA '08 also specifies what constitutes a "fair opportunity to be considered" in competitions for orders in excess of $5.5 million under multiple-award TO/DO contracts. Under the NDAA, for contractors to have a fair opportunity, agencies must provide them with (1) a notice of the task or delivery order that includes a clear statement of the agency's requirements; (2) a reasonable period of time to provide a proposal in response to the notice; (3) disclosure of the significant factors and subfactors (including cost or price) that the agency expects to consider in evaluating proposals and their relative importance; (4) a written statement documenting the basis for the award and the relative importance of quality and price or cost factors, if the award is to be made on a best-value basis; and (5) an opportunity for post-award debriefing.[126]

Finally, the NDAA '08 granted GAO exclusive authority to hear protests alleging improprieties in agencies' award of task and delivery orders valued in excess of $10 million that do not increase the scope, period, or maximum value of the underlying contract.127 When granting such authority, Congress initially included a "sunset" provision, stating that the "subsection" granting this authority would be "in effect for three years, beginning on the date that is 120 days after [its] date of enactment" (i.e., May 27, 2011).128 However, the 112th Congress subsequently granted GAO permanent jurisdiction over the protests of "large" orders issued under defense contracts.129 It also extended GAO's jurisdiction over similar orders issued under civilian contracts through September 30, 2016.[130]

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[125] P.L. 110-181, §843, 122 Stat. 236-39 (October 14, 2008). Agency heads must notify Congress within 30 days after making a determination to award a single-award TO/DO contract in excess of $103 million. P.L. 110-181 addressed the TO/DO contracts of both defense and civilian agencies. An earlier law, the National Defense Authorization Act for Fiscal Year 2002, had addressed only DOD TO/DO contracts. This law required that the Defense Federal Acquisition Regulation Supplement (DFARS) be updated to (1) require that issuance of orders for services in excess of $100,000 under multiple award contracts be "competitive" unless a CICA exception applies and the agency issues a written justification and (2) specify what "competitive" means. *See* P.L. 107-107, §803, 115 Stat. 1179 (December 28, 2001).

[126] P.L. 110-181, §843, 122 Stat. 236-39.

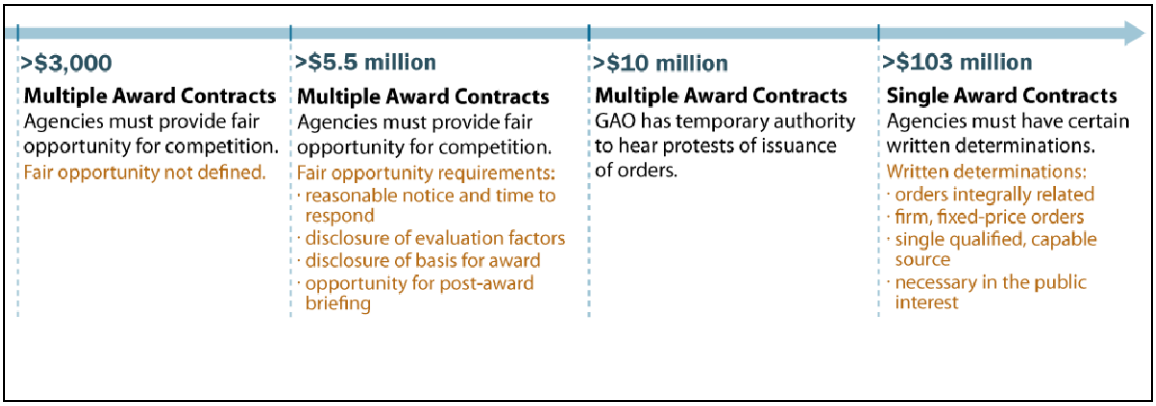
[127] *Id*.

[128] *Id*. at §843(a), 122 Stat. 237.

[129] National Defense Authorization Act for FY2013, P.L. 112-239, §830, 126 Stat. 1842 (January 2, 2013).

[130] National Defense Authorization Act for FY2012, P.L. 112-81, §813, 125 Stat. 1491 (December 31, 2011) ("Paragraph (1)(B) and paragraph (2) of this subsection shall not be in effect after September 30, 2016."). For more on developments in the period between May 27, 2011, when the prior provision pertaining to the protests of orders issued under civilian agency contracts "sunset," and December 31, 2011, when this sunset date was extended until September 30, 2016, see CRS Report R42049, *Jurisdiction over Challenges to "Large" Orders Under Federal Contracts*, by (name redacted) and (name redacted).

Figure 2. TO/DO Contracts: Competition Requirements at Various Price Thresholds



Source: Congressional Research Service, based on various sources cited above, "Competition Requirements for Task and Delivery Order Contracts."

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