



# Competition in Federal Contracting: An Overview of the Legal Requirements

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## Summary

This report describes the legal requirements pertaining to competition that presently apply to federal procurement contracts. Among other things, it discusses (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) circumstances permitting agencies to award contracts on the basis of other than full and open competition; (5) “special simplified procedures for small purchases”; and (6) competition requirements for task and delivery order (TO/DO) contracts.

Any procurement contract not entered into through the use of procurement procedures expressly authorized by a particular statute is subject to the Competition in Contracting Act (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 procurements defined as competitive under CICA (e.g., procurement of architectural or engineering services under the Brooks Act, competitive selection of basic research proposals). 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. 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 \$100,000, or commercial goods or services whose expected value is less than \$5.5 million (\$11 million in emergencies).

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 of 1994 establishes a preference for multiple-award TO/DO contracts and requires that agencies provide contractors “a fair opportunity” to compete for orders in excess of \$2,500 under multiple-award contracts. The National Defense Authorization Act for FY2008 (P.L. 110-181) strengthened these requirements by limiting the use of single-award TO/DO contracts; specifying what constitutes a “fair opportunity to be considered” for orders in excess of \$5 million under multiple-award TO/DO contracts; and granting the Government Accountability Office (GAO) temporary jurisdiction to hear protests alleging improprieties in agencies’ award of task and delivery orders in excess of \$10 million.

Competition in federal procurement contracting has become a topic of increased congressional and public interest, in part because of high-profile incidents of alleged misconduct by contractors or agency officials involving noncompetitive contracts and reports that the number of noncompetitive contract actions by the federal government has increased. Members of Congress have recently introduced or enacted several bills addressing competition requirements (e.g., P.L. 111-5; P.L. 111-8; H.R. 1665; S. 454), and the executive branch has also proposed reforms. Additional legislation may be forthcoming if the percentage or value of noncompetitively awarded contracts remains high.

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## Introduction

“Procurement” describes the process whereby the government obtains from private parties goods and services that it does not produce or provide for itself. Competition in government procurement means that the government determines from whom to buy goods and 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.”<sup>1</sup> Competition in federal procurement contracting has recently become a topic of increased congressional and public interest, in part because of high-profile incidents of alleged misconduct by contractors or agency officials involving noncompetitive contracts and reports that the number of noncompetitive contract actions by the federal government has increased.<sup>2</sup> Hearings in the 110<sup>th</sup> and 111<sup>th</sup> Congresses have addressed agencies’ alleged failures to compete contracts properly;<sup>3</sup> Members have proposed and enacted legislation addressing reported deficiencies in the laws governing competition in federal contracting, or agencies’ compliance with these laws;<sup>4</sup> and commentators have advocated numerous reforms.<sup>5</sup>

This report describes the competition requirements currently governing the procurement activities of federal agencies. 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”; (6) the competition requirements for task order and delivery order (TO/DO) contracts; (7) recent executive branch policies promoting competition in federal procurement contracting; and (8) possible legislative reforms relating to competition. It also briefly describes the benefits and drawbacks of competition, situates recent reform efforts within

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<sup>1</sup> 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).

<sup>2</sup> See, e.g., Daniel Friedman, The Fight over GSA’s Lurita Doan, *Fed. Times*, Apr. 2, 2007, at 1 (describing the controversy surrounding an attempt by the head of the General Services Administration to award a sole-source contract to a friend); Scott Shane & Ron Nixon, In Washington, Contractors Take On Biggest Role Ever, *New York Times*, Feb. 4, 2007, at 1 (reporting that only 48% of federal contract actions were subject to full and open competition in FY2005, as compared to 79% in FY2001). Contract actions include both awards of new contracts and modifications of existing contracts.

<sup>3</sup> See, e.g., Failed Homeland Security Contracts: Hearings Before the Subcomm. on Mgmt., Investigations & Oversight of the House Comm. on Homeland Security, 110<sup>th</sup> Cong. (Sept. 17, 2008) (testimony of James L. Taylor, Deputy Inspector General, DHS) (noting that DHS did not comply with federal regulations when it awarded a sole-source contract to Chenega Technology Services Corporation); Contracting Revision Bills: Hearing before the Subcomm. on Government Mgmt., Organization & Procurement of the H. Comm. on Oversight & Government Reform, 110<sup>th</sup> Cong. (Feb. 27, 2008) (testimony of Paul A. Denett, Administrator, Office of Federal Procurement Policy) (highlighting recent executive branch efforts to increase competition in contracting).

<sup>4</sup> See, e.g., P.L. 111-5 § 1554 (“To the maximum extent possible, contracts funded under this Act shall be awarded as fixed-price contracts through the use of competitive procedures.”); S. 454, 111<sup>th</sup> Cong., § at 203 (“The Secretary of Defense shall ensure that the acquisition plan for each major defense acquisition program includes measures to maximize competition.”).

<sup>5</sup> See, e.g., Center for American Progress, *A Return to Competitive Contracting: Congress Needs to Clean Up the Procurement Process Mess*, May 2007, available at <https://www.policyarchive.org/handle/10207/7772> (proposing, among other things, reforms relating to blanket purchase agreements and TO/DO contracts); Contracting Revision Bills, *supra* note 3 (testimony of Marcia Madsen, Chair, Acquisition Advisory Panel) (proposing to enhance competition through requirements definition and planning).

their historical context, and discusses how the policy debates surrounding competition in federal contracting can shape legislative responses. It does not directly 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.<sup>6</sup> 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. Such competitions are generally subject to the requirements described here.<sup>7</sup>

## Background

The federal government has promoted competition between bidders and 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.<sup>8</sup> Then, as now, the government encouraged competition because of its reported benefits to the government and the general public. Proponents of competition note that when multiple bidders or 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. Proponents also note 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 is similarly 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). Because the government is said to acquire the highest quality goods and services at the lowest prices, proponents of competition further note that competition helps government officials reassure citizens that their tax dollars are not spent wastefully. Finally, proponents of competition claim that citizens are less likely to perceive contracts as being awarded because of favoritism when there is competition.

Competition is not an unmitigated good, however, as those who advocate for limits on competition note. They claim that (1) ensuring eligible suppliers are aware of government needs and have time to prepare bids and offers and (2) evaluating competing offers take time and can delay agency operations. Such 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 bids or offers, these commentators note 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 obtains through competition. It was, in part, for this reason that the drafters of the Competition in Contracting Act (CICA) of 1984<sup>9</sup> opted to require full and open competition rather than maximum competition. They

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<sup>6</sup> 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://a-76.nih.gov/a76\\_rev2003.pdf](http://a-76.nih.gov/a76_rev2003.pdf).

<sup>7</sup> The Omnibus Appropriations Act for 2009 prohibits agencies from conducting new public-private competitions under OMB Circular A-76 through September 30, 2009. P.L. 111-8, Title VII, Transfer for Funds, § 737. For more on public-private competitions generally, see CRS Report RL32079, *Federal Contracting of Commercial Activities: Competitive Sourcing Targets*, by L. Elaine Halchin.

<sup>8</sup> James F. Nagle, *A History of Government Contracting*, 49 (2d ed. 1999).

<sup>9</sup> CICA was enacted as part of the Deficit Reduction Act of 1984, P.L. 98-369, §§ 2701-2753, 98 Stat. 1175 (1984). It (continued...)

reportedly considered language calling for “maximum competition,”<sup>10</sup> but rejected it, in part, because “there is a point of diminishing return” with competition.<sup>11</sup> Proponents of limits on competition further note that competition can increase the risk that government contractors will be unable to perform by allowing new contractors—who do 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.<sup>12</sup>

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 to 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—such as “war profiteering” by contractors and waste of money on overpriced goods and services—that later lead to increased competition requirements.<sup>13</sup>

### **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 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

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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.

<sup>10</sup> *Competition in Contracting Act of 1983: Hearings Before the Senate Comm. on Armed Services, 98<sup>th</sup> Cong., 1<sup>st</sup> 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 Peter R. Orszag, Initial Implementing Guidance for the American Recovery and Reinvestment Act of 2009, at 38 (Feb. 18, 2009), available at <http://www.recovery.gov/files/Initial%20Recovery%20Act%20Implementing%20Guidance.pdf>.

<sup>11</sup> *Competition in Contracting Act of 1983, supra* note 10, at 304 (testimony of John Cibinic, Jr., Government Contracts Program, National Law Center, The George Washington University).

<sup>12</sup> William S. Cohen, The Competition in Contracting Act, 14 *Pub. Cont. L.J.* 20-21 (1983/1984) (“Generally, agency officials have an easier time if they stay with the same contractor throughout the procurement process.”).

<sup>13</sup> 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, 98<sup>th</sup> Cong.*, at 2 (1984) (statement by Representative Brooks) (describing how DOD spent \$435 for “an ordinary claw hammer”).

	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 seventeen exceptions apply. These exceptions address things like (1) medicines or medical property; (2) property purchased for authorized resale; (3) perishable or nonperishable subsistence supplies; and (4) property and 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 fifteen 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 released 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 experience difficulties in procuring commercial items for use during the Gulf War. In one high-profile incident, the Air Force’s attempt to purchase \$10 million worth of commercially available mobile radios for the troops falls through because the supplier, Motorola, is not used to dealing with the government and does not have a government-approved cost-accounting program in place to justify its price. Motorola sells the radios to Japan, which gives them to the Air Force.
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.

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.<sup>14</sup> CICA remains the foundation

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<sup>14</sup> 10 U.S.C. § 2304(a)(1)(A) & 41 U.S.C. § 253(a)(1)(A). 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—(continued...)



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 are generally not subject to full and open competition under CICA.<sup>15</sup> 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."<sup>16</sup> FARA and the Services Acquisition Reform Act (SARA) of 2003<sup>17</sup> also relaxed the rules governing agencies' acquisition of commercial items. More recently, the Emergency Economic Stabilization Act (EESA) of 2008 authorizes 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."<sup>18</sup> This provision is designed to ensure that competition requirements, among other things, do not slow the Treasury Department's formation of contracts for services that would help stabilize U.S. financial markets and the banking system.<sup>19</sup>

## 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, or an "exception" to it, under CICA.<sup>20</sup> Non-procurement contracts, such as those resulting from agencies' use of other transaction authority (OTA) or similar authorities, are not subject to CICA because they are not procurement contracts, and CICA only applies to "procurement procedures."<sup>21</sup> OTA refers to agencies' authority to enter into an

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but not always—identical.

<sup>15</sup> 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. § 264b(a)-(b)) ("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.")

<sup>16</sup> P.L. 104-106 § 4101, 110 Stat. 642 (Feb. 10, 1996) (codified at 41 U.S.C. § 251 note).

<sup>17</sup> P.L. 108-136 §§ 1401-1433, 117 Stat. 1664-1676 (Nov. 23, 2003) (codified, in part, at 41 U.S.C. § 264 note and 41 U.S.C. § 403).

<sup>18</sup> P.L. 110-343, Title I, § 107(a), 122 Stat. 3773 (Oct. 3, 2008). The Secretary must transmit his or her determination, and its accompanying justification, to the House Committees on Oversight and Government Reform and Financial Services and the Senate Committees on Homeland Security and Governmental Affairs and Banking, Housing, and Urban Affairs within 7 days.

<sup>19</sup> Some of the contracts entered into without full and open competition under the EESA have been of types traditionally "considered high risk for the government because they provide no positive incentive to the contractor for cost control or labor efficiency." Gov't Accountability Office, *Troubled Asset Relief Program: Additional Actions Needed to Better Ensure Integrity, Accountability, and Transparency* 38 (Dec. 2008), available at <http://www.gao.gov/products/GAO-09-161>.

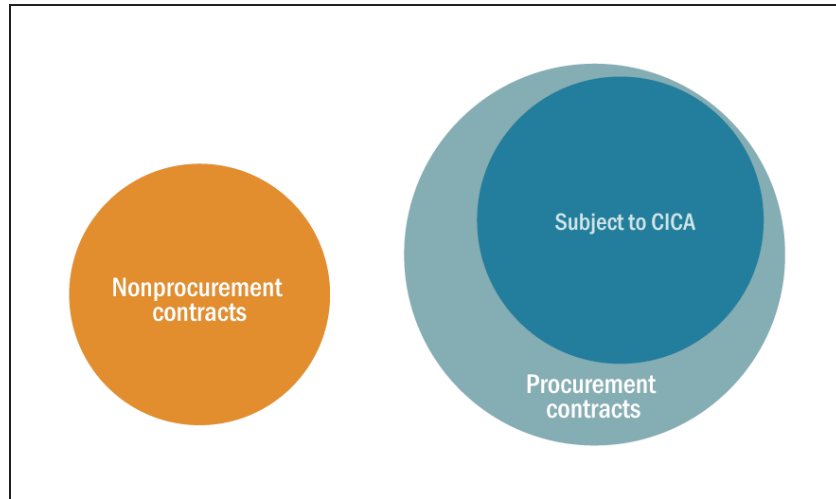
<sup>20</sup> In introducing the circumstances permitting use of noncompetitive procedures, CICA does not speak of "exceptions" to its competition requirements. See 10 U.S.C. § 2304(c) & 41 U.S.C. § 253(c). However, it uses the term "exception" in reference to these circumstances in its requirement for 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. § 253(f)(3)(B).

<sup>21</sup> 10 U.S.C. § 2304(a)(1)(A) & 41 U.S.C. § 253(a)(1)(A).

“other transaction,” or “a form of contract ... that is not a procurement contract, grant, or cooperative agreement.”<sup>22</sup> Only a few agencies, most notably the Departments of Defense, Transportation, Homeland Security, Health and Human Services, and Energy, have been granted OTA on a permanent or temporary basis so that they can contract for research and development (R&D) or prototypes of promising new technologies without full and open competition.<sup>23</sup> 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.”<sup>24</sup> 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, allows the U.S. Agency for International Development to place task orders with small or small disadvantaged businesses in lieu of providing a “fair opportunity” for all eligible firms to compete.<sup>25</sup> Other provisions of this law allow agencies to limit competition to certain groups or entities, notwithstanding CICA, or to enter into contracts without competition.<sup>26</sup>

**Figure I. Contracts Subject and Not Subject to CICA**



**Source:** Congressional Research Service

<sup>22</sup> *Government Contracts Reference Book*, *supra* note 1, at 414.

<sup>23</sup> For more on OTA generally, see CRS Report RL34760, *Other Transaction (OT) Authority*, by L. Elaine Halchin.

<sup>24</sup> 10 U.S.C. § 2304(a)(1)(A) & 41 U.S.C. § 253(a)(1)(A). CICA also does not apply to (1) contract modifications, including the exercise of price options evaluated as part of the initial competition, that are within the scope and under the terms of existing contracts or (2) orders under requirements contracts or definite-quantity contracts. 48 C.F.R. § 6.001(a)-(f).

<sup>25</sup> P.L. 108-447, Division D, § 534(e), 118 Stat. 2809, 3006 (Dec. 8, 2004).

<sup>26</sup> *Id.* at Division E, Title I, 118 Stat. 3040 (allowing the Bureau of Land Management to limit competition for contracts for hazardous fuel reduction activities to specified groups or entities, notwithstanding CICA); *id.* at Division E, Title II, 118 Stat. 3089 (allowing the National Gallery of Art to contract for the restoration and repair without competition).

## 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.<sup>27</sup> 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.<sup>28</sup>

### 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.”<sup>29</sup> 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.<sup>30</sup>

### 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.<sup>31</sup> 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.<sup>32</sup> 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.<sup>33</sup>
2. **Competitive Proposals.** Agencies are to use competitive proposals whenever “sealed bids are not appropriate” in light of the previous four factors.<sup>34</sup>

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<sup>27</sup> 10 U.S.C. § 2304(a)(1)(A) & 41 U.S.C. § 253(a)(1)(A).

<sup>28</sup> 10 U.S.C. § 2304(a)(1)(A) & 41 U.S.C. § 253(a)(1)(A) (requirement for full and open competition); 10 U.S.C. § 2304(c) & 41 U.S.C. § 243(c) (circumstances allowing use of other than competitive procedures).

<sup>29</sup> 41 U.S.C. § 403(6).

<sup>30</sup> 41 U.S.C. § 403(7).

<sup>31</sup> CICA defines “competitive procedures” as those under which an agency enters into a contract pursuant to full and open competition. 41 U.S.C. § 403(5).

<sup>32</sup> 48 C.F.R. § 14.101(a)-(e).

<sup>33</sup> 10 U.S.C. § 2304(a)(2)(A)(i)-(iv) & 41 U.S.C. § 253(a)(2)(A)(i)-(iv).

<sup>34</sup> 10 U.S.C. § 2304(a)(2)(B) & 41 U.S.C. § 253(a)(2)(B).

- 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.<sup>35</sup>
3. ***Combinations of competitive procedures.*** This includes 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. § 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 (1) participation in the GSA’s program is open to all responsible sources and (2) orders and contracts under the GSA’s procedures result in the lowest overall cost alternative to meet the government’s needs.
  7. ***Procurements conducted in pursuant to 15 U.S.C. § 644.*** Section 644 addresses awards or contracts to small businesses, including contract bundling and contracting goals. Such procurements are competitive so long as all responsible businesses entitled to submit bids or offers under the provisions of 15 U.S.C. § 644 are permitted to compete.<sup>36</sup>

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.<sup>37</sup>

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<sup>35</sup> 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 subfactors 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 (Feb. 10, 1996) (codified at 10 U.S.C. § 2305(b) & 41 U.S.C. § 253b(d)).

<sup>36</sup> 41 U.S.C. § 259(b)(1)-(5).

<sup>37</sup> 48 C.F.R. § 8.402(a).

## **“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.”<sup>38</sup> “Full and open competition after exclusion of sources” occurs in two contexts: agencies’ “dual sourcing” initiatives and set-asides for small businesses.<sup>39</sup>

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.<sup>40</sup> 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.<sup>41</sup>

Recently, Congress has sometimes mandated dual sourcing, especially by the Department of Defense (DOD), in order to ensure competition in future procurements.<sup>42</sup>

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<sup>38</sup> 10 U.S.C. § 2304(b) & 41 U.S.C. § 253(b).

<sup>39</sup> 10 U.S.C. § 2304(b)(1)-(2) & 41 U.S.C. § 253(b)(1)-(2). 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 engaged in dual sourcing need justifications and approvals for their awards, which are discussed in more detail below, while those making set-asides for small businesses 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).

<sup>40</sup> *See, e.g.*, Competition in Contracting Act, *supra* note 12, at 25-26.

<sup>41</sup> 10 U.S.C. § 2304(b)(1)(A)-(F) & 41 U.S.C. § 253(b)(1)(A)-(F). CICA added the provisions currently in subsections (A)-(C) of these statutes, while FARA added those in (D)-(F).

<sup>42</sup> *See, e.g.*, P.L. 110-181 § 213, 122 Stat. 36 (Oct. 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 (continued...)”).

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.”<sup>43</sup> The Small Business Act provides for such set-asides for small businesses generally; HUBZone, women-owned, and service-disabled veteran-owned 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.<sup>44</sup> 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).<sup>45</sup>

## Circumstances Permitting Other Than Full and Open Competition

By definition, under CICA, any procurement contract entered into without full and open competition is noncompetitive.<sup>46</sup> This is not to say, however, that every procurement contract entered into without using competitive procedures is in violation of CICA. CICA recognizes seven circumstances wherein agencies can use other than competitive procedures without violating the act’s competition requirements.<sup>47</sup> 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.
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.

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(...continued)

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 (Feb. 3, 2009).

<sup>43</sup> 10 U.S.C. § 2304(b)(2) & 41 U.S.C. § 253(b)(2).

<sup>44</sup> 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).

<sup>45</sup> 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.”)

<sup>46</sup> 10 U.S.C. § 2304(c) & 41 U.S.C. § 253(c).

<sup>47</sup> 10 U.S.C. § 2304(c) & 41 U.S.C. § 253(c).

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.<sup>48</sup>

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 (1) there is a single responsible source and (2) no other supplies or services will satisfy agency requirements. Although sole-source awards have been the subject of much reported concern recently, especially among those worried about the alleged increase in their use since 2000,<sup>49</sup> 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.<sup>50</sup> 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 make through Federal Prison Industries or qualified nonprofit agencies for the blind or severely disabled, as well as sole-source awards to 8(a), service-disabled veteran-owned, or HUBZone small businesses. These are purchases that agencies are, respectively, required or authorized to make under other laws.<sup>51</sup> **Table A-1** provides additional information on the

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<sup>48</sup> 10 U.S.C. § 2304(c)(1)-(7) & 41 U.S.C. § 253(c)(1)-(7).

<sup>49</sup> 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.house.gov/Documents/20060711103910-86046.pdf>.

<sup>50</sup> 10 U.S.C. § 2304(d)(1)(A)-(B) & 41 U.S.C. § 253(d)(1)(A)-(B). 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.

<sup>51</sup> CICA 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 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.” See **Table 3**.

circumstances permitting other than full and open competition, including potential application of and specific limits on these authorities.

Despite covering many common situations, CICA's exceptions do not grant agencies unfettered discretion to contract for goods and services without using competitive procedures, however. 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;<sup>52</sup> (2) bar agencies from obtaining through other agencies goods or services that were not obtained in compliance with CICA;<sup>53</sup> (3) prohibit agency heads from delegating their authority to determine that use of other than competitive procedures is necessary in the public interest;<sup>54</sup> 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.<sup>55</sup> 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 their appropriations are about to expire.<sup>56</sup>

## 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.<sup>57</sup> 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.<sup>58</sup> 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,<sup>59</sup> as **Table 1** illustrates.

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<sup>52</sup> 10 U.S.C. § 2304(f)(5)(A) & 41 U.S.C. § 253(f)(5)(A).

<sup>53</sup> 10 U.S.C. § 2304(f)(5)(B) & 41 U.S.C. § 253(f)(5)(B).

<sup>54</sup> 10 U.S.C. § 2304(d)(2) & 41 U.S.C. § 253(d)(2).

<sup>55</sup> 10 U.S.C. § 2304(e) & 41 U.S.C. § 253(e). Under the FAR, similar requirements apply to all the CICA exceptions, although the statutory basis for these requirements is unclear. *See* 48 C.F.R. § 6.301(d).

<sup>56</sup> *See, e.g.,* Competition in Contracting Act, *supra* note 12, 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).

<sup>57</sup> 10 U.S.C. § 2304(f) & 41 U.S.C. § 253(f).

<sup>58</sup> 10 U.S.C. § 2304(f)(1)(A) & 41 U.S.C. § 253(f)(1)(A).

<sup>59</sup> 10 U.S.C. § 2304(f)(1)(B) & 41 U.S.C. § 253(f)(1)(B).



**Table 1. Approving Officials for Noncompetitive Contracts in General**

Contract Value	Approving Official
Under \$550,000	Contracting officer’s certification suffices unless higher approval is required under agency procedures
Over \$550,000 and below \$11.5 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 \$11.5 million and below \$57 million (all agencies other than 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 \$11.5 million and below \$78.5 million (DOD, NASA, and the Coast Guard)	
Over \$57 million (all agencies other than 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 Undersecretary of Defense for Acquisition, Technology and Logistics acting as the senior procurement executive of DOD)
Over \$78.5 million (DOD, NASA, and the Coast Guard)	

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

Written justifications and approvals must normally precede the contract award.<sup>60</sup> 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 usual and compelling urgency prior to making the award.<sup>61</sup> 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 Section 8(a) of the Small Business Act; or (3) purchases brand-name items for authorized resale.<sup>62</sup> 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.”<sup>63</sup> It does not include agencies’ purchase of brand-name commercial items for their own use.<sup>64</sup>

<sup>60</sup> 10 U.S.C. § 2304(f)(2) & 41 U.S.C. § 253(f)(2).

<sup>61</sup> 48 C.F.R. § 6.303-1(d).

<sup>62</sup> 10 U.S.C. § 2304(f)(2)(A)-(E) & 41 U.S.C. § 253(f)(2)(A)-(D).

<sup>63</sup> 48 C.F.R. § 6.302-5(c)(3).

<sup>64</sup> Such purchases are governed by other authorities. *See* 48 C.F.R. § 11.105.

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 market survey; (5) a listing of any sources that expressed, in writing, interest in the procurement; and (6) a statement of any actions that the agency may take to remove or overcome barriers to competition before subsequent procurements.<sup>65</sup>

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).<sup>66</sup> The National Defense Authorization Act for FY2008 amended CICA by requiring that agencies also post the justification and approval documents for all contracts awarded in reliance on a CICA exception on FedBizOpps (<http://www.fedbizopps.gov>) within 14 days of contract award.<sup>67</sup> Agencies are also required, under CICA, to publish notices regarding certain noncompetitive contracts that they propose to award on FedBizOpps prior to their award.<sup>68</sup> These notices identify the intended recipient of the noncompetitive contract award and state the agencies' reasons for making a noncompetitive award.<sup>69</sup> 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."<sup>70</sup> 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.<sup>71</sup> CICA itself defined a "small purchase" as one whose expected value was less than \$25,000,<sup>72</sup> but was later amended to include purchases whose expected value was below the simplified acquisition threshold (currently, \$100,000).<sup>73</sup> 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 \$5.5 million (or \$11 million in the case of goods or services purchased in support of

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<sup>65</sup> 10 U.S.C. § 2304(f)(3)(A)-(F) & 41 U.S.C. § 253(f)(3)(A)-(F).

<sup>66</sup> 10 U.S.C. § 2304(f)(4) & 41 U.S.C. § 253(f)(4).

<sup>67</sup> P.L. 110-181 § 844, 122 Stat. 236-39 (Oct. 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.

<sup>68</sup> 10 U.S.C. § 2304(f)(1)(C) & 41 U.S.C. § 253(f)(1)(C). *See generally* 41 U.S.C. § 416(b)(5) (notice requirements).

<sup>69</sup> *Id.*

<sup>70</sup> 10 U.S.C. § 2304(g)(1)(A) & 41 U.S.C. § 253(g)(1)(A).

<sup>71</sup> *See, e.g., Competition in Contracting Act of 1984, supra* note 13, 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.

<sup>72</sup> P.L. 98-369 at § 2711 and § 2723.

<sup>73</sup> 10 U.S.C. § 2304(g)(1)(A) & 41 U.S.C. § 253(g)(1)(A). The simplified acquisition threshold is presently set at \$100,000 unless there is an emergency. *See* 41 U.S.C. § 403(11) (simplified acquisition threshold generally) & 41 U.S.C. § 428a(b)(2) (increasing the threshold to \$250,000, for contracts to be awarded or performed within the United States, and \$500,000, for contracts to be awarded or performed outside the United States, in emergencies).

contingency operations, or for defense against or recovery from nuclear, biological, chemical or radiological attack).<sup>74</sup> 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.<sup>75</sup> This authority to use simplified procedures in purchases of commercial items valued at between \$100,000 and \$5.5 million is temporary, under what the Federal Acquisition Regulation (FAR) calls a “test program,” and will expire on January 1, 2010, unless renewed.<sup>76</sup> Although the Bush administration’s reliance on this authority proved controversial,<sup>77</sup> the Obama administration has signaled its intent to rely on it.<sup>78</sup> CICA prohibits agencies from dividing 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.<sup>79</sup>

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 2**. Under the FAR, purchases whose expected value is below the simplified acquisition threshold (\$100,000) are further subdivided into (1) those below the micropurchase threshold (generally \$3,000) and (2) those above it.<sup>80</sup> 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.”<sup>81</sup> They may make micropurchases without soliciting competitive quotations only if the contracting officer, or other duly appointed official, considers the price to be reasonable.<sup>82</sup> When purchases are above the micropurchase threshold but below the simplified acquisition threshold, agencies “shall use simplified acquisition procedures to the maximum extent practicable.”<sup>83</sup> These purchases are set aside for small businesses,<sup>84</sup>

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<sup>74</sup> 48 C.F.R. § 13.500(a) & (e).

<sup>75</sup> 10 U.S.C. § 2304(g)(1)(B) & 41 U.S.C. § 253(g)(1)(B).

<sup>76</sup> 48 C.F.R. § 13.500(d). FARA created this authority, which has been repeatedly renewed. See P.L. 104-106 at § 4202 (establishing the authority); National Defense Authorization Act for Fiscal Year 2000, P.L. 106-65 at § 806 (extension through January 1, 2002); National Defense Authorization Act for Fiscal Year 2002, P.L. 107-107 at § 823 (extension through January 1, 2003); Bob Stump National Defense Authorization Act for Fiscal Year 2003, P.L. 107-314 at § 812 (extension through January 1, 2004); National Defense Authorization Act for Fiscal Year 2004, P.L. 108-136 at § 1442 (extension through January 1, 2006); and Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, P.L. 108-375 at § 817 (extension through January 1, 2008).

<sup>77</sup> *Dollars, Not Sense, supra* note 49, at 18.

<sup>78</sup> Initial Implementing Guidance, *supra* note 10, at 42.

<sup>79</sup> 10 U.S.C. § 2304(g)(3) & 41 U.S.C. § 253(g)(4).

<sup>80</sup> 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 \$25,000 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).

<sup>81</sup> 48 C.F.R. § 13.202(a)(1).

<sup>82</sup> 48 C.F.R. § 13.202(a)(2).

<sup>83</sup> 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).

making them “full and open competitions after the exclusion of sources” under CICA. In such purchases, and in purchases of commercial items whose expected value exceeds the simplified acquisition threshold but is below \$5.5 million (or \$11 million in emergencies), agencies “must promote competition to the maximum extent practicable to obtain supplies and services from the source whose offer is the most advantageous to the Government considering the administrative cost of the purchase.”<sup>85</sup> This generally means that agencies “must consider solicitation of at least three sources,” two of which were not included in the previous solicitation.<sup>86</sup> 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.<sup>87</sup>

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).<sup>88</sup> 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.

**Figure 2. Simplified Acquisition Procedures: Competition Requirements at Various Price Thresholds**

commercial or noncommercial items		commercial items only	
micropurchases	set-asides for small businesses		
<p><b>\$0</b></p> <ul style="list-style-type: none"> <li>• Purchases to be distributed equitably among qualified suppliers to the extent practicable.</li> <li>• Purchases can be made without soliciting competitive quotations only when price is reasonable.</li> </ul>	<p><b>\$3,000</b></p> <ul style="list-style-type: none"> <li>• Agencies must promote competition to the maximum extent (at least three sources, two of which were not included in previous solicitation).</li> <li>• Sole-source award permissible if only one source reasonably deemed available.</li> </ul>	<p><b>\$100,000</b> simplified acquisition threshold</p>	<p><b>\$5.5 million</b> (\$11 million in emergencies)</p> <ul style="list-style-type: none"> <li>• Agencies must promote competition to the maximum extent (at least three sources, two of which were not included in previous solicitation).</li> <li>• Sole source award permissible if justification, approval, and notice have been provided as required under CICA.</li> </ul>

Source: Congressional Research Service

(...continued)

<sup>84</sup> 48 C.F.R. § 13.003(b)(1).

<sup>85</sup> 48 C.F.R. § 13.104.

<sup>86</sup> 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, agencies can “ordinarily” obtain the “maximum practicable competition ... by soliciting quotations or offers from sources within the local trade area.”

<sup>87</sup> 48 C.F.R. § 13.104(a)(1)-(2).

<sup>88</sup> 48 C.F.R. § 13.106-1(b)(1).

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

Contract Value	Approving Official
Over \$100,000 and below \$550,000	Contracting officer’s certification serves as approval unless agency regulations require higher-level approval
Over \$550,000 and below \$11.5 million	Competition advocate for the procuring activity, or an official described in 48 C.F.R. § 6.304(a)(3)-(4) (cannot be delegated)
Over \$11.5 million and below \$57 million (all agencies other than 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 \$11.5 million and below \$78.5 million (DOD, NASA, and the Coast Guard)	
Over \$57 million (all agencies other than 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))
Over \$78.5 million (DOD, NASA, and the Coast Guard)	

Source: Congressional Research Service, based on 48 C.F.R. § 13.501

**Table 3. Types of Competition Under CICA**

Competition Type	Includes
Full and Open Competition	<ul style="list-style-type: none"> <li>Sealed bids</li> <li>Competitive proposals</li> <li>Other competitive procedures (e.g., GSA’s Federal Supply Schedule)</li> <li>Full and open competition after the exclusion of sources                             <ul style="list-style-type: none"> <li>Dual sourcing</li> <li>Set-asides for small businesses</li> </ul> </li> </ul>
Permissibly Noncompetitive	<ul style="list-style-type: none"> <li>Sole source</li> <li>Unusual and compelling urgency</li> <li>Maintenance of the industrial base</li> <li>International agreements</li> <li>Statutory requirements or brand-name items for resale                             <ul style="list-style-type: none"> <li>Sole-source awards for small businesses</li> </ul> </li> <li>National security</li> <li>Necessary in the public interest</li> </ul>
Special Simplified Procedures	<ul style="list-style-type: none"> <li>Micropurchases (noncommercial or commercial items)</li> <li>Purchases above the micropurchase threshold but below the simplified acquisition threshold (\$100,000) (noncommercial or commercial items) → set aside for small businesses</li> <li>Purchases of commercial items whose prices are between \$100,000 and \$5.5 million (or \$11 million in emergencies)</li> </ul>

Source: Congressional Research Service

## 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 bids or 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.<sup>89</sup> These provisions are not the primary focus of this report, but are briefly summarized below in order to provide a complete sense 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."<sup>90</sup> 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.<sup>91</sup> 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 bidders or offerors.<sup>92</sup>
2. **Evaluation and award requirements:** Agencies must evaluate sealed bids and competitive proposals based solely on the factors specified in the solicitation.<sup>93</sup> 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."<sup>94</sup> Agency competition advocates are responsible, among other things, for challenging barriers to and promoting full and open competition in agency procurement activities.<sup>95</sup> 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.<sup>96</sup> FASA removed this reporting requirement,<sup>97</sup>

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<sup>89</sup> See, e.g., Competition in Contracting Act, *supra* note 12, at 2 ("It is important to understand ... that competition is not a procurement procedure, but an objective which a procedure is designed to attain.").

<sup>90</sup> 10 U.S.C. § 2305(a)(1)(A)(i)-(iii) & 41 U.S.C. § 253a(a)(1)(A)-(C).

<sup>91</sup> 10 U.S.C. § 2305(a)(1)(B)(i)-(ii) & 41 U.S.C. § 253a(a)(2)(B) & (3)(A)-(C).

<sup>92</sup> See, e.g., Competition in Contracting Act, *supra* note 12, 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.").

<sup>93</sup> 10 U.S.C. § 2305(b); 41 U.S.C. § 253b.

<sup>94</sup> 41 U.S.C. § 418.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> P.L. 103-355 § 1031 (repealing subsection (c) of 10 U.S.C. § 2318 and of 41 U.S.C. § 419, which required annual (continued...))

but Paul A. Denett, the Administrator of the Office of Federal Procurement Policy (OFPP) in the Bush administration, recently required similar reports, albeit for agencies' chief acquisition officers and senior procurement executives, not for Congress.<sup>98</sup> It is unclear whether the Obama administration will continue this policy.

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.<sup>99</sup> 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.<sup>100</sup> These requirements promote competition by ensuring that would-be bidders or offerors have ample notice of proposed agency procurement actions and adequate time to prepare their bids or offers. Notices were originally published in *Commerce Business Daily*, but are now posted online at FedBizOpps.<sup>101</sup>

## 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."<sup>102</sup> 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.<sup>103</sup> TO/DO contracts are also known as single-award or multiple-award contracts, a designation based upon the number of firms—one or more than one, respectively—able to compete for task or delivery orders under the contract. Some commentators further refer to single-award TO/DO contracts as "monopoly contracts,"<sup>104</sup> but such usage obscures 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.<sup>105</sup>

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(...continued)

reports on competition from defense and civilian agencies, respectively).

<sup>98</sup> Executive Office of the President, OMB, OFPP, *Enhancing Competition in Federal Acquisition: Memorandum*, May 31, 2007, available at <http://www.dhhs.gov/oamp/policies/competitionmemo053107.pdf> ("Your competition advocate should provide a written report to you with appropriate analysis, including trend analysis, and recommendations. The report should be completed by December 20, 2007, and annually thereafter.").

<sup>99</sup> 41 U.S.C. § 416.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> 48 C.F.R. § 16.501-1.

<sup>103</sup> See 48 C.F.R. § 16.501-2(a).

<sup>104</sup> See, e.g., *Dollars, Not Sense*, *supra* note 49, at 13.

<sup>105</sup> Federal contracts are normally for one year, but can be extended to five years through agencies' use of options. 48 (continued...)

Under FASA, agencies are effectively subject to CICA when awarding TO/DO contracts and can use other than competitive procedures only when (1) one of the seven exceptions to full and open competition applies and (2) there are the requisite justifications and approvals.<sup>106</sup> 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.”<sup>107</sup> Moreover, FASA requires agencies, when using multiple-award contracts, to provide “a fair opportunity” for competition in the issuance of individual task or delivery orders in excess of \$2,500 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.<sup>108</sup>

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.<sup>109</sup> 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 have a “fair opportunity” to be considered for orders.<sup>110</sup> 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.<sup>111</sup>

The National Defense Authorization Act for FY2008 (NDAA '08) further strengthened the competition requirements for TO/DO contracts established by FASA. See **Figure 3**. 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 \$100 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;

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(...continued)

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.”).

<sup>106</sup> 10 U.S.C. § 2304a(c) & 41 U.S.C. § 303h(c).

<sup>107</sup> 10 U.S.C. § 2304a(d)(3) & 41 U.S.C. § 303h(d)(3).

<sup>108</sup> 10 U.S.C. § 2304c(b)(1)-(4) & 41 U.S.C. § 303j(b)(1).

<sup>109</sup> 48 C.F.R. § 6.001(e)-(f).

<sup>110</sup> 10 U.S.C. § 2304c(e) & 41 U.S.C. § 303j(e).

<sup>111</sup> 10 U.S.C. § 2304c(d) & 41 U.S.C. § 303j(d).



(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.<sup>112</sup>

The NDAA '08 also specifies what constitutes a “fair opportunity to be considered” in competitions for orders in excess of \$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.<sup>113</sup> Finally, the NDAA '08 grants the GAO temporary jurisdiction to hear protests alleging improprieties in agencies’ award of task and delivery orders valued in excess of \$10 million.<sup>114</sup> GAO’s authority to hear such protests applies only to contracts awarded on or after February 11, 2009, and will sunset on February 11, 2012.<sup>115</sup>

**Figure 3. TO/DO Contracts: Competition Requirements at Various Price Thresholds**

>\$2,500	>\$5 million	>\$10 million	>\$100 million
<p><b>Multiple Award Contracts</b> Agencies must provide fair opportunity for competition. Fair opportunity not defined.</p>	<p><b>Multiple Award Contracts</b> Agencies must provide fair opportunity for competition. Fair opportunity requirements:</p> <ul style="list-style-type: none"> <li>· reasonable notice and time to respond</li> <li>· disclosure of evaluation factors</li> <li>· disclosure of basis for award</li> <li>· opportunity for post-award briefing</li> </ul>	<p><b>Multiple Award Contracts</b> GAO has temporary authority to hear protests of issuance of orders.</p>	<p><b>Single Award Contracts</b> Agencies must have certain written determinations. Written determinations:</p> <ul style="list-style-type: none"> <li>· orders integrally related</li> <li>· firm, fixed-price orders</li> <li>· single qualified, capable source</li> <li>· necessary in the public interest</li> </ul>

Source: Congressional Research Service

<sup>112</sup> P.L. 110-181 § 843, 122 Stat. 236-39 (Oct. 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 \$100 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 (Dec. 28, 2001).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

## Recent Executive Branch Policies

The executive branch, particularly under the Obama administration, has signaled its interest in increasing competition in federal procurement contracting.<sup>116</sup> President Obama himself has said that “the Federal Government must strive for an open and competitive process,” making noncompetitive awards only in exigent circumstances and taking steps to minimize the risks associated with noncompetitive contracts.<sup>117</sup> Prominent officials within the DOD, which accounts for some 70% of federal procurement spending per year,<sup>118</sup> have also expressed their commitment to reducing DOD’s use of noncompetitive contracts.<sup>119</sup>

Because President Obama has called for the Director of OMB to develop guidance to “govern the appropriate use and oversight of sole-source and other types of noncompetitive contracts and to maximize the use of full and open competition and other competitive procurement processes” by September 30, 2009,<sup>120</sup> further developments in this area seem likely. OMB has already issued initial guidance on, among other things, contracting under the American Recovery and Reinvestment Act of 2009. This guidance calls for agencies to award contracts “using competitive procedures” to “the maximum extent practicable.”<sup>121</sup> When contracts or task or delivery orders are not competitively awarded, agencies must post summaries of them, including descriptions of required products and services, on a website (<http://www.recovery.gov>).<sup>122</sup>

## Conclusion

Congressional and public interest in the competition requirements for federal procurement contracting seems likely to remain high for the foreseeable future. Members of the 111<sup>th</sup> Congress have already introduced or enacted several bills that seek to ensure agencies’ compliance with existing competition requirements (e.g., P.L. 111-5 § 1610; S. 454), or promote public disclosure of noncompetitive awards (e.g., P.L. 111-5 § 1554; P.L. 111-8 § 747). Additional legislation may be introduced, especially if the number of noncompetitive awards remains high or there are high-

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<sup>116</sup> The Bush administration at times signaled a similar interest. *See, e.g.*, Enhancing Competition in Federal Acquisition, *supra* note 97.

<sup>117</sup> The White House, Office of the Press Secretary, Government Contracting: Memorandum for the Heads of Executive Departments and Agencies, Mar. 4, 2009, *available at* [http://www.whitehouse.gov/the\\_press\\_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-Subject-Government-Contracting](http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-Subject-Government-Contracting).

<sup>118</sup> Federal Contract Awards by Major Contracting Agency, *usaspending.gov*, 2009, *available at* <http://www.usaspending.gov/fpds/tables.php?tabtype=t1&rowtype=f&subtype=a&sorttype=2008>.

<sup>119</sup> *See, e.g.*, Gates Cites Acquisition Reform as One of Defense Department’s Greatest Challenges, 91 *Fed. Cont. R.* 71 (Feb. 3, 2009) (Gates’ mentioning “seeking increased competition” as one strategy for reforming DOD procurement); Office of the Undersecretary of Defense for Acquisition, Technology and Logistics, Review Criteria for the Acquisition of Services: Memorandum, Feb. 18, 2009, *available at* <http://www.acq.osd.mil/dpap/policy/policyvault/USA002735-08-DPAP.pdf> (memorandum from Shay D. Assad, Director of Defense Procurement, 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).

<sup>120</sup> Government Contracting, *supra* note 116.

<sup>121</sup> Initial Implementing Guidance, *supra* note 10, at 39. This guidance also specifies that the act’s mandate to expend funds quickly does not, in itself, justify noncompetitive awards.

<sup>122</sup> *Id.*

profile scandals involving noncompetitively awarded contracts. Potential reforms may address concerns targeted in the 110<sup>th</sup> Congress that did not result in enacted legislation, such as

1. agencies' use of OTA instead of procurement contracts;<sup>123</sup>
2. problems associated with acquisitions under the FSS or GSA schedules;<sup>124</sup>
3. fraud by businesses participating in small business set-asides;<sup>125</sup>
4. agencies' alleged abuse of the CICA exceptions;<sup>126</sup>
5. increasing public awareness of agencies' noncompetitive contract actions;<sup>127</sup> and
6. increasing competition for orders under TO/DO contracts.<sup>128</sup>

Such legislation could take various forms depending upon whether agencies are thought to have awarded noncompetitive contracts in defiance of existing legal requirements, or in compliance with them. When agencies are seen as acting in defiance of existing requirements, proposed legislative reforms may restate agencies' need to comply with competition requirements or seek greater disclosure of information regarding noncompetitive awards.<sup>129</sup> Alternatively, when agencies are seen as having awarded noncompetitive contracts despite compliance with the competition requirements, there may be greater emphasis on amending the competition requirements, particularly their exceptions.<sup>130</sup> There are also lingering questions about the extent

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<sup>123</sup> See, e.g., *Dollars, Not Sense*, *supra* note 49, at 19 ("When the exemption was enacted by Congress, [OTA] was intended to lure smaller, nontraditional contractors who might otherwise be dissuaded by federal contract regulations to participate in government research and development. In practice, 'other transaction' authority has been used by the Bush Administration to shield major acquisitions from normal contract oversight and competition requirements."); S. 3328, 110<sup>th</sup> Cong., at § 1 (annual report on DHS's use of OTA to include "[t]he rationale for using other transaction authority, including why grants or Federal Acquisition Regulation-based contracts were not used, the extent of competition, and the amount expended for each such project.").

<sup>124</sup> DOD acquired the services of some interrogators implicated in prisoner abuse at Abu Ghraib by using the FSS. See, e.g., Glenn James Voelz, *Commercial Augmentation for Intelligence Operations: Lessons Learned from the Global War on Terrorism*, 2008 *Def. Acquisition Rev. J.* 418, 422 (2008) ("The Army investigation into abuse incidents at Abu Ghraib specifically cited the potential danger of using the GSA Federal Supply Schedule for sensitive intelligence activities, noting that such 'contracts should be carefully scrutinized given the complexity and sensitivity connected to interrogation operations'").

<sup>125</sup> See, e.g., Gov't Accountability Office, *HUBZone Program: Fraud and Abuse Identified in Four Metropolitan Areas* (Mar. 25, 2009), available at <http://www.gao.gov/new.items/d09519t.pdf>.

<sup>126</sup> See, e.g., S. 680, 110<sup>th</sup> Cong., at § 205 (limiting the duration of contracts that agencies enter in reliance on the exception for unusual and compelling circumstances); S. 3702, 110<sup>th</sup> Cong., at § 2 (restricting agencies' ability to rely on the CICA exceptions when contracting to procure property or services for reconstruction efforts).

<sup>127</sup> See, e.g., S. 3702, 110<sup>th</sup> Cong., at § 4 (requiring public disclosure of noncompetitive awards); S. 3139, 110<sup>th</sup> Cong., at § 2 (requiring that sworn affidavits by procurement managers and political appointees involved in the award of contracts—stating that "they complied with the contracting rules regarding full and open competition"—be posted on [usaspending.gov](http://www.usaspending.gov) for each contract (<http://www.usaspending.gov>)).

<sup>128</sup> See, e.g., H.R. 6411, 110<sup>th</sup> Cong. (requiring that information on individual task and delivery orders, including the extent of competition in their award and the legal authority and specific rationale for noncompetitive awards, be posted on [usaspending.gov](http://www.usaspending.gov) (<http://www.usaspending.gov>)). Orders issued under TO/DO contracts are presently exempted from CICA's notice requirements, even when they are issued without competition. See 41 U.S.C. § 416(c)(1)(D).

<sup>129</sup> See, e.g., H.R. 6999, 110<sup>th</sup> Cong., at § 102(a)(1) (requiring the Secretary of Defense and the lead system integrators for DHS's Deepwater acquisition to use full and open competition unless a CICA exception applies); S. 3139, 110<sup>th</sup> Cong., at § 202 (requiring that sworn affidavits by procurement managers and political appointees involved in the award of contracts—stating that "they complied with the contracting rules regarding full and open competition"—be posted on [usaspending.gov](http://www.usaspending.gov) for each contract).

<sup>130</sup> See, e.g., S. 680, 110<sup>th</sup> Cong., at § 205 (limiting agencies' ability to rely on the exception for unusual and (continued...))

of noncompetitive contracting over time (see **Appendix B**),<sup>131</sup> as well as about the effects of industry consolidation upon competitive contracting,<sup>132</sup> whose answers may shape future legislative proposals.

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(...continued)

compelling circumstances).

<sup>131</sup> See, e.g., David Berteau, Guy Ben-Ari, and Gregory Sanders, *Structure and Dynamics of the U.S. Federal Professional Services Industrial Base 1995-2007* xi (2009) (noting that, while the number of noncompetitive awards has risen over the past five years, the dollar amount of these contracts has been decreasing). As the data in **Table B-1** though **Table B-3** illustrate, the trends in noncompetitive contracting during the Bush administration are arguably less consistent and less striking than they are sometimes presented as being. See, e.g., *Dollars, Not Sense*, *supra* note 49, at ii (“The dollar value of [noncompetitive] contracts [during the Bush administration] rose from \$67.5 billion in 2000 to \$145 billion in 2005, an increase of 115%.”).

<sup>132</sup> See, e.g., DOD Study Looks to Quantify Reasons for Single Offers on Competed Contracts, 91 *Fed. Contr. R.* 231 (Mar. 24, 2009) (noting that single offers on competed contracts may reflect insufficiencies in the industrial base); Vasilis Fervos, Whatever Happened to Competition in Space Agency Procurement? The Case of NASA, 11 *J. of Applied Econ.* 221 (2008) (noting that industry consolidation negatively impacts agencies’ ability to engage in competitive procurements).

# Appendix A. Circumstances Permitting Other Than Full and Open Competition Under CICA

**Table A-1. Potential Applications and Limitations**

Circumstance	Potential Applications	Limitations
Sole source for goods or services	<p>Authority here to be used, if appropriate, in preference to that allowing procurement contracts necessary in the public interest</p> <p>Reasonable basis to conclude that the agency's minimum needs can only be satisfied by (1) unique supplies or services available from only one source or supplier with unique capabilities, or (2) for DOD, NASA, and the Coast Guard, unique supplies or services available from only one or a limited number of sources or from only one or a limited number of suppliers with unique capabilities</p> <p>Existence of rights in data, patent rights, copyrights, or trade secrets; control of raw materials; or similar circumstances make supplies and services available from only one source</p> <p>When acquiring utility services, if circumstances dictate that only one supplier can furnish the service, or when the contract is for construction of a part of a utility system and the utility company is the only source available to work on the system</p> <p>When the agency head determines, in accordance with an agency's standardization program, that only specified makes and models of equipment or parts satisfy the agency's needs for additional units or replacement items, and only one source is available</p>	<p>Contracts must be supported by written justifications and approvals</p> <p>Synopses of proposed contract actions must be published, and any resultant bids, proposals, etc. must be considered</p> <p>An acquisition that uses a brand name description or other purchase description to specify a particular brand name, product, or feature of a product peculiar to one manufacturer does not provide for full and open competition regardless of the number of sources solicited</p>
Unusual and compelling urgency	<p>Unusual and compelling urgency precludes full and open competition, and delay in award of a contract would result in serious financial or other injury to the government</p>	<p>Contracts must be supported by written justifications and approvals; justifications may be made and approved after contract award when preparation and approval prior to award would unreasonably delay the acquisition</p> <p>Agencies must still request offers from as many potential sources as practicable under the circumstances</p>
Maintenance of the industrial base	<p>Keep vital facilities or suppliers in business or make them available in the event of a national emergency</p> <p>Train selected suppliers in the furnishing of critical supplies or services; prevent the loss of a supplier's ability and employees' skills; or maintain active engineering,</p>	<p>Contracts must be supported by written justifications and approvals</p>

Circumstance	Potential Applications	Limitations
	<p>research, or development work</p> <p>Maintain properly balanced sources of supply for meeting the requirements of acquisition programs in the interest of industrial mobilization</p> <p>Limit competition for current acquisition of selected supplies or services approved for production planning under the DOD Industrial Preparedness Program to planned producers with whom industrial preparedness agreements for those items exist, or limit award to offerors who agree to enter into industrial preparedness agreements</p> <p>Create or maintain the required domestic capability for production of critical supplies by limiting competition to items manufactured in the United States or its outlying areas or Canada</p> <p>Continue in production contractors that are manufacturing critical items, when there would otherwise be a break in production</p> <p>Divide current production requirements among two or more contractors to provide for an adequate industrial mobilization base</p> <p>Establish or maintain an essential capability for theoretical analyses, exploratory studies, or experiments in any field of science or technology</p> <p>Establish or maintain an essential capability for engineering or developmental work calling for the practical application of investigative findings and theories of a scientific or technical nature</p> <p>Acquiring the services of either an expert to use in litigation or neutral persons (e.g., mediators, arbitrators) to facilitate alternative dispute resolution processes</p>	
Requirements of international agreements	<p>When a contemplated acquisition is to be reimbursed by a foreign country that requires that the product be obtained from a particular firm as specified in official written directions</p> <p>When a contemplated acquisition is for services to be performed, or supplies to be used, in the sovereign territory of another country and the terms of a treaty or agreement specify or limit the sources to be solicited</p>	Except for DOD, NASA, and the Coast Guard, contracts must be supported by written justifications and approvals
Statutory authorization or acquisition of brand-name items for authorized resale	<p>Federal Prison Industries (UNICOR) (18 U.S.C. § 4124)</p> <p>Qualified Nonprofit Agencies for the Blind or other Severely Disabled (41 U.S.C. § 46-48c)</p> <p>Government Printing and Binding (44 U.S.C. §§ 501-504, 1121)</p> <p>Sole source awards under the 8(a) Program (15 U.S.C. § 637)</p>	Not to be used when a provision of law requires an agency to award a new contract to a specified non-federal government entity <i>unless</i> the law specifically identifies the entity involved; refers to 10 U.S.C. § 2304(j) (for the armed services) or section 303(h) of the FPASA (for civilian agencies); and states that award shall be made in contravention of the procedures in CICA

Circumstance	Potential Applications	Limitations
	<p>Sole source awards under the HUBZone Act of 1997 (15 U.S.C. § 657a)</p> <p>Sole source awards under the Veterans Benefits Act of 2003 (15 U.S.C. § 657f)</p>	<p>Contracts must be supported by written justifications and approvals unless the statute expressly requires that procurement be made from specified sources</p> <p>May be used only for purchases of brand-name commercial items for resale through commissaries or similar facilities</p>
National security	Disclosure of the Government's needs would compromise the national security	<p>Not to be used merely because the acquisition is classified, or because access to classified matter will be necessary to submit a proposal or perform the contract</p> <p>Contracts must be supported by written justifications and approvals</p> <p>Synopses of proposed contract actions must be published</p> <p>Agencies must request offers from as many potential sources as is practicable under the circumstances</p>
Necessary in the public interest	Used when none of the other authorities apply	<p>Need written determination of the agency head; authority may not be delegated</p> <p>Congress must be notified in writing of such determination not less than 30 days before award of the contract</p> <p>This determination and finding shall not be made on a class basis</p>

**Source:** Congressional Research Service, based on 48 C.F.R. § 6.302

## Appendix B. Statistical Data on Competition in Federal Contracting

**Table B-1. Federal Contract Awards by Extent of Competition: FY2000-FY2009**

<b>Competition category</b>	<b>FY2000</b>	<b>FY2001</b>	<b>FY2002</b>	<b>FY2003</b>	<b>FY2004</b>	<b>FY2005</b>	<b>FY2006</b>	<b>FY2007</b>	<b>FY2008</b>	<b>FY2009</b>
Full and open competition	44.631%	44.512%	45.255%	44.304%	34.383%	33.918%	32.439%	32.465%	36.037%	41.591%
Not competed	23.339%	26.076%	24.931%	25.345%	31.153%	26.268%	26.588%	25.418%	26.047%	17.652%
Competed after exclusion of sources	9.693%	11.196%	11.260%	11.868%	14.266%	17.163%	18.145%	19.689%	18.519%	15.214%
Full and open competition, but only one bid	8.465%	6.847%	6.636%	7.002%	11.331%	10.353%	9.544%	9.863%	8.864%	9.626%
Unknown	2.102%	0.167%	0.068%	0.526%	1.785%	3.846%	4.901%	4.957%	4.480%	8.526%
Not available for competition	8.456%	7.131%	9.293%	6.620%	4.551%	5.217%	5.408%	4.942%	4.702%	5.103%
Follow-on to previous contract	3.314%	4.071%	2.557%	4.335%	2.532%	3.235%	2.975%	2.665%	1.351%	2.289%
Total	100.000%	100.000%	100.000%	100.000%	100.000%	100.000%	100.000%	100.000%	100.000%	100.000%

**Source:** usaspending.gov



**Table B-2. Federal Contract Awards by Type of Competition: FY2000-FY2009**

<b>Extent Completed</b>	<b>FY2000</b>	<b>FY2001</b>	<b>FY2002</b>	<b>FY2003</b>	<b>FY2004</b>	<b>FY2005</b>	<b>FY2006</b>	<b>FY2007</b>	<b>FY2008</b>	<b>FY2009</b>
Full and Open Competition	54.955%	54.833%	54.979%	54.313%	49.364%	47.038%	44.547%	46.838%	49.308%	45.417%
Not Competed	23.338%	26.070%	24.917%	25.308%	30.861%	25.280%	25.288%	24.054%	24.901%	15.278%
Full and Open Competition after exclusion of sources	7.834%	7.684%	8.111%	8.703%	9.363%	12.087%	12.349%	11.257%	10.015%	11.344%
Competitive Delivery Order	0.000%	0.036%	0.057%	0.147%	1.196%	2.004%	2.782%	3.666%	3.821%	9.018%
Not Available for Competition	8.456%	7.131%	9.293%	6.620%	4.551%	5.217%	5.408%	4.942%	4.702%	5.103%
Follow On to Competed Action	3.314%	4.071%	2.557%	4.335%	2.532%	3.235%	2.975%	2.665%	1.351%	2.289%
Non-Competitive Delivery Order	0.000%	0.005%	0.006%	0.012%	0.175%	0.731%	1.110%	1.137%	0.906%	1.964%
Competed under SAT (Simplified Acquisition Threshold)	0.000%	0.003%	0.004%	0.010%	0.057%	0.304%	0.449%	0.255%	0.275%	0.653%
Not Competed, under SAT (Simplified Acquisition Threshold)	0.001%	0.001%	0.008%	0.026%	0.117%	0.257%	0.190%	0.227%	0.239%	0.410%
Invalid or blank	2.102%	0.167%	0.068%	0.526%	1.785%	3.846%	4.901%	4.957%	4.480%	8.526%
<b>Total</b>	<b>100.000%</b>	<b>100.000%</b>	<b>100.000%</b>	<b>100.000%</b>	<b>100.000%</b>	<b>100.000%</b>	<b>100.000%</b>	<b>100.000%</b>	<b>100.000%</b>	<b>100.000%</b>

**Source:** [usaspending.gov](http://usaspending.gov)

**Notes:** Table shows amounts in percentages of total for fiscal year, and is sorted by FY2009 dollars.

**Table B-3. Federal Contract Awards by Reason Not Completed: FY2000-FY2009**

<b>Reason not completed</b>	<b>FY2000</b>	<b>FY2001</b>	<b>FY2002</b>	<b>FY2003</b>	<b>F2004</b>	<b>FY2005</b>	<b>FY2006</b>	<b>FY2007</b>	<b>FY2008</b>	<b>F2009</b>
Only One Source - Other	0.863%	9.343%	8.255%	6.371%	8.019%	9.130%	8.773%	10.710%	13.076%	7.155%
Authorized by Statute	0.207%	2.428%	2.457%	3.527%	2.690%	3.401%	3.126%	3.246%	3.180%	5.267%
Follow-on Contract	1.015%	4.068%	3.261%	3.422%	3.238%	2.293%	3.877%	3.535%	3.228%	4.494%
Unique Source	1.036%	10.916%	10.494%	11.005%	13.058%	9.770%	10.575%	10.088%	8.525%	4.040%
Particular Sources (e.g., mobilization, essential R & D)	0.016%	2.167%	2.541%	2.519%	2.767%	2.915%	2.438%	1.759%	1.521%	2.254%
Utilities	0.188%	0.425%	0.361%	0.315%	0.273%	0.280%	0.282%	0.257%	0.228%	0.717%
Urgency	0.172%	1.349%	2.015%	3.047%	2.712%	2.619%	3.139%	1.475%	1.156%	0.462%
Public Interest	1.308%	2.230%	1.960%	3.124%	1.669%	1.392%	1.110%	0.420%	0.181%	0.458%
JWOD	0.101%	0.267%	1.036%	0.181%	0.058%	0.061%	0.051%	0.056%	0.079%	0.436%
Non-Competitive 8(a)	0.454%	2.366%	2.516%	1.672%	0.619%	0.295%	0.182%	0.190%	0.138%	0.228%
National Security	0.052%	1.186%	1.354%	0.891%	1.009%	0.693%	0.687%	0.602%	0.619%	0.224%
International Agreement	0.029%	1.175%	1.857%	1.676%	0.671%	0.609%	0.590%	0.871%	0.769%	0.203%
Simplified Procedures Non-Competitive	0.000%	0.003%	0.024%	0.028%	0.275%	0.200%	0.121%	0.089%	0.072%	0.175%
Patent/Data Rights	0.005%	0.093%	0.050%	0.057%	0.063%	0.056%	0.051%	0.103%	0.144%	0.081%
Standardization	0.007%	0.045%	0.005%	0.011%	0.015%	0.035%	0.025%	0.026%	0.023%	0.039%
UNICOR	0.020%	0.015%	0.015%	0.018%	0.027%	0.022%	0.015%	0.010%	0.011%	0.024%
Non-Competitive Delivery Order	0.016%	0.042%	0.047%	0.066%	1.363%	0.726%	0.268%	0.115%	0.062%	0.014%
Below Micro Purchase Threshold	0.000%	0.000%	0.000%	0.000%	0.000%	0.022%	0.020%	0.023%	0.020%	0.010%
Authorized for Resale	0.003%	0.432%	0.376%	0.343%	0.322%	1.166%	1.353%	1.014%	0.944%	0.002%

<b>Reason not competed</b>	<b>FY2000</b>	<b>FY2001</b>	<b>FY2002</b>	<b>FY2003</b>	<b>F2004</b>	<b>FY2005</b>	<b>FY2006</b>	<b>FY2007</b>	<b>FY2008</b>	<b>F2009</b>
Unsolicited Research Proposal	0.007%	0.019%	0.022%	0.015%	0.012%	0.009%	0.011%	0.008%	0.006%	0.002%
Minimum Guarantee	0.000%	0.088%	0.040%	0.033%	0.008%	0.002%	0.000%	0.000%	0.000%	0.000%
HUBZone Sole Source	0.000%	0.000%	0.000%	0.000%	0.003%	0.001%	0.000%	0.000%	0.000%	0.000%
Buy Indian	0.000%	0.002%	0.002%	0.001%	0.014%	0.002%	0.000%	0.000%	0.000%	0.000%
Follow-on Delivery Order	0.004%	0.189%	0.022%	0.032%	1.008%	0.183%	0.055%	0.013%	0.004%	0.002%
Invalid or blank	94.497%	61.154%	61.290%	61.643%	60.109%	64.120%	63.251%	65.389%	66.016%	73.715%
Total	100.000%	100.000%	100.000%	100.000%	100.000%	100.000%	100.000%	100.000%	100.000%	100.000%

**Source:** [usaspending.gov](http://usaspending.gov)

**Notes:** Table shows amounts in percentages of total for fiscal year, and is sorted by FY2009 dollars. All percentages are rounded to the nearest tenth.

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