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UNITED STATES CODE SERVICE
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*** CURRENT THROUGH PL 111-4, APPROVED 2/11/2009 ***

TITLE 10. ARMED FORCES
SUBTITLE A. GENERAL MILITARY LAW
PART IV. SERVICE, SUPPLY, AND PROCUREMENT
CHAPTER 146. CONTRACTING FOR PERFORMANCE OF CIVILIAN COMMERCIAL OR INDUSTRIAL TYPE
FUNCTIONS

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10 USCS § 2463

§ 2463. Guidelines and procedures for use of civilian employees to perform Department of Defense functions

(a) Guidelines required.

(1) The Under Secretary of Defense for Personnel and Readiness shall devise and implement guidelines and procedures to ensure that consideration is given to using, on a regular basis, Department of Defense civilian employees to perform new functions and functions that are performed by contractors and could be performed by Department of Defense civilian employees. The Secretary of a military department may prescribe supplemental regulations, if the Secretary determines such regulations are necessary for implementing such guidelines within that military department.

(2) The guidelines and procedures required under paragraph (1) may not include any specific limitation or restriction on the number of functions or activities that may be converted to performance by Department of Defense civilian employees.

(b) Special consideration for certain functions. The guidelines and procedures required under subsection (a) shall provide for special consideration to be given to using Department of Defense civilian employees to perform any function that--

(1) is performed by a contractor and--

(A) has been performed by Department of Defense civilian employees at any time during the previous 10 years;

(B) is a function closely associated with the performance of an inherently governmental function;

(C) has been performed pursuant to a contract awarded on a non-competitive basis; or

(D) has been performed poorly, as determined by a contracting officer during the 5-year period preceding the date of such determination, because of excessive costs or inferior quality; or

(2) is a new requirement, with particular emphasis given to a new requirement that is similar to a function previously performed by Department of Defense civilian employees or is a function closely associated with the performance of an inherently governmental function.

(c) Exclusion of certain functions from competitions. The Secretary of Defense may not conduct a public-private competition under this chapter [*10 USCS §§ 2460 et seq.*], Office of Management and Budget Circular A-76, or any

other provision of law or regulation before--

(1) in the case of a new Department of Defense function, assigning the performance of the function to Department of Defense civilian employees;

(2) in the case of any Department of Defense function described in subsection (b), converting the function to performance by Department of Defense civilian employees; or

(3) in the case of a Department of Defense function performed by Department of Defense civilian employees, expanding the scope of the function.

(d) Use of flexible hiring authority.

(1) The Secretary of Defense may use the flexible hiring authority available to the Secretary under the National Security Personnel System, as established pursuant to section 9902 of title 5, to facilitate the performance by Department of Defense civilian employees of functions described in subsection (b).

(2) The Secretary shall make use of the inventory required by section 2330a(c) of this *title* [10 USCS § 2330a(c)] for the purpose of identifying functions that should be considered for performance by Department of Defense civilian employees pursuant to subsection (b).

(e) Definitions. In this section the term "functions closely associated with inherently governmental functions" has the meaning given that term in section 2383(b)(3) of this *title* [10 USCS § 2383(b)].

HISTORY:

(Added Jan. 28, 2008, P.L. 110-181, Div A, Title III, Subtitle C, § 324(a)(1), 122 Stat. 60.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

A former § 2463 (Act July 19, 1988, P.L. 100-370, § 2(a)(1), 102 Stat. 851; Nov. 29, 1989, P.L. 101-189, Div A, Title XVI, Part C, § 1622(c)(7), 103 Stat. 1604; Nov. 5, 1990, P.L. 101-510, Div A, Title XIII, Part A, § 1301(14), 104 Stat. 1668; Nov. 18, 1997, P.L. 105-85, Div A, Title III, Subtitle F, § 385(a), 111 Stat. 1712) was repealed by Act Jan. 6, 2006, P.L. 109-163, Div A, Title III, Subtitle E, § 341(f), 119 Stat. 3199. It provided for collection and retention of cost information data on converted services and functions.

Other provisions:

Deadline for issuance of guidelines and procedures. Act Jan. 28, 2008, P.L. 110-181, Div A, Title III, Subtitle C, § 324(a)(3), 122 Stat. 61, provides: "The Secretary of Defense shall implement the guidelines and procedures required under *section 2463 of title 10, United States Code*, as added by paragraph (1), by not later than 60 days after the date of the enactment of this Act."

Interpretive Notes and Decisions:

Federal civilian employees, at least one of whom allegedly lost job at Air Force base as result of decision to outsource some operating-support work to private contractor, did not have prudential standing, under Administrative Procedure Act provision (5 USCS § 702), for purposes of suing Air Force officer to challenge outsourcing decision, as, among other factors, employees were not in zone of interests protected by former 10 USCS § 2463, with respect to

employees' asserted interest in preserving federal employment. *Courtney v Smith* (2002, CA6 Ohio) 297 F3d 455, 2002 FED App 248P, cert den (2003) 540 US 814, 157 L Ed 2d 28, 124 S Ct 64.