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House Report 110-477 - NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2008

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SEC. 324. GUIDELINES ON INSOURCING NEW AND CONTRACTED OUT FUNCTIONS.

(a) *Codification and Revision of Requirement for Guidelines-*

(1) *IN GENERAL-* Chapter 146 of title 10, United States Code, is amended by inserting after section 2462 the following new section:

Sec. 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 five-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, 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 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.'

(2) CLERICAL AMENDMENT- The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 2462 the following new item:

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

(3) DEADLINE FOR ISSUANCE OF GUIDELINES AND PROCEDURES- 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.

(b) Inspector General Report- Not later than 180 days after the date of the enactment of this Act, the Inspector General of the Department of Defense shall submit to the congressional defense committees a report on the implementation of this section and the amendments made by this section.

(c) Conforming Repeal- The National Defense Authorization Act for Fiscal Year 2006 (Public Law 109-163) is amended by striking section 343.

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Information Systems Network (sec. 321)

The Senate amendment contained a provision (sec. 321) that would authorize the Defense Information Systems Agency to use up to \$500,000 of working capital funds to pay for any project directly related to technology upgrades to the Defense Information System Network.

The House bill contained no similar provision.

The House recedes with an amendment that would provide this authority notwithstanding section 2208 of title 10, United States Code, and clarifies the limitation on its use with respect to changing a system's performance envelope.

Modification to public-private competition requirements before conversion to contractor performance (sec. 322)

The House bill contained a provision (sec. 324) that would modify the provisions of section 2461 of title 10, United States Code, regarding the requirements for public-private competition for the performance of a function.

The Senate amendment contained an identical provision (sec. 365). The conference agreement includes this provision.

Public-private competition at end of period specified in performance agreement not required (sec. 323)

The House bill contained a provision (sec. 325) that would override the requirement in Office of Management and Budget Circular A-76 that all work awarded to federal employees pursuant to a public-private competition be recompeted at the end of the period specified in the performance agreement.

The Senate amendment contained a similar provision (sec. 370).

The House recedes.

The conferees note that this provision would give Department of Defense managers discretion to determine whether it is in the interest of the Department of Defense to conduct a follow-on competition at the end of the period specified in the performance agreement. Nothing in this provision would prohibit the conduct of such a competition, if it were determined to be in the Department's interest.

Guidelines on insourcing new and contracted out functions (sec. 324)

The House bill contained a provision (sec. 326) that would require the Under Secretary of Defense for Personnel and Readiness to establish guidelines and procedures for ensuring

that full consideration is given to using federal employees to perform new functions and other categories of work that would otherwise be performed under contract.

The Senate amendment contained a similar provision (sec. 368).

The Senate recedes with an amendment that would eliminate language prohibiting the Department of Defense from initiating any new public-private competitions until the guidelines and procedures are issued. The amendment would require the Inspector General of the Department of Defense to report to the Committees on Armed Services of the Senate and the House of Representatives on the compliance of the Secretary of Defense with the requirements of this section.

Restriction on Office of Management and Budget influence over Department of Defense public-private competitions (sec. 325)

The House bill contained a provision (sec. 328) that would prohibit the Office of Management and Budget (OMB) from directing or requiring the Secretary of Defense or the secretary of a military department to undertake a particular public-private competition under OMB Circular A-76.

The Senate amendment contained a similar provision (sec. 369).

The Senate recedes with an amendment that would strike the requirement that the Secretary of Defense suspend public-private competitions under OMB Circular A-76 and substitute a requirement that the Inspector General conduct a comprehensive review of the compliance of the Secretary of Defense and the secretaries of the military departments with the requirements of the provision.

The conferees remain concerned about efforts by OMB to intervene in internal Department of Defense (DOD) decisions regarding how the Department should best be staffed to carry out its vital national security functions. Most recently, the Deputy Director of OMB sent a memorandum to the Deputy Secretary of Defense complaining that the Department of the Army had not subjected a large enough number of federal employee positions to public-private competition and that DOD had classified too many positions as being inappropriate for public-private competition. The OMB memorandum further urged DOD to actively review positions in the intelligence community for possible public-private competition.

The conferees agree that decisions about which functions should be performed by DOD employees in the interest of national security are best made by the Department of Defense. In recent years the DOD budget has grown dramatically as the Department has taken on substantial new burdens in the global war on terrorism. The Department of the Army and the defense intelligence agencies