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

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### **SEC. 807. INVENTORIES AND REVIEWS OF CONTRACTS FOR SERVICES.**

(a) *Inventory Requirement- Section 2330a of title 10, United States Code, is amended--*

(1) *by redesignating subsection (d) as subsection (g);*

(2) *by striking subsection (c) and inserting the following:*

*(c) Inventory- (1) Not later than the end of the third quarter of each fiscal year, the Secretary of Defense shall submit to Congress an annual inventory of the activities performed during the preceding fiscal year pursuant to contracts for services for or on behalf of the Department of Defense. The entry for an activity on an inventory under this subsection shall include, for the fiscal year covered by such entry, the following:*

*(A) The functions and missions performed by the contractor.*

*(B) The contracting organization, the component of the Department of Defense administering the contract, and the organization whose requirements are being met through contractor performance of the function.*

*(C) The funding source for the contract under which the function is performed by appropriation and operating agency.*

*(D) The fiscal year for which the activity first appeared on an inventory under this section.*

*(E) The number of full-time contractor employees (or its equivalent) paid for the performance of the activity.*

*`(F) A determination whether the contract pursuant to which the activity is performed is a personal services contract.*

*`(G) A summary of the data required to be collected for the activity under subsection (a).*

*`(2) The inventory required under this subsection shall be submitted in unclassified form, but may include a classified annex.*

*`(d) Public Availability of Inventories- Not later than 30 days after the date on which an inventory under subsection (c) is required to be submitted to Congress, the Secretary shall--*

*`(1) make the inventory available to the public; and*

*`(2) publish in the Federal Register a notice that the inventory is available to the public.*

*`(e) Review and Planning Requirements- Within 90 days after the date on which an inventory is submitted under subsection (c), the Secretary of the military department or head of the Defense Agency responsible for activities in the inventory shall--*

*`(1) review the contracts and activities in the inventory for which such Secretary or agency head is responsible;*

*`(2) ensure that--*

*`(A) each contract on the list that is a personal services contract has been entered into, and is being performed, in accordance with applicable statutory and regulatory requirements;*

*`(B) the activities on the list do not include any inherently governmental functions; and*

*`(C) to the maximum extent practicable, the activities on the list do not include any functions closely associated with inherently governmental functions;*

*`(3) identify activities that should be considered for conversion--*

*`(A) to performance by civilian employees of the Department of Defense pursuant to section 2463 of this title; or*

*`(B) to an acquisition approach that would be more advantageous to the Department of Defense; and*

*`(4) develop a plan to provide for appropriate consideration of the conversion of activities identified under paragraph (3) within a reasonable period of time.*

*`(f) Rule of Construction- Nothing in this section shall be construed to authorize the*

*performance of personal services by a contractor except where expressly authorized by a provision of law other than this section.'; and*

*(3) by adding at the end of subsection (g) (as so redesignated) the following new paragraphs:*

*'(3) FUNCTION CLOSELY ASSOCIATED WITH INHERENTLY GOVERNMENTAL FUNCTIONS- The term 'function closely associated with inherently governmental functions' has the meaning given that term in section 2383(b) (3) of this title.*

*'(4) INHERENTLY GOVERNMENTAL FUNCTIONS- The term 'inherently governmental functions' has the meaning given that term in section 2383(b) (2) of this title.*

*'(5) PERSONAL SERVICES CONTRACT- The term 'personal services contract' means a contract under which, as a result of its terms or conditions or the manner of its administration during performance, contractor personnel are subject to the relatively continuous supervision and control of one or more Government officers or employees, except that the giving of an order for a specific article or service, with the right to reject the finished product or result, is not the type of supervision or control that makes a contract a personal services contract.'*

*(b) Effective Date-*

*(1) The amendments made by subsection (a) shall be effective upon the date of the enactment of this Act.*

*(2) The first inventory required by section 2330a(c) of title 10, United States Code, as added by subsection (a), shall be submitted not later than the end of the third quarter of fiscal year 2008.*

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Department to utilize the required data collection system and ensure that budget information is collected and reported in a manner that is consistent with the collection and reporting of information on expenditures.

*Inventories and reviews of contracts for services (sec. 807)*

The House bill contained a provision (sec. 326(b)) that would require the Secretary of Defense to establish an inventory of work performed by contractors.

The Senate amendment contained a provision (sec. 845) that would require the secretary of each military department and the head of each defense agency to maintain an inventory of activities performed pursuant to contracts for services based on cost or time of performance.

The House recedes with an amendment that would codify a requirement for the Secretary of Defense to maintain an annual inventory of activities performed pursuant to contracts for services for or on behalf of the Department of Defense. The provision would require the secretaries of the military departments and the heads of defense agencies to conduct certain review and planning activities on the basis of the annual inventories.

*Independent management reviews of contracts for services (sec. 808)*

The Senate amendment contained a provision (sec. 847) that would require the Secretary of Defense to issue guidance to provide for independent management reviews of contracts for services.

The House bill contained no similar provision.

The House recedes with an amendment that would extend the amount of time for the Secretary to issue the required guidance and add additional matters to be addressed in the guidance. In addition to the matters required in the Senate provision, the independent management reviews would be required to specifically address issues raised by contracts under which an agency uses one contractor to perform program management and other acquisition services with regard to services performed by other contractors.

The conferees note the military services and defense agencies are beginning to rely on a single contractor to oversee program management of large services contracts, in a manner

similar to that of the "lead systems integrator" concept on hardware programs.

For example, the conferees understand that the program structure for the Defense Logistics "tire privatization" program places extensive control for the management, supply, and distribution of military tires into the hands of a single contractor. Similarly, the Army's Warfighter Field Operations Customer Support (Warfighter FOCUS) consolidates several existing contracts for training aids, simulators, and ranges used by the active, reserve, and Guard components of the Army into a single contract for life cycle support to be managed by a single large prime contractor over a 10 year period.

The conferees are concerned that the trend toward large single contracts for the procurement of services may undermine competition and result in unequal access to information about future government needs. The conferees expect the Department of Defense to review these issues and take appropriate action to ensure that, to the extent that the Department continues to rely upon such contracts, they do not result in the exclusion or unequal treatment of competing contractors.

*Implementation and enforcement of requirements applicable to undefinitized contractual actions (sec. 809)*

The Senate amendment contained a provision (sec. 848) that would require the Secretary of Defense to issue guidance, with detailed implementation instructions, for the Department of Defense (DOD) to ensure the implementation and enforcement of requirements applicable to undefinitized contractual actions (UCAs).

The House bill contained no similar provision.

The House recedes with an amendment clarifying the issues to be addressed in the guidance.

The conferees note that the DOD already has requirements in place regarding the use of UCAs. However, the Government Accountability Office (GAO) reported in June 2007 that DOD has frequently failed to comply with these requirements.

For example, the Defense Federal Acquisition Regulation Supplement (DFARS) states that when the final price of a UCA is negotiated after a substantial portion of the required performance has been completed, the negotiated profit rate should reflect any reduced cost risk to the contractor for costs incurred during contract performance before negotiation of the final price. Section 215.404-71-3(d)(2) of the DFARS states: