

10 USC 2463: Guidelines and procedures for use of civilian employees to perform Department of Defense functions

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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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§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) is a critical function that-

- (i) is necessary to maintain sufficient Government expertise and technical capabilities; or
- (ii) entails operational risk associated with contractor performance;

(B) is an acquisition workforce function;

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

(D) has been performed by Department of Defense civilian employees at any time during the previous 10-year period;

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

(F) 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, 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 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) Determinations Relating to the Conversion of Certain Functions.—(1) Except as provided in paragraph (2), in determining whether a function should be converted to performance by Department of Defense civilian employees, the Secretary of Defense shall—

(A) develop methodology for determining costs based on the guidance outlined in the Directive-Type Memorandum 09–007 entitled "Estimating and Comparing the Full Costs of Civilian and Military Manpower and Contractor Support" or any successor guidance for the determination of costs when costs are the sole basis for the determination;

(B) take into consideration any supplemental guidance issued by the Secretary of a military department for determinations affecting functions of that military department; and

(C) ensure that the difference in the cost of performing the function by a contractor compared to the cost of performing the function by Department of Defense civilian employees would be equal to or exceed the lesser of—

- (i) 10 percent of the personnel-related costs for performance of that function; or
- (ii) \$10,000,000.

(2) Paragraph (1) shall not apply to any function that is inherently governmental or any function described in subparagraph (A), (B), or (C) of subsection (b)(1).

(f) Notification Relating to the Conversion of Certain Functions.—The Secretary of Defense shall establish procedures for the timely notification of any contractor who performs a function that the Secretary plans to convert to performance by Department of Defense civilian employees pursuant to subsection (a). The Secretary shall provide a copy of any such notification to the congressional defense committees.

(g) Definitions.—In this section:

(1) The term "functions closely associated with inherently governmental functions" has the meaning given that term in section 2383(b)(3) of this title.

(2) The term "acquisition function" has the meaning given that term under section 1721(a) of this title.

(3) The term "inherently governmental function" has the meaning given that term in the Federal Activities Inventory Reform Act of 1998 (Public Law 105–270; 31 U.S.C. 501 note).

(Added Pub. L. 110–181, div. A, title III, §324(a)(1), Jan. 28, 2008, 122 Stat. 60 ; amended Pub. L. 111–383, div. A, title III, §353, Jan. 7, 2011, 124 Stat. 4194 ; Pub. L. 112–81, div. A, title IX, §938, Dec. 31, 2011, 125 Stat. 1547 .)

PRIOR PROVISIONS

Provisions similar to those in this section were contained in Pub. L. 109–163, div. A, title III, §343, Jan. 6, 2006, 119 Stat. 3200 , which was set out as a note under section 2461 of this title, prior to repeal by Pub. L. 110–181, div. A, title III, §324(c), Jan. 28, 2008, 122 Stat. 61 .

A prior section 2463, added Pub. L. 100–370, §2(a)(1), July 19, 1988, 102 Stat. 853 ; amended Pub. L. 101–189, div. A, title XVI, §1622(c)(7), Nov. 29, 1989, 103 Stat. 1604 ; Pub. L. 101–510, div. A, title XIII, §1301(14), Nov. 5, 1990, 104 Stat. 1668 ; Pub. L. 105–85, div. A, title III, §385(a), Nov. 18, 1997, 111 Stat. 1712 , related to collection and retention of cost information data on the conversion of services and functions of the Department of Defense to or from contractor performance, prior to repeal by Pub. L. 109–163, div. A, title III, §341(f), Jan. 6, 2006, 119 Stat. 3199 .

AMENDMENTS

2011-Subsec. (b)(1). Pub. L. 112–81, §938(1), added subpars. (A), (B), and (D), redesignated former subpars. (B), (C), and (D) as (C), (E), and (F), and struck out former subpar. (A) which read as follows: "has been performed by Department of Defense civilian employees at any time during the previous 10 years;".

Subsec. (d)(1). Pub. L. 111–383 struck out "under the National Security Personnel System, as established" before "pursuant to section 9902 of title 5".

Subsecs. (e), (f). Pub. L. 112–81, §938(3), added subsecs. (e) and (f). Former subsec. (e) redesignated (g).

Subsec. (g). Pub. L. 112–81, §938(4), substituted "this section:" for "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." and added pars. (1) to (3).

Pub. L. 112–81, §938(2), redesignated subsec. (e) as (g).

PROHIBITION ON ESTABLISHING GOALS OR QUOTAS FOR CONVERSION OF FUNCTIONS TO PERFORMANCE BY DEPARTMENT OF DEFENSE CIVILIAN EMPLOYEES

Pub. L. 111–383, div. A, title III, §323, Jan. 7, 2011, 124 Stat. 4184 , provided that:

"(a) Prohibition.-The Secretary of Defense may not establish, apply, or enforce any numerical goal, target, or quota for the conversion of Department of Defense functions to performance by Department of Defense civilian employees, unless such goal, target, or quota is based on considered research and analysis, as required by section 235, 2330a, or 2463 of title 10, United States Code.

"(b) Decisions to Insource.-In deciding which functions should be converted to performance by Department of Defense civilian employees pursuant to section 2463 of title 10, United States Code, the Secretary of Defense shall use the costing methodology outlined in the Directive-Type Memorandum 09–007 (Estimating and Comparing the Full Costs of Civilian and Military Manpower and Contractor Support) or any successor guidance for the determination of costs when costs are the sole basis for the decision. The Secretary of a military department may issue supplemental guidance to assist in such decisions affecting functions of that military department.

"(c) Reports.-

"(1) Report to congress.-Not later than March 31, 2011, the Secretary of Defense shall submit to the congressional defense committees [Committees on Armed Services and Appropriations of the Senate and the House of Representatives] a report on the decisions with respect to the conversion of functions to performance by Department of Defense civilian employees made during fiscal year 2010. Such report shall identify, for each such decision-

"(A) the agency or service of the Department involved in the decision;

"(B) the basis and rationale for the decision; and

"(C) the number of contractor employees whose functions were converted to performance by Department of Defense civilian employees.

"(2) Comptroller general review.-Not later than 120 days after the submittal of the report under paragraph (1), the Comptroller General of the United States shall submit to the congressional defense committees an assessment of the report.

"(d) Construction.-Nothing in this section shall be construed-

"(1) to preclude the Secretary of Defense from establishing, applying, and enforcing goals for the conversion of acquisition functions and other critical functions to performance by Department of Defense civilian employees, where such goals are based on considered research and analysis; or

"(2) to require the Secretary of Defense to conduct a cost comparison before making a decision to convert any acquisition function or other critical function to performance by Department of Defense civilian employees, where factors other than cost serve as a basis for the Secretary's decision."

DEADLINE FOR ISSUANCE OF GUIDELINES AND PROCEDURES

Pub. L. 110–181, div. A, title III, §324(a)(3), Jan. 28, 2008, 122 Stat. 61 , provided that: "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 [Jan. 28, 2008]."