

- Sec.  
2475. Consolidation, restructuring, or reengineering of organizations, functions, or activities: notification requirements.
2476. Minimum capital investment for certain depots.

## AMENDMENTS

2011—Pub. L. 112-81, div. A, title III, § 327(b), Dec. 31, 2011, 125 Stat. 1368, substituted “Core depot-level maintenance and repair capabilities” for “Core logistics capabilities” in item 2464.

Pub. L. 111-383, div. A, title VIII, § 822(b), Jan. 7, 2011, 124 Stat. 4268, struck out item 2473 “Procurements from the small arms production industrial base”.

2008—Pub. L. 110-181, div. A, title III, §§ 322(d), 324(a)(2), Jan. 28, 2008, 122 Stat. 60, 61, added item 2463 and struck out item 2467 “Cost comparisons: inclusion of retirement costs; consultation with employees; waiver of comparison”.

2006—Pub. L. 109-364, div. A, title III, § 332(b), Oct. 17, 2006, 120 Stat. 2150, added item 2476.

Pub. L. 109-163, div. A, title III, § 341(g)(4), Jan. 6, 2006, 119 Stat. 3200, substituted “Public-private competition required” for “Commercial or industrial type functions: required studies and reports” in item 2461, “Development and implementation of system for monitoring cost saving resulting from public-private competitions” for “Development of system for monitoring cost savings resulting from workforce reductions” in item 2461a, and “Reports on public-private competition” for “Contracting for certain supplies and services required when cost is lower” in item 2462 and struck out item 2463 “Collection and retention of cost information data on converted services and functions”.

2004—Pub. L. 108-375, div. A, title III, § 322(b)(2), Oct. 28, 2004, 118 Stat. 1846, substituted “Prohibition on management of depot employees by end strength” for “Management of depot employees” in item 2472.

2002—Pub. L. 107-314, div. A, title III, § 333(b), Dec. 2, 2002, 116 Stat. 2514, struck out item 2469a “Use of competitive procedures in contracting for performance of depot-level maintenance and repair workloads formerly performed at certain military installations”.

2001—Pub. L. 107-107, div. A, title X, § 1048(e)(10)(B), Dec. 28, 2001, 115 Stat. 1228, struck out item 2468 “Military installations: authority of base commanders over contracting for commercial activities”.

2000—Pub. L. 106-398, § 1 [div. A], title III, §§ 341(g)(2), 353(b), 354(b)], Oct. 30, 2000, 114 Stat. 1654, 1654A-64, 1654A-73, 1654A-75, added items 2461a and 2475 and struck out item 2471 “Persons outside the Department of Defense: lease of excess depot-level equipment and facilities by”.

1999—Pub. L. 106-65, div. A, title III, § 342(b)(2), Oct. 5, 1999, 113 Stat. 569, added item 2467 and struck former item 2467 “Cost comparisons: requirements with respect to retirement costs and consultation with employees”.

1997—Pub. L. 105-85, div. A, title III, §§ 355(c)(1), 356(b), 359(a)(2), 361(a)(2), 385(b), Nov. 18, 1997, 111 Stat. 1694, 1695, 1699, 1701, 1712, added item 2460, substituted “Collection and retention of cost information data on converted services and functions” for “Reports on savings or costs from increased use of DOD civilian personnel” in item 2463 and “capabilities” for “functions” in item 2464, and added items 2469a and 2474.

1996—Pub. L. 104-201, div. A, title VIII, § 832(b), Sept. 23, 1996, 110 Stat. 2616, added item 2473.

Pub. L. 104-106, div. A, title III, § 312(d), Feb. 10, 1996, 110 Stat. 251, added item 2472.

Pub. L. 104-106, div. A, title III, § 311(f)(2), Feb. 10, 1996, 110 Stat. 248, which directed striking out items 2466 and 2469, was repealed by Pub. L. 105-85, div. A, title III, § 363, Nov. 18, 1997, 111 Stat. 1702.

1994—Pub. L. 103-337, div. A, title III, §§ 335(b), 336(b), Oct. 5, 1994, 108 Stat. 2717, added items 2470 and 2471.

1992—Pub. L. 102-484, div. A, title III, § 353(b), Oct. 23, 1992, 106 Stat. 2379, added item 2469.

1991—Pub. L. 102-190, div. A, title III, § 314(a)(2), Dec. 5, 1991, 105 Stat. 1337, substituted “Limitations on the

performance of depot-level maintenance of materiel” for “Prohibition on certain depot maintenance workload competitions” in item 2466.

1989—Pub. L. 101-189, div. A, title XI, § 1131(a)(2), Nov. 29, 1989, 103 Stat. 1561, added item 2468.

1988—Pub. L. 100-456, div. A, title III, §§ 326(b), 331(b), Sept. 29, 1988, 102 Stat. 1956, 1958, added items 2466 and 2467.

### § 2460. Definition of depot-level maintenance and repair

In this chapter, the term “depot-level maintenance and repair”—

(1) means any action performed on materiel or software in the conduct of inspection, repair, overhaul, or the modification or rebuild of end-items, assemblies, subassemblies, and parts, that—

(A) requires extensive industrial facilities, specialized tools and equipment, or uniquely experienced and trained personnel that are not available in lower echelon-level maintenance activities; and

(B) is a function and, as such, is independent of any location or funding source and may be performed in the public or private sectors (including the performance of interim contract support or contract logistic support arrangements); and

(2) includes—

(A) the fabrication of parts, testing, and reclamation, as necessary;

(B) the repair, adaptive modifications or upgrades, change events made to operational software, integration and testing; and

(C) in the case of either hardware or software modifications or upgrades, the labor associated with the application of the modification.

(Added Pub. L. 105-85, div. A, title III, § 355(a), Nov. 18, 1997, 111 Stat. 1693; amended Pub. L. 105-261, div. A, title III, § 341, Oct. 17, 1998, 112 Stat. 1973; Pub. L. 112-81, div. A, title III, § 321, Dec. 31, 2011, 125 Stat. 1361.)

## AMENDMENTS

2011—Pub. L. 112-81 amended section generally. Prior to amendment, section related to definition of depot-level maintenance and repair and provided for certain exceptions.

1998—Subsec. (a). Pub. L. 105-261 inserted “or the location at which the maintenance or repair is performed” before period at end of first sentence.

### § 2461. Public-private competition required before conversion to contractor performance

(a) PUBLIC-PRIVATE COMPETITION.—(1) No function of the Department of Defense performed by Department of Defense civilian employees may be converted, in whole or in part, to performance by a contractor unless the conversion is based on the results of a public-private competition that—

(A) formally compares the cost of performance of the function by Department of Defense civilian employees with the cost of performance by a contractor;

(B) creates an agency tender, including a most efficient organization plan, in accordance with Office of Management and Budget Circular A-76, as implemented on May 29, 2003, or any successor circular;

(C) includes the issuance of a solicitation;  
 (D) determines whether the submitted offers meet the needs of the Department of Defense with respect to factors other than cost, including quality, reliability, and timeliness;

(E) examines the cost of performance of the function by Department of Defense civilian employees and the cost of performance of the function by one or more contractors to demonstrate whether converting to performance by a contractor will result in savings to the Government over the life of the contract, including—

(i) the estimated cost to the Government (based on offers received) for performance of the function by a contractor;

(ii) the estimated cost to the Government for performance of the function by Department of Defense civilian employees; and

(iii) an estimate of all other costs and expenditures that the Government would incur because of the award of such a contract;

(F) requires continued performance of the function by Department of Defense civilian employees unless the difference in the cost of performance of the function by a contractor compared to the cost of performance of the function by Department of Defense civilian employees would, over all performance periods required by the solicitation, be equal to or exceed the lesser of—

(i) 10 percent of the personnel-related costs for performance of that function in the agency tender; or

(ii) \$10,000,000;

(G) requires that the contractor shall not receive an advantage for a proposal that would reduce costs for the Department of Defense by—

(i) not making an employer-sponsored health insurance plan (or payment that could be used in lieu of such a plan), health savings account, or medical savings account available to the workers who are to be employed to perform the function under the contract;

(ii) offering to such workers an employer-sponsored health benefits plan that requires the employer to contribute less towards the premium or subscription share than the amount that is paid by the Department of Defense for health benefits for civilian employees of the Department under chapter 89 of title 5; or

(iii) offering to such workers a retirement benefit that, in any year, costs less than the annual retirement cost factor applicable to civilian employees of the Department of Defense under chapter 84 of title 5; and

(H) examines the effect of performance of the function by a contractor on the military mission associated with the performance of the function.

(2) A function that is performed by the Department of Defense and is reengineered, reorganized, modernized, upgraded, expanded, or changed to become more efficient, but still essentially provides the same service, shall not be considered a new requirement.

(3) In no case may a function being performed by Department of Defense personnel be—

(A) modified, reorganized, divided, or in any way changed for the purpose of exempting the conversion of the function from the requirements of this section; or

(B) converted to performance by a contractor to circumvent a civilian personnel ceiling.

(4) A military department or Defense Agency may not be required to conduct a public-private competition under Office of Management and Budget Circular A-76 or any other provision of law at the end of the performance period specified in a letter of obligation or other agreement entered into with Department of Defense civilian employees pursuant to a public-private competition for any function of the Department of Defense performed by Department of Defense civilian employees.

(5)(A) Except as provided in subparagraph (B), the duration of a public-private competition conducted pursuant to Office of Management and Budget Circular A-76 or any other provision of law for any function of the Department of Defense performed by Department of Defense civilian employees may not exceed a period of 24 months, commencing on the date on which the preliminary planning for the public-private competition begins and ending on the date on which a performance decision is rendered with respect to the function.

(B)(i) The Secretary of Defense may specify an alternative period of time for a public-private competition, which may not exceed 33 months, if the Secretary—

(I) determines that the competition is of such complexity that it cannot be completed within 24 months; and

(II) submits to Congress, as part of the formal congressional notification of a public-private competition pursuant to subsection (c), written notification that explains the basis of such determination.

(ii) The notification under clause (i)(II) shall also address each of the following:

(I) Any efforts of the Secretary to break up the study geographically or functionally.

(II) The Secretary's justification for undertaking a public-private competition instead of using internal reengineering alternatives.

(III) The cost savings that the Secretary expects to achieve as a result of the public-private competition.

(iii) If the Secretary specifies an alternative time period under this subparagraph, the alternative time period shall be binding on the Department in the same manner and to the same extent as the limitation provided in subparagraph (A).

(C) The time period specified in subparagraph (A) for a public-private competition does not include any day during which the public-private competition is delayed by reason of the filing of a protest before the Government Accountability Office or a complaint in the United States Court of Federal Claims up until the day the decision or recommendation of either authority becomes final. In the case of a protest before the Government Accountability Office, the recommendation becomes final after the period of time for

filing a request for reconsideration, or if a request for reconsideration is filed, on the day the Government Accountability Office issues a decision on the reconsideration.

(D) If a protest with respect to a public-private competition before the Government Accountability Office or the United States Court of Federal Claims is sustained, and the recommendation is final as described in subparagraph (C), and if such protest and recommendation result in an unforeseen delay in implementing a final performance decision, the Secretary of Defense may terminate the public-private competition or extend the period of time specified for the public-private competition under subparagraph (A) or subparagraph (B). If the Secretary decides not to terminate a competition, the Secretary shall submit to Congress written notice of such decision. Any such notification shall include a justification for the Secretary's decision and a new time limitation for the competition, which shall not exceed 12 months from the final decision and shall be binding on the Department.

(E) For the purposes of this paragraph, preliminary planning with respect to a public-private competition shall be conducted in accordance with guidance and procedures that shall be issued and maintained by the Under Secretary of Defense for Personnel and Readiness and shall begin on the date on which a component of the Department of Defense first obligates funds specifically for the acquisition of contract support for the preliminary planning effort, or formally assigns Department of Defense personnel, to carry out any of the following activities:

- (i) Determining the scope of the a<sup>1</sup> public-private competition.
- (ii) Conducting research to determine the appropriate grouping of functions for the competition.
- (iii) Assessing the availability of workload data, quantifiable outputs of functions, and agency or industry performance standards applicable to the competition.
- (iv) Determining the baseline cost of any function for which the competition is conducted.

(F) To effectively establish the date that is the first day of preliminary planning for a public-private competition, the head of a military department or Defense Agency shall submit to Congress written notice of the actions intended to be taken during the preliminary planning process and shall provide public notice of such actions by announcing such date on an appropriate Internet website and through other means as determined necessary. The date of such announcement shall be used for the purpose of computing the duration of the public private competition for purposes of this section.

(G) The Secretary of Defense shall submit to the congressional defense committees an annual report on the use, during the year covered by the report, of alternative time periods for public-private competitions under this section, and the explanations of the Secretary for such alternative time periods.

<sup>1</sup> So in original.

(b) REQUIREMENT TO CONSULT DOD EMPLOYEES.—(1) Each officer or employee of the Department of Defense responsible for determining under Office of Management and Budget Circular A-76 whether to convert to contractor performance any function of the Department of Defense—

(A) shall, at least monthly during the development and preparation of the performance work statement and the management efficiency study used in making that determination, consult with civilian employees who will be affected by that determination and consider the views of such employees on the development and preparation of that statement and that study; and

(B) may consult with such employees on other matters relating to that determination.

(2)(A) In the case of employees represented by a labor organization accorded exclusive recognition under section 7111 of title 5, consultation with representatives of that labor organization shall satisfy the consultation requirement in paragraph (1).

(B) In the case of employees other than employees referred to in subparagraph (A), consultation with appropriate representatives of those employees shall satisfy the consultation requirement in paragraph (1).

(C) The Secretary of Defense shall prescribe regulations to carry out this subsection. The regulations shall include provisions for the selection or designation of appropriate representatives of employees referred to in subparagraph (B) for purposes of the consultation required by paragraph (1).

(c) CONGRESSIONAL NOTIFICATION.—(1) Before commencing a public-private competition under subsection (a), the Secretary of Defense shall submit to Congress a report containing the following:

(A) The function for which such public-private competition is to be conducted.

(B) The location at which the function is performed by Department of Defense civilian employees.

(C) The number of Department of Defense civilian employee positions potentially affected.

(D) The anticipated length and cost of the public-private competition, and a specific identification of the budgetary line item from which funds will be used to cover the cost of the public-private competition.

(E) A certification that a proposed performance of the function by a contractor is not a result of a decision by an official of a military department or Defense Agency to impose predetermined constraints or limitations on such employees in terms of man years, end strengths, full-time equivalent positions, or maximum number of employees.

(2) The report required under paragraph (1) shall include an examination of the potential economic effect of performance of the function by a contractor on—

(A) Department of Defense civilian employees who would be affected by such a conversion in performance; and

(B) the local community and the Government, if more than 50 Department of Defense civilian employees perform the function.

(3)(A) A representative individual or entity at a facility where a public-private competition is conducted may submit to the Secretary of Defense an objection to the public-private competition on the grounds that the report required by paragraph (1) has not been submitted or that the certification required by paragraph (1)(E) is not included in the report submitted as a condition for the public-private competition. The objection shall be in writing and shall be submitted within 90 days after the following date:

(i) In the case of a failure to submit the report when required, the date on which the representative individual or an official of the representative entity authorized to pose the objection first knew or should have known of that failure.

(ii) In the case of a failure to include the certification in a submitted report, the date on which the report was submitted to Congress.

(B) If the Secretary determines that the report required by paragraph (1) was not submitted or that the required certification was not included in the submitted report, the function for which the public-private competition was conducted for which the objection was submitted may not be the subject of a solicitation of offers for, or award of, a contract until, respectively, the report is submitted or a report containing the certification in full compliance with the certification requirement is submitted.

(d) EXEMPTION FOR THE PURCHASE OF PRODUCTS AND SERVICES OF THE BLIND AND OTHER SEVERELY HANDICAPPED PERSONS.—This section shall not apply to a commercial or industrial type function of the Department of Defense that—

(1) is included on the procurement list established pursuant to section 8503 of title 41; or

(2) is planned to be changed to performance by a qualified nonprofit agency for the blind or by a qualified nonprofit agency for other severely handicapped persons in accordance with that Act.<sup>2</sup>

(e) INAPPLICABILITY DURING WAR OR EMERGENCY.—The provisions of this section shall not apply during war or during a period of national emergency declared by the President or Congress.

(Added Pub. L. 100-370, §2(a)(1), July 19, 1988, 102 Stat. 851; amended Pub. L. 101-189, div. A, title XI, §1132, Nov. 29, 1989, 103 Stat. 1561; Pub. L. 104-106, div. D, title XLIII, §4321(b)(19), Feb. 10, 1996, 110 Stat. 673; Pub. L. 105-85, div. A, title III, §384, Nov. 18, 1997, 111 Stat. 1711; Pub. L. 105-261, div. A, title III, §342(a)-(c), Oct. 17, 1998, 112 Stat. 1974-1976; Pub. L. 106-65, div. A, title III, §341, Oct. 5, 1999, 113 Stat. 568; Pub. L. 106-398, §1 [[div. A], title III, §§351, 352], Oct. 30, 2000, 114 Stat. 1654, 1654A-71, 1654A-72; Pub. L. 107-107, div. A, title III, §344, Dec. 28, 2001, 115 Stat. 1061; Pub. L. 107-314, div. A, title III, §331, Dec. 2, 2002, 116 Stat. 2512; Pub. L. 109-163, div. A, title III, §341(a), (b), (c)(2), (3), (g)(1)-(2)(B), Jan. 6, 2006, 119 Stat. 3195, 3196, 3199, 3200; Pub. L. 110-181, div. A, title III, §§322(a), (b)(2), (c), 323, Jan. 28, 2008, 122 Stat. 58-60; Pub. L. 111-84, div. A, title III, §§321(a), 322(a), title X, §1073(a)(25), Oct. 28, 2009,

123 Stat. 2250, 2251, 2474; Pub. L. 111-350, §5(b)(34), Jan. 4, 2011, 124 Stat. 3845; Pub. L. 112-81, div. A, title IX, §937, Dec. 31, 2011, 125 Stat. 1546.)

#### HISTORICAL AND REVISION NOTES

Section is based on Pub. L. 96-342, title V, §502, Sept. 8, 1980, 94 Stat. 1086, as amended by Pub. L. 97-252, title XI, §1112(a), Sept. 8, 1982, 96 Stat. 747; Pub. L. 99-145, title XII, §1234(a), Nov. 8, 1985, 99 Stat. 734; Pub. L. 99-661, div. A, title XII, §1221, Nov. 14, 1986, 100 Stat. 3976.

#### REFERENCES IN TEXT

That Act, referred to in subsec. (d)(2), is a reference to the Javits-Wagner-O'Day Act, which is act June 25, 1938, ch. 697, 52 Stat. 1196, and was classified to sections 46 to 48c of former Title 41, Public Contracts, prior to being repealed and restated as chapter 85 (§8501 et seq.) of Title 41, Public Contracts, by Pub. L. 111-350, §§3, 7(b), Jan. 4, 2011, 124 Stat. 3677, 3855. For disposition of sections of former Title 41, see Disposition Table preceding section 101 of Title 41.

#### AMENDMENTS

2011—Subsec. (a)(5)(E). Pub. L. 112-81, §937(1)(A)-(E), in introductory provisions, substituted “competition shall be conducted in accordance with guidance and procedures that shall be issued and maintained by the Under Secretary of Defense for Personnel and Readiness and shall begin on the date on which a component of the Department of Defense first obligates funds specifically for the acquisition of contract support for the preliminary planning effort” for “competition, begins on the date on which the Department of Defense obligates funds for the acquisition of contract support”.

Subsec. (a)(5)(E)(i). Pub. L. 112-81, §937(1)(F), inserted “a public-private” before “competition”.

Subsec. (a)(5)(F). Pub. L. 112-82, §937(2), substituted “military department or Defense Agency shall submit to Congress written notice of the actions intended to be taken during the preliminary planning process and shall provide public notice of such actions by announcing such date on an appropriate Internet website and through other means as determined necessary. The date of such announcement shall be used for the purpose” for “military department shall submit to Congress written notice of such date and shall provide public notice by announcing such date on an appropriate Internet website. Such date is the first day of preliminary planning for a public-private competition for the purpose”.

Subsec. (d)(1). Pub. L. 111-350, which directed substitution of “section 8503 of title 41” for “section 2 of the Javits-Wagner-O'Day Act (41 U.S.C. 47)” in subsec. (c)(1), was executed by making the substitution in subsec. (d)(1) to reflect the probable intent of Congress and the amendment by Pub. L. 110-181, §322(b)(2). See 2008 Amendment note below.

2009—Subsec. (a)(1). Pub. L. 111-84, §321(a), in introductory provisions, substituted “No function” for “A function” and “may be converted” for “may not be converted” and struck out “10 or more” before “Department of Defense civilian employees”.

Subsec. (a)(5). Pub. L. 111-84, §322(a), added par. (5).

Subsec. (c)(3)(A). Pub. L. 111-84, §1073(a)(25), substituted “the public-private competition” for “the public private competition” in two places in introductory provisions.

2008—Subsec. (a)(1)(B). Pub. L. 110-181, §322(c)(1)(A), inserted “, or any successor circular” after “2003”.

Subsec. (a)(1)(D). Pub. L. 110-181, §322(c)(1)(B), substituted “, reliability, and timeliness” for “and reliability”.

Subsec. (a)(1)(G), (H). Pub. L. 110-181, §322(a), added subpar. (G) and redesignated former subpar. (G) as (H).

Subsec. (a)(4). Pub. L. 110-181, §323, added par. (4).

Subsecs. (b), (c). Pub. L. 110-181, §322(b)(2), added subsec. (b) and redesignated former subsec. (b) as (c). Former subsec. (c) redesignated (d).

<sup>2</sup> See References in Text note below.

Subsec. (c)(2). Pub. L. 110-181, §322(c)(2), inserted “of” after “examination” in introductory provisions.

Subsecs. (d), (e). Pub. L. 110-181, §322(b)(2), redesignated subsecs. (c) and (d) as (d) and (e), respectively.

2006—Pub. L. 109-163, §341(g)(2)(A), substituted “Public-private competition required” for “Commercial or industrial type functions: required studies and reports” in section catchline.

Subsec. (a). Pub. L. 109-163, §341(a), amended heading and text of subsec. (a) generally. Prior to amendment, text read as follows: “A commercial or industrial type function of the Department of Defense that, as of October 1, 1980, was being performed by Department of Defense civilian employees may not be changed to performance by the private sector until the Secretary of Defense fully complies with the reporting and analysis requirements specified in subsections (b) and (c).”

Subsec. (b). Pub. L. 109-163, §341(g)(2)(B), substituted “Congressional Notification” for “Notification and Elements of Analysis” in heading.

Subsec. (b)(1). Pub. L. 109-163, §341(b)(1)(A), in introductory provisions, substituted “a public-private competition under subsection (a)” for “to analyze a commercial or industrial type function described in subsection (a) for possible change to performance by the private sector”.

Subsec. (b)(1)(A). Pub. L. 109-163, §341(b)(1)(B), substituted “for which such public-private competition is to be conducted” for “to be analyzed for possible change”.

Subsec. (b)(1)(C). Pub. L. 109-163, §341(b)(1)(C), inserted “Department of Defense” before “civilian employee”.

Subsec. (b)(1)(D). Pub. L. 109-163, §341(b)(1)(D), substituted “the public-private competition” for “the analysis” in two places.

Subsec. (b)(1)(E). Pub. L. 109-163, §341(b)(1)(E), struck out “commercial or industrial type” before “function” and substituted “a contractor” for “persons who are not civilian employees of the Department of Defense”.

Subsec. (b)(2). Pub. L. 109-163, §341(b)(2), added par. (2) and struck out former par. (2) which read as follows: “The duty to prepare a report under paragraph (1) may be delegated. A report prepared below the major command or claimant level of a military department, or below the equivalent level in a Defense Agency, pursuant to any such delegation shall be reviewed at the major command, claimant level, or equivalent level, as the case may be, before submission to Congress.”

Subsec. (b)(3). Pub. L. 109-163, §341(b)(2), (3), redesignated par. (4) as (3) and struck out former par. (3) which related to analysis of a commercial or industrial type function for possible change to performance by the private sector.

Subsec. (b)(3)(A). Pub. L. 109-163, §341(b)(4)(A), in introductory provisions, substituted “where a public-private competition is conducted” for “where a commercial or industrial type function is analyzed for possible change in performance” and “the public private competition” for “the analysis” in two places.

Subsec. (b)(3)(B). Pub. L. 109-163, §341(b)(4)(B), substituted “the function for which the public-private competition was conducted for which the objection was submitted” for “the commercial or industrial type function covered by the analysis to which objected”.

Subsec. (b)(4). Pub. L. 109-163, §341(b)(3), redesignated par. (4) as (3).

Subsec. (c). Pub. L. 109-163, §341(g)(1), substituted “This section” for “Subsections (a) through (c) and subsection (g)”.

Pub. L. 109-163, §341(c)(3), substituted “Exemption” for “Waiver” in heading.

Pub. L. 109-163, §341(c)(2), redesignated subsec. (e) as (c) and struck out former subsec. (c) which related to submission of analysis results by the Secretary of Defense.

Subsecs. (d) to (h). Pub. L. 109-163, §341(c)(2), redesignated subsecs. (e) and (h) as (c) and (d), respectively, and struck out former subsecs. (d), (f), and (g) which related, respectively, to waiver for small functions, additional limitations, and annual reports.

2002—Subsec. (c). Pub. L. 107-314 amended heading and text of subsec. (c) generally. Prior to amendment, text related to the report to Congress by the Secretary of Defense upon a decision to change the commercial or industrial type function that was the subject of the analysis to performance by the private sector, with requirements for contents of the report and submission of the report prior to the change of the function to contractor performance.

2001—Subsec. (g). Pub. L. 107-107 substituted “June 30” for “February 1”.

2000—Subsec. (b)(1)(D). Pub. L. 106-398, §1 [[div. A], title III, §351(a)], inserted before period “,” and a specific identification of the budgetary line item from which funds will be used to cover the cost of the analysis”.

Subsec. (c)(1). Pub. L. 106-398, §1 [[div. A], title III, §351(b)], added subpars. (A), (D), (E), and (G) and redesignated former subpars. (A), (B), (C), (D), and (E) as (B), (C), (F), (H), and (I), respectively.

Subsec. (c)(2), (3). Pub. L. 106-398, §1 [[div. A], title III, §352], added par. (2) and redesignated former par. (2) as (3).

1999—Subsec. (b)(3)(B)(ii). Pub. L. 106-65 substituted “50 employees” for “75 employees”.

1998—Subsec. (a). Pub. L. 105-261, §342(a)(2), added subsec. (a) and struck out former subsec. (a) which provided that commercial or industrial type functions of the Department of Defense that on Oct. 1, 1980, were being performed by Department of Defense civilian employees could not be converted to performance by private contractors unless the Secretary of Defense provided certain notices, information, certifications, and reports to Congress.

Subsec. (b). Pub. L. 105-261, §342(a)(2), added subsec. (b) and struck out heading and text of former subsec. (b). Text read as follows: “If, after completion of the studies required for completion of the certification and report required by paragraphs (3) and (4) of subsection (a), a decision is made to convert the function to contractor performance, the Secretary of Defense shall notify Congress of such decision. The notification shall include the timetable for completing conversion of the function to contractor performance.”

Subsec. (c). Pub. L. 105-261, §342(a)(2), added subsec. (c). Former subsec. (c) redesignated (g).

Subsec. (d). Pub. L. 105-261, §342(b), (c)(1), substituted “50” for “20” and inserted “and subsection (g)” after “Subsections (a) through (c)”.

Subsec. (e). Pub. L. 105-261, §342(c)(1), (2), inserted “and subsection (g)” after “Subsections (a) through (c)” in introductory provisions and substituted “changed” for “converted” in par. (2).

Subsec. (f). Pub. L. 105-261, §342(c)(2), (3), substituted “changed” for “converted” in par. (1) and “change” for “conversion” in par. (2).

Subsecs. (g), (h). Pub. L. 105-261, §342(a)(1), redesignated subsecs. (c) and (g) as (g) and (h), respectively.

1997—Subsec. (a)(1). Pub. L. 105-85, §384(a), inserted “and the anticipated length and cost of the study” before semicolon at end.

Subsec. (b). Pub. L. 105-85, §384(b), inserted at end “The notification shall include the timetable for completing conversion of the function to contractor performance.”

Subsec. (d). Pub. L. 105-85, §384(c), substituted “20 or fewer” for “45 or fewer”.

1996—Subsec. (e)(1). Pub. L. 104-106 substituted “the Javits-Wagner-O’Day Act (41 U.S.C. 47)” for “the Act of June 25, 1938 (41 U.S.C. 47), popularly referred to as the Wagner-O’Day Act”.

1989—Subsecs. (e) to (g). Pub. L. 101-189 added subsec. (e) and redesignated former subsecs. (e) and (f) as (f) and (g), respectively.

#### EFFECTIVE DATE OF 2009 AMENDMENT

Pub. L. 111-84, div. A, title III, §321(b), Oct. 28, 2009, 123 Stat. 2250, provided that: “The amendments made by subsection (a) [amending this section] shall apply with respect to a function for which a public-private

competition is commenced on or after the date of the enactment of this Act [Oct. 28, 2009].”

Pub. L. 111–84, div. A, title III, §322(b), Oct. 28, 2009, 123 Stat. 2252, provided that: “Paragraph (5) of section 2461(a) of title 10, United States Code, as added by subsection (a), shall apply with respect to a public-private competition covered by such section that is initiated on or after the date of the enactment of this Act [Oct. 28, 2009].”

#### EFFECTIVE DATE OF 1998 AMENDMENT

Pub. L. 105–261, div. A, title III, §342(d), Oct. 17, 1998, 112 Stat. 1976, provided that: “The amendments made by this section [amending this section] shall take effect on the date of the enactment of this Act [Oct. 17, 1998], but the amendments shall not apply with respect to a conversion of a function of the Department of Defense to performance by a private contractor concerning which the Secretary of Defense provided to Congress, before the date of the enactment of this Act, a notification under paragraph (1) of section 2461(a) of title 10, United States Code, as in effect on the day before the date of the enactment of this Act.”

#### EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104–106, see section 4401 of Pub. L. 104–106, set out as a note under section 2302 of this title.

#### RESTRICTION ON OFFICE OF MANAGEMENT AND BUDGET INFLUENCE OVER DEPARTMENT OF DEFENSE PUBLIC-PRIVATE COMPETITIONS

Pub. L. 110–181, div. A, title III, §325, Jan. 28, 2008, 122 Stat. 61, provided that:

“(a) RESTRICTION ON OFFICE OF MANAGEMENT AND BUDGET.—The Office of Management and Budget may not direct or require the Secretary of Defense or the Secretary of a military department to prepare for, undertake, continue, or complete a public-private competition or direct conversion of a Department of Defense function to performance by a contractor under Office of Management and Budget Circular A–76, or any other successor regulation, directive, or policy.

“(b) RESTRICTION ON SECRETARY OF DEFENSE.—The Secretary of Defense or the Secretary of a military department may not prepare for, undertake, continue, or complete a public-private competition or direct conversion of a Department of Defense function to performance by a contractor under Office of Management and Budget Circular A–76, or any other successor regulation, directive, or policy by reason of any direction or requirement provided by the Office of Management and Budget.

“(c) INSPECTOR GENERAL REVIEW.—

“(1) COMPREHENSIVE REVIEW REQUIRED.—The Inspector General of the Department of Defense shall conduct a comprehensive review of the compliance of the Secretary of Defense and the Secretaries of the military departments with the requirements of this section during calendar year 2008. The Inspector General shall submit to the congressional defense committees [Committees on Armed Services and Appropriations of the Senate and the House of Representatives] the following reports on the comprehensive review:

“(A) An interim report, to be submitted by not later than 90 days after the date of the enactment of this Act [Jan. 28, 2008].

“(B) A final report, to be submitted by not later than December 31, 2008.

“(2) INSPECTOR GENERAL ACCESS.—For the purpose of determining compliance with the requirements of this section, the Secretary of Defense shall ensure that the Inspector General has access to all Department records of relevant communications between Department officials and officials of other departments and agencies of the Federal Government, whether such communications occurred inside or outside of the Department.”

#### PILOT PROGRAM ON COMMERCIAL FEE-FOR-SERVICE AIR REFUELING SUPPORT FOR THE AIR FORCE

Pub. L. 111–84, div. A, title X, §1082, Oct. 28, 2009, 123 Stat. 2481, provided that:

“(a) MULTIYEAR CONTRACTS AUTHORIZED.—The Secretary of the Air Force may enter into one or more multiyear contracts, beginning with the fiscal year 2011 program year, for purposes of conducting the pilot program on utilizing commercial fee-for-service air refueling tanker aircraft for Air Force operations required by section 1081 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110–181; 122 Stat. 335) [set out below].

“(b) COMPLIANCE WITH LAW APPLICABLE TO MULTIYEAR CONTRACTS.—Any contract entered into under subsection (a) shall be entered into in accordance with the provisions of section 2306c of title 10, United States Code, except that—

“(1) the term of the contract may not be more than 8 years; and

“(2) notwithstanding section 2306c(b) of such title, the authority under section 2306c(a) of such title shall apply to the fee-for-service air refueling pilot program.

“(c) COMPLIANCE WITH LAW APPLICABLE TO SERVICE CONTRACTS.—A contract entered into under subsection (a) shall be entered into in accordance with the provisions of section 2401 of title 10, United States Code, except that—

“(1) the Secretary shall not be required to certify to the congressional defense committees [Committees on Armed Services and Appropriations of the Senate and the House of Representatives] that the contract is the most cost-effective means of obtaining commercial fee-for-service air refueling tanker aircraft for Air Force operations; and

“(2) the Secretary shall not be required to certify to the congressional defense committees that there is no alternative for meeting urgent operational requirements other than making the contract.

“(d) LIMITATION ON AMOUNT.—The amount of a contract under subsection (a) may not exceed \$999,999,999.

“(e) PROVISION OF GOVERNMENT INSURANCE.—A commercial air operator contracting with the Department of Defense under the pilot program referred to in subsection (a) shall be eligible to receive Government-provided insurance pursuant to chapter 443 of title 49, United States Code, if commercial insurance is unavailable on reasonable terms and conditions.”

Pub. L. 110–181, div. A, title X, §1081, Jan. 28, 2008, 122 Stat. 335, as amended by Pub. L. 111–84, div. A, title X, §1081, Oct. 28, 2009, 123 Stat. 2481, provided that:

“(a) PILOT PROGRAM REQUIRED.—The Secretary of the Air Force shall conduct, as soon as practicable after the date of the enactment of this Act [Jan. 28, 2008], a pilot program to assess the feasibility and advisability of utilizing commercial fee-for-service air refueling tanker aircraft for Air Force operations, unless the Secretary of Defense submits notification to the congressional defense committees [Committees on Armed Services and Appropriations of the Senate and the House of Representatives] that pursuing such a program is not in the national interest. The duration of the pilot program shall be at least five years after commencement of the program.

“(b) PURPOSE.—

“(1) IN GENERAL.—The pilot program required by subsection (a) shall evaluate the feasibility of fee-for-service air refueling to support, augment, or enhance the air refueling mission of the Air Force by utilizing commercial air refueling providers on a fee-for-service basis.

“(2) ELEMENTS.—In order to achieve the purpose of the pilot program, the Secretary of the Air Force shall—

“(A) demonstrate and validate a comprehensive strategy for air refueling on a fee-for-service basis by evaluating all mission areas, including testing support, training support to receiving aircraft,

homeland defense support, deployment support, air bridge support, aeromedical evacuation, and emergency air refueling; and

“(B) integrate fee-for-service air refueling described in paragraph (1) into Air Mobility Command operations during the evaluation and execution phases of the pilot program.

“(c) ANNUAL REPORT.—The Secretary of the Air Force shall provide to the congressional defense committees [Committees on Armed Services and Appropriations of the Senate and the House of Representatives] an annual report on the fee-for-service air refueling program, which includes—

“(1) information with respect to—

“(A) missions flown;

“(B) mission areas supported;

“(C) aircraft number, type, model series supported;

“(D) fuel dispensed;

“(E) departure reliability rates; and

“(F) the annual and cumulative cost to the Government for the program, including a comparison of costs of the same service provided by the Air Force;”

“(2) an assessment of the impact of outsourcing air refueling on the Air Force’s flying hour program and aircrew training; and

“(3) any other data that the Secretary determines is appropriate for evaluating the performance of the commercial air refueling providers participating in the pilot program.

“(d) COMPTROLLER GENERAL REVIEW.—The Comptroller General shall submit to the congressional defense committees [Committees on Armed Services and Appropriations of the Senate and the House of Representatives]—

“(1) an annual review of the conduct of the pilot program under this section and any recommendations of the Comptroller General for improving the program; and

“(2) not later than 90 days after the completion of the pilot program, a final assessment of the results of the pilot program and the recommendations of the Comptroller General for whether the Secretary of the Air Force should continue to utilize fee-for-service air refueling.”

#### INAPPLICABILITY OF SUBSECTION (a)(1)(E) TO BEST-VALUE SOURCE SELECTION PILOT PROGRAM

Pub. L. 109-163, div. A, title III, §341(e), Jan. 6, 2006, 119 Stat. 3199, as amended by Pub. L. 109-364, div. A, title X, §1071(e)(1), Oct. 17, 2006, 120 Stat. 2401, provided that: “Subsection (a)(1)(F) of section 2461 of title 10, United States Code, as amended by subsection (a), shall not apply with respect to the pilot program for best-value source selection for performance of information technology services authorized by section 336 of the National Defense Authorization Act for Fiscal Year 2004 (Public Law 108-136; 117 Stat. 1444; 10 U.S.C. 2461 note).”

#### PERFORMANCE OF CERTAIN WORK BY FEDERAL GOVERNMENT EMPLOYEES

Pub. L. 109-163, div. A, title III, §343, Jan. 6, 2006, 119 Stat. 3200, which provided that the Secretary of Defense was to prescribe guidelines and procedures for ensuring that consideration be given to using Federal Government employees for work that was currently performed or would otherwise be performed under Department of Defense contracts, and that the Secretary was to include the use of the flexible hiring authority available through the National Security Personnel System in order to facilitate performance by Federal Government employees of new requirements and work that was performed under Department of Defense contracts, was repealed and restated in section 2463 of this title by Pub. L. 110-181, div. A, title III, §324(a)(1), (c), Jan. 28, 2008, 122 Stat. 60, 61.

#### PILOT PROGRAM FOR PURCHASE OF CERTAIN MUNICIPAL SERVICES FOR MILITARY INSTALLATIONS

Pub. L. 108-375, div. A, title III, §325, Oct. 28, 2004, 118 Stat. 1847, as amended by Pub. L. 110-181, div. B, title

XXVIII, §2826, Jan. 28, 2008, 122 Stat. 546; Pub. L. 110-417, [div. A], title X, §1061(b)(16), Oct. 14, 2008, 122 Stat. 4613, provided that:

“(a) PILOT PROGRAM AUTHORIZED.—The Secretary of a military department may carry out a pilot program to procure one or more of the municipal services specified in subsection (b) for a military installation under the jurisdiction of the Secretary from a county or municipality in which the installation is located for the purpose of evaluating the efficacy of procuring such services rather than providing them directly.

“(b) SERVICES AUTHORIZED FOR PROCUREMENT.—Only the following services may be procured for a military installation participating in the pilot program:

“(1) Refuse collection.

“(2) Refuse disposal.

“(3) Library services.

“(4) Recreation services.

“(5) Facility maintenance and repair.

“(6) Utilities.

“(c) PARTICIPATING INSTALLATIONS.—Not more than three military installations from each military service may be selected to participate in the pilot program, and only installations located in the United States are eligible for selection.

“(d) CONGRESSIONAL NOTIFICATION.—The Secretary of a military department may not enter into a contract under the pilot program for the procurement of municipal services until the Secretary notifies the congressional defense committees [Committees on Armed Services and Appropriations of Senate and House of Representatives] of the proposed contract and a period of 14 days elapses from the date the notification is received by the committees.

“(e) TERMINATION OF PILOT PROGRAM.—The pilot program shall terminate on September 30, 2012. Any contract entered into under the pilot program shall terminate not later than that date.”

#### LIMITATIONS ON CONVERSION OF WORK PERFORMED BY DEPARTMENT OF DEFENSE CIVILIAN EMPLOYEES TO CONTRACTOR PERFORMANCE

Pub. L. 108-375, div. A, title III, §327, Oct. 28, 2004, 118 Stat. 1849, which generally required the Secretary of Defense to maintain the continued performance of certain activities and functions by civilian employees unless the competitive sourcing official determined that the cost of performance of the activity or function by a contractor would be less costly by an amount that equaled or exceeded the lesser of \$10,000,000 or 10 percent of the most efficient organization’s personnel-related costs for performance of the activity or function by civilian employees, was repealed by Pub. L. 109-163, div. A, title III, §341(g)(3), Jan. 6, 2006, 119 Stat. 3200.

#### DELAYED IMPLEMENTATION OF REVISED OFFICE OF MANAGEMENT AND BUDGET CIRCULAR A-76 BY DEPARTMENT OF DEFENSE

Pub. L. 108-136, div. A, title III, §335, Nov. 24, 2003, 117 Stat. 1443, provided that:

“(a) LIMITATION PENDING REPORT.—No studies or competitions may be conducted under the policies and procedures contained in the revised Office of Management and Budget Circular A-76 dated May 29, 2003 (68 Fed. Reg. 32134), relating to the possible contracting out of commercial activities being performed, as of such date, by employees of the Department of Defense, until the end of the 45-day period beginning on the date on which the Secretary of Defense submits to Congress a report on the effects of the revisions.

“(b) CONTENT OF REPORT.—The report required by subsection (a) shall contain, at a minimum, specific information regarding the following:

“(1) The extent to which the revised circular will ensure that employees of the Department of Defense have the opportunity to compete to retain their jobs.

“(2) The extent to which the revised circular will provide appeal and protest rights to employees of the Department of Defense.

“(3) Identify safeguards in the revised circular to ensure that all public-private competitions are fair, appropriate, and comply with requirements of full and open competition.

“(4) The plans of the Department to ensure an appropriate phase-in period for the revised circular, as recommended by the Commercial Activities Panel of the Government [General] Accounting Office [now Government Accountability Office] in its April 2002 report to Congress, including recommendations for any legislative changes that may be required to ensure a smooth and efficient phase-in period.

“(5) The plans of the Department to provide training to employees of the Department of Defense regarding the revised circular, including how the training will be funded, how employees will be selected to receive the training, and the number of employees likely to receive the training.

“(6) The plans of the Department to collect and analyze data on the costs and quality of work contracted out or retained in-house as a result of a sourcing process conducted under the revised circular.”

#### PILOT PROGRAM FOR BEST-VALUE SOURCE SELECTION FOR PERFORMANCE OF INFORMATION TECHNOLOGY SERVICES

Pub. L. 108-136, div. A, title III, § 336, Nov. 24, 2003, 117 Stat. 1444, provided that:

“(a) **AUTHORITY TO USE BEST-VALUE CRITERION.**—The Secretary of Defense may carry out a pilot program for the procurement of information technology services for the Department of Defense that uses a best-value criterion in the selection of the source for the performance of the information technology services.

“(b) **REQUIRED EXAMINATION UNDER PILOT PROJECT.**—Under the pilot program, the Secretary of Defense shall modify the examination otherwise required by section 2461(b)(3)(A) [now 2461(c)(3)(A)] of title 10, United States Code, to be an examination of the performance of an information technology services function by Department of Defense civilian employees and by one or more private contractors to demonstrate whether—

“(1) a change to performance by the private sector will result in the best value to the Government over the life of the contract, as determined in accordance with the competition requirements of Office of Management and Budget Circular A-76; and

“(2) certain benefits exist, in addition to price, that warrant performance of the function by a private sector source at a cost higher than that of performance by Department of Defense civilian employees.

“(c) **EXEMPTION FOR PILOT PROGRAM.**—Section 2462(a) of title 10, United States Code, does not apply to the procurement of information technology services under the pilot program.

“(d) **DURATION OF PILOT PROGRAM.**—(1) The authority to carry out the pilot program begins on the date on which the Secretary of Defense submits to Congress the report on the effect of the recent revisions to Office of Management and Budget Circular A-76, as required by section 335 of this Act [set out above], and expires on September 30, 2008.

“(2) The expiration of the pilot program shall not affect the selection of the source for the performance of an information technology services function for the Department of Defense for which the analysis required by section 2461(b)(3) [now 2461(c)(3)] of title 10, United States Code, has been commenced before the expiration date or for which a solicitation has been issued before the expiration date.

“(e) **GAO REVIEW.**—Not later than February 1, 2008, the Comptroller General shall submit to Congress a report containing—

“(1) a review of the pilot program to assess the extent to which the pilot program is effective and is equitable for the potential public sources and the potential private sources of information technology services for the Department of Defense; and

“(2) any other conclusions of the Comptroller General resulting from the review.

“(f) **INFORMATION TECHNOLOGY SERVICE DEFINED.**—In this section, the term ‘information technology service’ means any service performed in the operation or maintenance of information technology (as defined in section 11101 of title 40, United States Code) that is necessary for or beneficial to the accomplishment of the authorized functions of the Department of Defense (other than functions which the Secretary of Defense determines must be performed by military or Government personnel).”

#### PILOT MANPOWER REPORTING SYSTEM IN DEPARTMENT OF THE ARMY

Pub. L. 107-107, div. A, title III, § 345(a)–(c), Dec. 28, 2001, 115 Stat. 1061, 1062, provided that, not later than Mar. 1 of each of the fiscal years 2002 through 2004, the Secretary of the Army was to submit to Congress a report describing the use during the previous fiscal year of non-Federal entities to provide services to the Department of the Army.

#### PILOT PROGRAM FOR COMMERCIAL SERVICES

Pub. L. 106-65, div. A, title VIII, § 814, Oct. 5, 1999, 113 Stat. 711, authorized the Secretary of Defense to carry out a pilot program to treat procurements of commercial services as procurements of commercial items, required the Secretary to issue guidance to procurement officials not later than 90 days after Oct. 5, 1999, and provided that the pilot program was to begin on the date that the Secretary issued the guidance and that it could continue for a period, not in excess of five years.

#### PUBLIC AVAILABILITY OF OPERATING AGREEMENTS BETWEEN MILITARY INSTALLATIONS AND FINANCIAL INSTITUTIONS

Pub. L. 105-261, div. A, title III, § 379, Oct. 17, 1998, 112 Stat. 1995, provided that: “With respect to an agreement between the commander of a military installation in the United States (or the designee of such an installation commander) and a financial institution that permits, allows, or otherwise authorizes the provision of financial services by the financial institution on the military installation, nothing in the terms or nature of such an agreement shall be construed to exempt the agreement from the provisions of sections 552 and 552a of title 5, United States Code.”

#### DEVELOPMENT OF STANDARD FORMS REGARDING PERFORMANCE WORK STATEMENT AND REQUEST FOR PROPOSAL FOR CONVERSION OF CERTAIN OPERATIONAL FUNCTIONS OF MILITARY INSTALLATIONS

Section 389 of Pub. L. 105-85, as amended by Pub. L. 105-261, div. A, title X, § 1069(b)(1), Oct. 17, 1998, 112 Stat. 2136, provided that:

“(a) **STANDARDIZATION OF REQUIREMENTS.**—The Secretary of Defense is authorized and encouraged to develop standard forms (to be known as a ‘standard performance work statement’ and a ‘standard request for proposal’) for use in the consideration for conversion to contractor performance of commercial services and functions at military installations. A separate standard form shall be developed for each service and function.

“(b) **RELATIONSHIP TO OMB REQUIREMENTS.**—A standard performance work statement or a standard request for proposal developed under subsection (a) must fulfill the basic requirements of the performance work statement or request for proposal otherwise required under the procedures and requirements of Office of Management and Budget Circular A-76 (or any successor administrative regulation or policy) in effect at the time the standard form will be used.

“(c) **PRIORITY DEVELOPMENT OF CERTAIN FORMS.**—In developing standard performance work statements and standard requests for proposal, the Secretary shall give first priority to those commercial services and functions that the Secretary determines have been successfully converted to contractor performance on a repeated basis.

“(d) **INCENTIVE FOR USE.**—Beginning not later than October 1, 1998, if a standard performance work state-



ment or a standard request for proposal is developed under subsection (a) for a particular service and function, the standard form may be used in lieu of the performance work statement or request for proposal otherwise required under the procedures and requirements of Office of Management and Budget Circular A-76 in connection with the consideration for conversion to contractor performance of that service or function at a military installation.

“(e) EXCLUSION OF MULTIFUNCTION CONVERSION.—If a commercial service or function for which a standard form is developed under subsection (a) is combined with another service or function (for which such a form has not yet been developed) for purposes of considering the services and functions at the military installation for conversion to contractor performance, a standard performance work statement or a standard request for a proposal developed under subsection (a) may not be used in the conversion process in lieu of the procedures and requirements of Office of Management and Budget Circular A-76.

“(f) EFFECT ON OTHER LAWS.—Nothing in this section shall be construed to supersede any other requirements or limitations, specifically contained in chapter 146 of title 10, United States Code, on the conversion to contractor performance of activities performed by civilian employees of the Department of Defense.

“(g) GAO REPORT.—Not later than June 1, 1999, the Comptroller General shall submit to Congress a report reviewing the implementation of this section.

“(h) MILITARY INSTALLATION DEFINED.—For purposes of this section, the term ‘military installation’ means a base, camp, post, station, yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Department of Defense, including any leased facility.”

[Pub. L. 105-261, div. A, title X, § 1069(b), Oct. 17, 1998, 112 Stat. 2136, provided that the amendment made by that section to section 389 of Pub. L. 105-85, set out above, is effective as of Nov. 18, 1997, and as if included in the National Defense Authorization Act for Fiscal Year 1998, Pub. L. 105-85, as enacted.]

PRIVATE-SECTOR OPERATION OF CERTAIN PAYROLL, FINANCE, AND ACCOUNTING FUNCTIONS OF DEPARTMENT OF DEFENSE; PLAN; REPORT

Section 353(a) of Pub. L. 104-106 provided that:

“(1) Not later than October 1, 1996, the Secretary of Defense shall submit to Congress a plan for the performance by private-sector sources of payroll functions for civilian employees of the Department of Defense other than employees paid from nonappropriated funds.

“(2)(A) The Secretary shall implement the plan referred to in paragraph (1) if the Secretary determines that the cost of performance by private-sector sources of the functions referred to in that paragraph does not exceed the cost of performance of those functions by employees of the Federal Government.

“(B) In computing the total cost of performance of such functions by employees of the Federal Government, the Secretary shall include the following:

“(i) Managerial and administrative costs.

“(ii) Personnel costs, including the cost of providing retirement benefits for such personnel.

“(iii) Costs associated with the provision of facilities and other support by Federal agencies.

“(C) The Defense Contract Audit Agency shall verify the costs computed for the Secretary under this paragraph by others.

“(3) At the same time the Secretary submits the plan required by paragraph (1), the Secretary shall submit to Congress a report on other accounting and finance functions of the Department that are appropriate for performance by private-sector sources.”

PILOT PROGRAM FOR PRIVATE-SECTOR OPERATION OF NAFFI FUNCTIONS

Section 353(b) of Pub. L. 104-106 provided that:

“(1) The Secretary shall carry out a pilot program to test the performance by private-sector sources of pay-

roll and other accounting and finance functions of nonappropriated fund instrumentalities and to evaluate the extent to which cost savings and efficiencies would result from the performance of such functions by those sources.

“(2) The payroll and other accounting and finance functions designated by the Secretary for performance by private-sector sources under the pilot program shall include at least one major payroll, accounting, or finance function.

“(3) To carry out the pilot program, the Secretary shall enter into discussions with private-sector sources for the purpose of developing a request for proposals to be issued for performance by those sources of functions designated by the Secretary under paragraph (2). The discussions shall be conducted on a schedule that accommodates issuance of a request for proposals within 60 days after the date of the enactment of this Act [Feb. 10, 1996].

“(4) A goal of the pilot program is to reduce by at least 25 percent the total costs incurred by the Department annually for the performance of a function referred to in paragraph (2) through the performance of that function by a private-sector source.

“(5) Before conducting the pilot program, the Secretary shall develop a plan for the program that addresses the following:

“(A) The purposes of the program.

“(B) The methodology, duration, and anticipated costs of the program, including the cost of an arrangement pursuant to which a private-sector source would receive an agreed-upon payment plus an additional negotiated amount not to exceed 50 percent of the dollar savings achieved in excess of the goal specified in paragraph (4).

“(C) A specific citation to any provisions of law, rule, or regulation that, if not waived, would prohibit the conduct of the program or any part of the program.

“(D) A mechanism to evaluate the program.

“(E) A provision for all payroll, accounting, and finance functions of nonappropriated fund instrumentalities of the Department of Defense to be performed by private-sector sources, if determined advisable on the basis of a final assessment of the results of the program.

“(6) The Secretary shall act through the Under Secretary of Defense (Comptroller) in the performance of the Secretary’s responsibilities under this subsection.”

DEMONSTRATION PROGRAM TO IDENTIFY OVERPAYMENTS MADE TO VENDORS

Pub. L. 105-85, div. A, title III, § 388(c), Nov. 18, 1997, 111 Stat. 1714, provided that, not later than Dec. 31, 1998, the Comptroller General was to submit to Congress a report containing the results of a review by the Comptroller General of the demonstration program conducted under section 354 of Pub. L. 104-106, set out below.

Section 354 of Pub. L. 104-106, as amended by Pub. L. 105-85, div. A, title III, § 388(a), (b), Nov. 18, 1997, 111 Stat. 1713, 1714, provided that:

“(a) IN GENERAL.—The Secretary of Defense shall conduct a demonstration program to evaluate the feasibility of using private contractors to audit accounting and procurement records of the Department of Defense in order to identify overpayments made to vendors by the Department.

“(b) PROGRAM REQUIREMENTS.—(1) Under the demonstration program, the Secretary shall, by contract, provide for one or more persons to audit the accounting and procurement records relating to fiscal years after fiscal year 1993 of the working-capital funds and industrial, commercial, and support type activities managed through the Defense Business Operations Fund, except the Defense Logistics Agency to the extent such records have already been audited. The Secretary may enter into more than one contract under the program.

“(2) A contract under the demonstration program shall require the contractor to use data processing

techniques that are generally used in audits of private-sector records similar to the records audited under the contract.

“(c) **AUDIT REQUIREMENTS.**—In conducting an audit under the demonstration program, a contractor shall compare Department of Defense purchase agreements (and related documents) with invoices submitted by vendors under the purchase agreements. A purpose of the comparison is to identify, in the case of each audited purchase agreement, the following:

“(1) Any payments to the vendor for costs that are not allowable under the terms of the purchase agreement or by law.

“(2) Any amounts not deducted from the total amount paid to the vendor under the purchase agreement that should have been deducted from that amount on account of goods and services provided to the vendor by the Department.

“(3) Duplicate payments.

“(4) Unauthorized charges.

“(5) Other discrepancies between the amount paid to the vendor and the amount actually due the vendor under the purchase agreement.

“(d) **COLLECTION METHOD.**—(1) In the case of an overpayment to a vendor identified under the demonstration program, the Secretary shall consider the use of the procedures specified in section 32.611 of the Federal Acquisition Regulation, regarding a setoff against existing invoices for payment to the vendor, as the first method by which the Department seeks to recover the amount of the overpayment (and any applicable interest and penalties) from the vendor.

“(2) The Secretary of Defense shall be solely responsible for notifying a vendor of an overpayment made to the vendor and identified under the demonstration program and for recovering the amount of the overpayment (and any applicable interest and penalties) from the vendor.

“(e) **FEES FOR CONTRACTOR.**—The Secretary shall pay to the contractor under the contract entered into under the demonstration program an amount not to exceed 25 percent of the total amount recovered by the Department (through the collection of overpayments and the use of setoffs) solely on the basis of information obtained as a result of the audits performed by the contractor under the program. When an overpayment is recovered through the use of a setoff, amounts for the required payment to the contractor shall be derived from funds available to the working-capital fund or industrial, commercial, or support type activity for which the overpayment is recovered.”

**PROGRAM FOR IMPROVED TRAVEL PROCESS FOR  
DEPARTMENT OF DEFENSE**

Section 356 of Pub. L. 104-106, as amended by Pub. L. 105-85, div. A, title X, §1073(d)(1)(B), Nov. 18, 1997, 111 Stat. 1905, provided that:

“(a) **IN GENERAL.**—(1) The Secretary of Defense shall conduct a program to evaluate options to improve the Department of Defense travel process. To carry out the program, the Secretary shall compare the results of the tests conducted under subsection (b) to determine which travel process tested under such subsection is the better option to effectively manage travel of Department personnel.

“(2) The program shall be conducted at not less than three and not more than six military installations, except that an installation may be the subject of only one test conducted under the program.

“(3) The Secretary shall act through the Under Secretary of Defense (Comptroller) in the performance of the Secretary’s responsibilities under this section.

“(b) **CONDUCT OF TESTS.**—(1) The Secretary shall conduct a test at an installation referred to in subsection (a)(2) under which the Secretary—

“(A) implements the changes proposed to be made with respect to the Department of Defense travel process by the task force on travel management that was established by the Secretary in July 1994;

“(B) manages and uniformly applies that travel process (including the implemented changes) throughout the Department; and

“(C) provides opportunities for private-sector sources to provide travel reservation services and credit card services to facilitate that travel process.

“(2) The Secretary shall conduct a test at an installation referred to in subsection (a)(2) under which the Secretary—

“(A) enters into one or more contracts with a private-sector source pursuant to which the private-sector source manages the Department of Defense travel process (except for functions referred to in subparagraph (B)), provides for responsive, reasonably priced services as part of the travel process, and uniformly applies the travel process throughout the Department; and

“(B) provides for the performance by employees of the Department of only those travel functions, such as travel authorization, that the Secretary considers to be necessary to be performed by such employees.

“(3) Each test required by this subsection shall begin not later than 60 days after the date of the enactment of this Act [Feb. 10, 1996] and end two years after the date on which it began. Each such test shall also be conducted in accordance with the guidelines for travel management issued for the Department by the Under Secretary of Defense (Comptroller).

“(c) **EVALUATION CRITERIA.**—The Secretary shall establish criteria to evaluate the travel processes tested under subsection (b). The criteria shall, at a minimum, include the extent to which a travel process provides for the following:

“(1) The coordination, at the time of a travel reservation, of travel policy and cost estimates with the mission which necessitates the travel.

“(2) The use of fully integrated travel solutions envisioned by the travel reengineering report of the Department of Defense dated January 1995.

“(3) The coordination of credit card data and travel reservation data with cost estimate data.

“(4) The elimination of the need for multiple travel approvals through the coordination of such data with proposed travel plans.

“(5) A responsive and flexible management information system that enables the Under Secretary of Defense (Comptroller) to monitor travel expenses throughout the year, accurately plan travel budgets for future years, and assess, in the case of travel of an employee on temporary duty, the relationship between the cost of the travel and the value of the travel to the accomplishment of the mission which necessitates the travel.

“(d) **PLAN FOR PROGRAM.**—Before conducting the program, the Secretary shall develop a plan for the program that addresses the following:

“(1) The purposes of the program, including the achievement of an objective of reducing by at least 50 percent the total cost incurred by the Department annually to manage the Department of Defense travel process.

“(2) The methodology and anticipated cost of the program, including the cost of an arrangement pursuant to which a private-sector source would receive an agreed-upon payment plus an additional negotiated amount that does not exceed 50 percent of the total amount saved in excess of the objective specified in paragraph (1).

“(3) A specific citation to any provision of law, rule, or regulation that, if not waived, would prohibit the conduct of the program or any part of the program.

“(4) The evaluation criteria established pursuant to subsection (c).

“(5) A provision for implementing throughout the Department the travel process determined to be the better option to effectively manage travel of Department personnel on the basis of a final assessment of the results of the program.

“(e) **REPORT.**—After the first full year of the conduct of the tests required by subsection (b), the Secretary shall submit to the Committee on Armed Services of the Senate and the Committee on National Security of

the House of Representatives a report on the implementation of the program. The report shall include an analysis of the evaluation criteria established pursuant to subsection (c).”

**INCREASED RELIANCE ON PRIVATE-SECTOR SOURCES FOR COMMERCIAL PRODUCTS AND SERVICES**

Section 357 of Pub. L. 104-106 provided that:

“(a) IN GENERAL.—The Secretary of Defense shall endeavor to carry out through a private-sector source any activity to provide a commercial product or service for the Department of Defense if—

“(1) the product or service can be provided adequately through such a source; and

“(2) an adequate competitive environment exists to provide for economical performance of the activity by such a source.

“(b) APPLICABILITY.—(1) Subsection (a) shall not apply to any commercial product or service with respect to which the Secretary determines that production, manufacture, or provision of that product or service by the Government is necessary for reasons of national security.

“(2) A determination under paragraph (1) shall be made in accordance with regulations prescribed under subsection (c).

“(c) REGULATIONS.—The Secretary shall prescribe regulations to carry out this section. Such regulations shall be prescribed in consultation with the Director of the Office of Management and Budget.

“(d) REPORT.—(1) The Secretary shall identify activities of the Department (other than activities specified by the Secretary pursuant to subsection (b)) that are carried out by employees of the Department to provide commercial-type products or services for the Department.

“(2) Not later than April 15, 1996, the Secretary shall transmit to the congressional defense committees [Committees on Armed Services and on Appropriations of the Senate and Committees on National Security and Appropriations of the House of Representatives] a report on opportunities for increased use of private-sector sources to provide commercial products and services for the Department.

“(3) The report required by paragraph (2) shall include the following:

“(A) A list of activities identified under paragraph (1) indicating, for each activity, whether the Secretary proposes to convert the performance of that activity to performance by private-sector sources and, if not, the reasons why.

“(B) An assessment of the advantages and disadvantages of using private-sector sources, rather than employees of the Department, to provide commercial products and services for the Department that are not essential to the warfighting mission of the Armed Forces.

“(C) A specification of all legislative and regulatory impediments to converting the performance of activities identified under paragraph (1) to performance by private-sector sources.

“(D) The views of the Secretary on the desirability of terminating the applicability of OMB Circular A-76 to the Department.

“(4) The Secretary shall carry out paragraph (1) in consultation with the Director of the Office of Management and Budget and the Comptroller General of the United States. In carrying out that paragraph, the Secretary shall consult with, and seek the views of, representatives of the private sector, including organizations representing small businesses.”

**§ 2461a. Development and implementation of system for monitoring cost saving resulting from public-private competitions**

(a) SYSTEM FOR MONITORING PERFORMANCE.—

(1) The Secretary of Defense shall monitor the performance, including the cost of performance,

of each function of the Department of Defense that, after October 30, 2000, is the subject of a public-private competition conducted under section 2461 of this title.

(2) In carrying out paragraph (1), the Secretary shall—

(A) compare the cost of performing the function before the public-private competition to the cost of performing the function after the implementation of the results of the public-private competition; and

(B) identify any actual savings of the Department of Defense after the implementation of the results of the public-private competition and compare such savings to the estimated savings identified pursuant to section 2461(a)(1)(E) of this title for that public-private competition;

(3) The monitoring of a function shall continue under this section for at least five years after the conversion, reorganization, or reengineering of the function pursuant to such a public-private competition.

(b) CONSIDERATION IN PREPARATION OF FUTURE-YEARS DEFENSE PROGRAM.—In preparing the future-years defense program under section 221 of this title, the Secretary of Defense shall, for the fiscal years covered by the program, estimate and take into account the costs to be incurred and the savings to be derived from the performance of functions by workforces selected in public-private competitions conducted under section 2461 of this title. The Secretary shall consider the results of the monitoring under this section in making the estimates.

(Added Pub. L. 106-398, § 1 [[div. A], title III, § 354(a)], Oct. 30, 2000, 114 Stat. 1654, 1654A-73; amended Pub. L. 107-107, div. A, title X, § 1048(a)(21), (c)(11), Dec. 28, 2001, 115 Stat. 1224, 1226; Pub. L. 109-163, div. A, title III, § 341(d), (g)(2)(C), Jan. 6, 2006, 119 Stat. 3199, 3200.)

**AMENDMENTS**

2006—Pub. L. 109-163, § 341(g)(2)(C), substituted “Development and implementation of system for monitoring cost saving resulting from public-private competitions” for “Development of system for monitoring cost savings resulting from workforce reductions” in section catchline.

Subsec. (a). Pub. L. 109-163, § 341(d)(1), (2), redesignated subsec. (b) as (a) and struck out former subsec. (a) which defined “workforce review”.

Subsec. (a)(1). Pub. L. 109-163, § 341(d)(3)(A), substituted “monitor” for “establish a system for monitoring” and “a public-private competition conducted under section 2461 of this title” for “a workforce review”.

Subsec. (a)(2). Pub. L. 109-163, § 341(d)(3)(B), added par. (2) and struck out former par. (2) which established requirements for the monitoring system.

Subsec. (a)(3). Pub. L. 109-163, § 341(d)(3)(C), inserted “pursuant to such a public-private competition” after “reengineering of the function”.

Subsec. (b). Pub. L. 109-163, § 341(d)(4), substituted “public-private competitions conducted under section 2461 of this title” for “workforce reviews”.

Pub. L. 109-163, § 341(d)(2), redesignated subsec. (e) as (b). Former subsec. (b) redesignated (a).

Subsecs. (c) to (e). Pub. L. 109-163, § 341(d)(1), (2), redesignated subsec. (e) as (b) and struck out former subsecs. (c) and (d) which related to waiver for certain workforce reviews and annual report, respectively.

2001—Subsec. (a)(2). Pub. L. 107-107, § 1048(a)(21), substituted “efficiency” for “efficiency”.