

contract shall be negotiated with the contractor at the time the contract is entered into.

(3)(A) Subject to subparagraph (B), the head of an agency may enter into share-in-savings contracts under this section in any given fiscal year even if funds are not made specifically available for the full costs of cancellation or termination of the contract if funds are available and sufficient to make payments with respect to the first fiscal year of the contract and the following conditions are met regarding the funding of cancellation and termination liability:

(i) The amount of unfunded contingent liability for the contract does not exceed the lesser of—

- (I) 25 percent of the estimated costs of a cancellation or termination; or
- (II) \$5,000,000.

(ii) Unfunded contingent liability in excess of \$1,000,000 has been approved by the Director of the Office of Management and Budget or the Director's designee.

(B) The aggregate number of share-in-savings contracts that may be entered into under subparagraph (A) by all agencies to which this chapter applies in a fiscal year may not exceed 5 in each of fiscal years 2003, 2004, and 2005.

(c) DEFINITIONS.—In this section:

(1) The term “contractor” means a private entity that enters into a contract with an agency.

(2) The term “savings” means—

- (A) monetary savings to an agency; or
- (B) savings in time or other benefits realized by the agency, including enhanced revenues (other than enhanced revenues from the collection of fees, taxes, debts, claims, or other amounts owed the Federal Government).

(3) The term “share-in-savings contract” means a contract under which—

(A) a contractor provides solutions for—

- (i) improving the agency's mission-related or administrative processes; or
- (ii) accelerating the achievement of agency missions; and

(B) the head of the agency pays the contractor an amount equal to a portion of the savings derived by the agency from—

- (i) any improvements in mission-related or administrative processes that result from implementation of the solution; or
- (ii) acceleration of achievement of agency missions.

(d) TERMINATION.—No share-in-savings contracts may be entered into under this section after September 30, 2005.

(Added Pub. L. 107-347, title II, §210(a)(1), Dec. 17, 2002, 116 Stat. 2932.)

#### EFFECTIVE DATE

Section effective 120 days after Dec. 17, 2002, see section 402(a) of Pub. L. 107-347, set out as a note under section 3601 of Title 44, Public Printing and Documents.

### § 2333. Joint policies on requirements definition, contingency program management, and contingency contracting

(a) JOINT POLICY REQUIREMENT.—The Secretary of Defense, in consultation with the

Chairman of the Joint Chiefs of Staff, shall develop joint policies for requirements definition, contingency program management, and contingency contracting during combat operations and post-conflict operations.

(b) REQUIREMENTS DEFINITION MATTERS COVERED.—The joint policy for requirements definition required by subsection (a) shall, at a minimum, provide for the following:

(1) The assignment of a senior commissioned officer or civilian member of the senior executive service, with appropriate experience and qualifications related to the definition of requirements to be satisfied through acquisition contracts (such as for delivery of products or services, performance of work, or accomplishment of a project), to act as head of requirements definition and coordination during combat operations, post-conflict operations, and contingency operations, if required, including leading a requirements review board involving all organizations concerned.

(2) An organizational approach to requirements definition and coordination during combat operations, post-conflict operations, and contingency operations that is designed to ensure that requirements are defined in a way that effectively implements United States Government and Department of Defense objectives, policies, and decisions regarding the allocation of resources, coordination of inter-agency efforts in the theater of operations, and alignment of requirements with the proper use of funds.

(c) CONTINGENCY PROGRAM MANAGEMENT MATTERS COVERED.—The joint policy for contingency program management required by subsection (a) shall, at a minimum, provide for the following:

(1) The assignment of a senior commissioned officer or civilian member of the senior executive service, with appropriate program management experience and qualifications, to act as head of program management during combat operations, post-conflict operations, and contingency operations, including stabilization and reconstruction operations involving multiple United States Government agencies and international organizations, if required.

(2) A preplanned organizational approach to program management during combat operations, post-conflict operations, and contingency operations that is designed to ensure that the Department of Defense is prepared to conduct such program management.

(3) Identification of a deployable cadre of experts, with the appropriate tools and authority, and trained in processes under paragraph (6).

(4) Utilization of the hiring and appointment authorities necessary for the rapid deployment of personnel to ensure the availability of key personnel for sufficient lengths of time to provide for continuing program and project management.

(5) A requirement to provide training (including training under a program to be created by the Defense Acquisition University) to program management personnel in—

- (A) the use of laws, regulations, policies, and directives related to program manage-

ment in combat or contingency environments;

(B) the integration of cost, schedule, and performance objectives into practical acquisition strategies aligned with available resources and subject to effective oversight; and

(C) procedures of the Department of Defense related to funding mechanisms and contingency contract management.

(6) Appropriate steps to ensure that training is maintained for such personnel even when they are not deployed in a contingency operation.

(7) Such steps as may be needed to ensure jointness and cross-service coordination in the area of program management during contingency operations.

(d) CONTINGENCY CONTRACTING MATTERS COVERED.—(1) The joint policy for contingency contracting required by subsection (a) shall, at a minimum, provide for the following:

(A) The designation of a senior commissioned officer or civilian member of the senior executive service in each military department with the responsibility for administering the policy.

(B) The assignment of a senior commissioned officer with appropriate acquisition experience and qualifications to act as head of contingency contracting during combat operations, post-conflict operations, and contingency operations, who shall report directly to the commander of the combatant command in whose area of responsibility the operations occur.

(C) A sourcing approach to contingency contracting that is designed to ensure that each military department is prepared to conduct contingency contracting during combat operations, post-conflict operations, and contingency operations, including stabilization and reconstruction operations involving inter-agency organizations, if required.

(D) A requirement to provide training (including training under a program to be created by the Defense Acquisition University) to contingency contracting personnel in—

(i) the use of law, regulations, policies, and directives related to contingency contracting operations;

(ii) the appropriate use of rapid acquisition methods, including the use of exceptions to competition requirements under section 2304 of this title, sealed bidding, letter contracts, indefinite delivery-indefinite quantity task orders, set asides under section 8(a) of the Small Business Act (15 U.S.C. 637(a)), undefinitized contract actions, and other tools available to expedite the delivery of goods and services during combat operations or post-conflict operations;

(iii) the appropriate use of rapid acquisition authority, commanders' emergency response program funds, and other tools unique to contingency contracting; and

(iv) instruction on the necessity for the prompt transition from the use of rapid acquisition authority to the use of full and open competition and other methods of con-

tracting that maximize transparency in the acquisition process.

(E) Appropriate steps to ensure that training is maintained for such personnel even when they are not deployed in a contingency operation.

(F) Such steps as may be needed to ensure jointness and cross-service coordination in the area of contingency contracting.

(2) To the extent practicable, the joint policy for contingency contracting required by subsection (a) should be taken into account in the development of interagency plans for stabilization and reconstruction operations, consistent with the report submitted by the President under section 1035 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Public Law 109-364; 120 Stat. 2388) on inter-agency operating procedures for the planning and conduct of stabilization and reconstruction operations.

(e) TRAINING FOR PERSONNEL OUTSIDE ACQUISITION WORKFORCE.—(1) The joint policy for requirements definition, contingency program management, and contingency contracting required by subsection (a) shall provide for training of military personnel outside the acquisition workforce (including operational field commanders and officers performing key staff functions for operational field commanders) who are expected to have acquisition responsibility, including oversight duties associated with contracts or contractors, during combat operations, post-conflict operations, and contingency operations.

(2) Training under paragraph (1) shall be sufficient to ensure that the military personnel referred to in that paragraph understand the scope and scale of contractor support they will experience in contingency operations and are prepared for their roles and responsibilities with regard to requirements definition, program management (including contractor oversight), and contingency contracting.

(3) The joint policy shall also provide for the incorporation of contractors and contract operations in mission readiness exercises for operations that will include contracting and contractor support.

(f) DEFINITIONS.—In this section:

(1) CONTINGENCY CONTRACTING PERSONNEL.—The term “contingency contracting personnel” means members of the armed forces and civilian employees of the Department of Defense who are members of the defense acquisition workforce and, as part of their duties, are assigned to provide support to contingency operations (whether deployed or not).

(2) CONTINGENCY CONTRACTING.—The term “contingency contracting” means all stages of the process of acquiring property or services by the Department of Defense during a contingency operation.

(3) CONTINGENCY OPERATION.—The term “contingency operation” has the meaning provided in section 101(a)(13) of this title.

(4) ACQUISITION SUPPORT AGENCIES.—The term “acquisition support agencies” means Defense Agencies and Department of Defense Field Activities that carry out and provide support for acquisition-related activities.

(5) CONTINGENCY PROGRAM MANAGEMENT.—The term “contingency program management” means the process of planning, organizing, staffing, controlling, and leading the combined efforts of participating civilian and military personnel and organizations for the management of a specific defense acquisition program or programs during combat operations, post-conflict operations, and contingency operations.

(6) REQUIREMENTS DEFINITION.—The term “requirements definition” means the process of translating policy objectives and mission needs into specific requirements, the description of which will be the basis for awarding acquisition contracts for projects to be accomplished, work to be performed, or products to be delivered.

(Added Pub. L. 109-364, div. A, title VIII, §854(a)(1), Oct. 17, 2006, 120 Stat. 2343; amended Pub. L. 110-181, div. A, title VIII, §849(a), Jan. 28, 2008, 122 Stat. 245; Pub. L. 111-84, div. A, title X, §1073(a)(23), Oct. 28, 2009, 123 Stat. 2473.)

#### REFERENCES IN TEXT

Section 1035 of the John Warner National Defense Authorization Act for Fiscal Year 2007, referred to in subsec. (d)(2), is section 1035 of Pub. L. 109-364, div. A, title X, Oct. 17, 2006, 120 Stat. 2388, which is not classified to the Code.

#### AMENDMENTS

2009—Subsec. (d)(1)(D)(ii). Pub. L. 111-84, §1073(a)(23)(A), substituted “indefinite delivery-indefinite quantity” for “indefinite delivery indefinite quantity”.

Subsec. (d)(2). Pub. L. 111-84, §1073(a)(23)(B), substituted “the John Warner National Defense Authorization Act for Fiscal Year 2007 (Public Law 109-364; 120 Stat. 2388)” for “this Act”.

Subsec. (f)(3). Pub. L. 111-84, §1073(a)(23)(C), substituted “section 101(a)(13)” for “section 101(13)”.

2008—Subsecs. (e), (f). Pub. L. 110-181 added subsec. (e) and redesignated former subsec. (e) as (f).

#### ENHANCEMENT OF INTERAGENCY SUPPORT DURING CONTINGENCY OPERATIONS AND TRANSITION PERIODS

Pub. L. 114-328, div. A, title XII, §1281, Dec. 23, 2016, 130 Stat. 2541, provided that:

“(a) AUTHORITY.—The Secretary of Defense and the Secretary of State may enter into an agreement under which each Secretary may provide covered support, supplies, and services on a reimbursement basis, or by exchange of covered support, supplies, and services, to the other Secretary during a contingency operation and related transition period for up to 2 years following the end of such contingency operation.

“(b) AGREEMENT.—An agreement entered into under this section shall be in writing and shall include the following terms:

“(1) The price charged by a supplying agency shall be the direct costs that such agency incurred by providing the covered support, supplies, or services to the requesting agency under this section.

“(2) Credits and liabilities of the agencies accrued as a result of acquisitions and transfers of covered support, supplies, and services under this section shall be liquidated not less often than once every 3 months by direct payment to the agency supplying such support, supplies, or services by the agency receiving such support, supplies, or services.

“(3) Exchange entitlements accrued as a result of acquisitions and transfers of covered support, supplies, and services under this section shall be satisfied within 12 months after the date of the delivery of the covered support, supplies, or services. Ex-

change entitlements not so satisfied shall be immediately liquidated by direct payment to the agency supplying such covered support, supplies, or services.

“(c) EFFECT OF OBLIGATION AND AVAILABILITY OF FUNDS.—An order placed by an agency pursuant to an agreement under this section is deemed to be an obligation in the same manner that a similar order placed under a contract with, or a contract for similar goods or services awarded to, a private contractor is an obligation. Appropriations remain available to pay an obligation to the servicing agency in the same manner as appropriations remain available to pay an obligation to a private contractor.

“(d) DEFINITIONS.—In this section:

“(1) COVERED SUPPORT, SUPPLIES, AND SERVICES.—The term ‘covered support, supplies, and services’ means food, billeting, transportation (including airlift), petroleum, oils, lubricants, communications services, medical services, ammunition, base operations support, use of facilities, spare parts and components, repair and maintenance services, and calibration services.

“(2) CONTINGENCY OPERATION.—The term ‘contingency operation’ has the meaning given that term in section 101(a)(13) of title 10, United States Code.

“(e) CREDITING OF RECEIPTS.—Any receipt as a result of an agreement entered into under this section shall be credited, at the option of the Secretary of Defense with respect to the Department of Defense and the Secretary of State with respect to the Department of State, to—

“(1) the appropriation, fund, or account used in incurring the obligation; or

“(2) an appropriate appropriation, fund, or account currently available for the purposes for which the expenditures were made.

“(f) NOTIFICATION.—Not later than 30 days after the end of a fiscal year in which covered support, supplies, and services are provided or exchanged pursuant to an agreement under this section, the Secretary of Defense and the Secretary of State shall jointly submit to the congressional defense committees [Committees on Armed Services and Appropriations of the Senate and the House of Representatives], the Committee on Foreign Relations of the Senate, and the Committee on Foreign Affairs of the House of Representatives a notification that contains a copy of such agreement and a description of such covered support, supplies, and services.”

#### AGREEMENTS WITH FOREIGN GOVERNMENTS TO DEVELOP LAND-BASED WATER RESOURCES IN SUPPORT OF AND IN PREPARATION FOR CONTINGENCY OPERATIONS

Pub. L. 114-328, div. A, title XII, §1291, Dec. 23, 2016, 130 Stat. 2558, provided that:

“(a) AGREEMENTS AUTHORIZED.—The Secretary of Defense, with the concurrence of the Secretary of State, is authorized to enter into agreements with the governments of foreign countries to develop land-based water resources in support of and in preparation for contingency operations, including water selection, pumping, purification, storage, distribution, cooling, consumption, water reuse, water source intelligence, research and development, training, acquisition of water support equipment, and water support operations.

“(b) NOTIFICATION REQUIRED.—Not later than 30 days after entering into an agreement under subsection (a), the Secretary of Defense shall notify the appropriate congressional committees of the existence of the agreement and provide a summary of the terms of the agreement.

“(c) DEFINITION.—In this section, the term ‘appropriate congressional committees’ means—

“(1) the Committee on Armed Services and the Committee on Foreign Relations of the Senate; and

“(2) the Committee on Armed Services and the Committee on Foreign Affairs of the House of Representatives.”

## DEADLINE FOR DEVELOPMENT OF JOINT POLICIES

Pub. L. 109-364, div. A, title VIII, §854(b), Oct. 17, 2006, 120 Stat. 2346, provided that: "The Secretary of Defense shall develop the joint policies required under section 2333 of title 10, United States Code, as added by subsection (a), not later than 18 months after the date of enactment of this Act [Oct. 17, 2006]."

**§ 2334. Independent cost estimation and cost analysis**

(a) IN GENERAL.—The Director of Cost Assessment and Program Evaluation shall ensure that the cost estimation and cost analysis processes of the Department of Defense provide accurate information and realistic estimates of cost for the acquisition programs of the Department of Defense. In carrying out that responsibility, the Director shall—

(1) prescribe, by authority of the Secretary of Defense, policies and procedures for the conduct of cost estimation and cost analysis for the acquisition programs of the Department of Defense;

(2) provide guidance to and consult with the Secretary of Defense, the Under Secretary of Defense for Acquisition, Technology, and Logistics, the Under Secretary of Defense (Comptroller), the Secretaries of the military departments, and the heads of the Defense Agencies with respect to cost estimation in the Department of Defense in general and with respect to specific cost estimates and cost analyses to be conducted in connection with a major defense acquisition program or major subprogram under chapter 144 of this title;

(3) issue guidance relating to the proper discussion of risk in cost estimates generally, and specifically, for the proper discussion of risk in cost estimates for major defense acquisition programs and major subprograms;

(4) issue guidance relating to full consideration of life-cycle management and sustainability costs in major defense acquisition programs and major subprograms;

(5) review all cost estimates and cost analyses conducted in connection with major defense acquisition programs and major subprograms;

(6) conduct or approve independent cost estimates and cost analyses for all major defense acquisition programs and major subprograms—

(A) in advance of—

(i) any decision to grant milestone approval pursuant to section 2366a or 2366b of this title;

(ii) any decision to enter into low-rate initial production or full-rate production;

(iii) any certification under section 2433a of this title; and

(iv) any report under section 2445c(f) of this title; and

(B) at any other time considered appropriate by the Director, upon the request of the Under Secretary of Defense for Acquisition, Technology, and Logistics, or upon the request of the milestone decision authority;

(7) periodically assess and update the cost indexes used by the Department to ensure that such indexes have a sound basis and meet the

Department's needs for realistic cost estimation; and

(8) annually review the cost and associated information required to be included, by section 2432(c)(1) of this title, in the Selected Acquisition Reports required by that section.

(b) INDEPENDENT COST ESTIMATE REQUIRED BEFORE APPROVAL.—(1) A milestone decision authority may not approve entering a milestone phase of a major defense acquisition program or major subprogram unless an independent cost estimate has been conducted or approved by the Director of Cost Assessment and Program Evaluation and considered by the milestone decision authority that—

(A) for the technology maturation and risk reduction phase, includes the identification and sensitivity analysis of key cost drivers that may affect life-cycle costs of the program or subprogram; and

(B) for the engineering and manufacturing development phase, or production and deployment phase, includes a cost estimate of the full life-cycle cost of the program or subprogram.

(2) The regulations governing the content and submission of independent cost estimates required by subsection (a) shall require that the independent cost estimate of the full life-cycle cost of a program or subprogram include—

(A) all costs of development, procurement, military construction, operations and support, and trained manpower to operate, maintain, and support the program or subprogram upon full operational deployment, without regard to funding source or management control; and

(B) an analysis to support decisionmaking that identifies and evaluates alternative courses of action that may reduce cost and risk, and result in more affordable programs and less costly systems.

(c) REVIEW OF COST ESTIMATES, COST ANALYSES, AND RECORDS OF THE MILITARY DEPARTMENTS AND DEFENSE AGENCIES.—The Secretary of Defense shall ensure that the Director of Cost Assessment and Program Evaluation—

(1) promptly receives the results of all cost estimates and cost analyses conducted by the military departments and Defense Agencies, and all studies conducted by the military departments and Defense Agencies in connection with such cost estimates and cost analyses, for major defense acquisition programs and major subprograms of the military departments and Defense Agencies; and

(2) has timely access to any records and data in the Department of Defense (including the records and data of each military department and Defense Agency and including classified and proprietary information) that the Director considers necessary to review in order to carry out any duties under this section.

(d) PARTICIPATION, CONCURRENCE, AND APPROVAL IN COST ESTIMATION.—The Director of Cost Assessment and Program Evaluation may—

(1) participate in the discussion of any discrepancies between an independent cost estimate and the cost estimate of a military department or Defense Agency for a major defense acquisition program or major subprogram of the Department of Defense;