PRIOR PROVISIONS

A prior section 2365, added Pub. L. 99–500, §101(c) [title X, §909(a)(1), formerly §909(a)], Oct. 18, 1986, 100 Stat. 1783–82, 1783–142, and Pub. L. 99–591, §101(c) [title X, §909(a)(1), formerly §909(a)], Oct. 30, 1986, 100 Stat. 3341–82, 3341–142, redesignated §909(a)(1), Pub. L. 100–26, §4(b), Apr. 21, 1987, 101 Stat. 274; Pub. L. 99–661, div. A, title IX, formerly title IV, §909(a)(1), Nov. 14, 1986, 100 Stat. 3921, renumbered title IX, Pub. L. 100–26, §3(5), Apr. 21, 1987, 101 Stat. 273; Pub. L. 100–26, §5(3)(A), Apr. 21, 1987, 101 Stat. 274; Pub. L. 100–456, div. A, title VIII, §802, Sept. 29, 1988, 102 Stat. 2008, required use of competitive prototype program strategy in development of major weapons systems, prior to repeal by Pub. L. 102–484, div. A, title VIII, §821(c)(1), Oct. 23, 1992, 106 Stat. 2460.

AMENDMENTS

2015—Subsec. (b)(1), (2). Pub. L. 114–92, §215(1), inserted ''and private sector persons'' after ''foreign nations''.

Subsec. (f). Pub. L. 114–92, §215(2), substituted ''September 30, 2025'' for ''September 30, 2015''.

2013—Subsec. (a). Pub. L. 112–239, §1076(c)(2)(B)(i), inserted ''of Defense for Research and Engineering'' after ''The Assistant Secretary''.

Subsec. (d)(3)(A). Pub. L. 112–239, §1076(c)(2)(B)(ii), substituted ''Assistant Secretary'' for ''Director''.

2011—Subsec. (a). Pub. L. 111–383, §901(j)(3)(A), substituted ''Assistant Secretary'' for ''Director of Defense Research and Engineering''.

Subsec. (d)(1). Pub. L. 111–383, §901(j)(3)(B), substituted ''Assistant Secretary'' for ''Director''.

Subsec. (d)(2). Pub. L. 111–383, §901(j)(3)(C), substituted ''Assistant Secretary of Defense for Research and Engineering'' for ''Director of Defense Research and Engineering'' and ''Assistant Secretary may'' for ''Director may''.

Subsec. (e). Pub. L. 111–383, §901(j)(3)(D), substituted ''Assistant Secretary'' for ''Director''.

2009—Subsec. (d)(3). Pub. L. 111–84, §211(a), added par. (3).

Subsec. (f). Pub. L. 111–84, §211(b), substituted ''2015'' for ''2011''.

2006—Subsec. (f). Pub. L. 109–364 substituted ''2011'' for ''2006''.

EFFECTIVE DATE OF 2011 AMENDMENT

Amendment by Pub. L. 111–383 effective Jan. 1, 2011, see section 901(p) of Pub. L. 111–383, set out as a note under section 131 of this title.

§ 2366. Major systems and munitions programs: survivability testing and lethality testing required before full-scale production

(a) REQUIREMENTS.—(1) The Secretary of Defense shall provide that—

(A) a covered system may not proceed beyond low-rate initial production until realistic survivability testing of the system is completed in accordance with this section and the report required by subsection (d) with respect to that testing is submitted in accordance with that subsection; and

(B) a major munition program or a missile program may not proceed beyond low-rate initial production until realistic lethality testing of the program is completed in accordance with this section and the report required by subsection (d) with respect to that testing is submitted in accordance with that subsection.

(2) The Secretary of Defense shall provide that a covered product improvement program may not proceed beyond low-rate initial production until—

(A) in the case of a product improvement to a covered system, realistic survivability testing is completed in accordance with this section; and

(B) in the case of a product improvement to a major munitions program or a missile program, realistic lethality testing is completed in accordance with this section.

(b) TEST GUIDELINES.—(1) Survivability and lethality tests required under subsection (a) shall be carried out sufficiently early in the development phase of the system or program (including a covered product improvement program) to allow any design deficiency demonstrated by the testing to be corrected in the design of the system, munition, or missile (or in the product modification or upgrade to the system, munition, or missile) before proceeding beyond low-rate initial production.

(2) The costs of all tests required under that subsection shall be paid from funds available for the system being tested.

(c) WAIVER AUTHORITY.—(1) The Secretary of Defense may waive the application of the survivability and lethality tests of this section to a covered system, munitions program, missile program, or covered product improvement program if the Secretary determines that live-fire testing of such system or program would be unreasonably expensive and impractical and submits a certification of that determination to Congress—

(A) before Milestone B approval for the system or program; or

(B) in the case of a system or program initiated at—

(i) Milestone B, as soon as is practicable after the Milestone B approval; or

(ii) Milestone C, as soon as is practicable after the Milestone C approval.

(2) In the case of a covered system (or covered product improvement program for a covered system), the Secretary may waive the application of the survivability and lethality tests of this section to such system or program and instead allow testing of the system or program in combat by firing munitions likely to be encountered in combat at components, subsystems, and subassemblies, together with performing design analyses, modeling and simulation, and analysis of combat data. Such alternative testing may not be carried out in the case of any covered system (or covered product improvement program for a covered system) unless the Secretary certifies to Congress, before the system or program enters system development and demonstration, that the survivability and lethality testing of such system or program otherwise required by this section would be unreasonably expensive and impracticable.

(3) The Secretary shall include with any certification under paragraph (1) or (2) a report explaining how the Secretary plans to evaluate the survivability or the lethality of the system or program and assessing possible alternatives to realistic survivability testing of the system or program.

(4) In time of war or mobilization, the President may suspend the operation of any provision of this section.

(d) REPORTING TO CONGRESS.—(1) At the conclusion of survivability or lethality testing under subsection (a), the Secretary of Defense shall submit a report on the testing to the congressional defense committees. Each such report shall describe the results of the survivability or lethality testing and shall give the Secretary's overall assessment of the testing.

(2) If a decision is made within the Department of Defense to proceed to operational use of a system, or to make procurement funds available for a system, before Milestone C approval of that system, the Secretary of Defense shall submit to the congressional defense committees, as soon as practicable after such decision, the following:

(A) A report describing the status of survivability and live fire testing of that system.

(B) The report required under paragraph (1).

(e) DEFINITIONS.—In this section:

(1) The term ''covered system'' means—

(A) a vehicle, weapon platform, or conventional weapon system that—

(i) includes features designed to provide some degree of protection to users in combat; and

(ii) is a major system as defined in section 2302(5) of this title; or

(B) any other system or program designated by the Secretary of Defense for purposes of this section.

(2) The term ''major munitions program'' means—

(A) a munition program for which more than 1,000,000 rounds are planned to be acquired; or

(B) a conventional munitions program that is a major system within the meaning of that term in section 2302(5) of this title.

(3) The term ''realistic survivability testing'' means, in the case of a covered system (or a covered product improvement program for a covered system), testing for vulnerability of the system in combat by firing munitions likely to be encountered in combat (or munitions with a capability similar to such munitions) at the system configured for combat, with the primary emphasis on testing vulnerability with respect to potential user casualties and taking into equal consideration the susceptibility to attack and combat performance of the system.

(4) The term ''realistic lethality testing'' means, in the case of a major munitions program or a missile program (or a covered product improvement program for such a program), testing for lethality by firing the munition or missile concerned at appropriate targets configured for combat.

(5) The term ''configured for combat'', with respect to a weapon system, platform, or vehicle, means loaded or equipped with all dangerous materials (including all flammables and explosives) that would normally be on board in combat.

(6) The term ''covered product improvement program'' means a program under which—

(A) a modification or upgrade will be made to a covered system which (as determined by the Secretary of Defense) is likely to affect significantly the survivability of such system; or

(B) a modification or upgrade will be made to a major munitions program or a missile program which (as determined by the Secretary of Defense) is likely to affect significantly the lethality of the munition or missile produced under the program.

(7) The term ''Milestone B approval'' means a decision to enter into system development and demonstration pursuant to guidance prescribed by the Secretary of Defense for the management of Department of Defense acquisition programs.

(8) The term ''Milestone C approval'' means a decision to enter into production and deployment pursuant to guidance prescribed by the Secretary of Defense for the management of Department of Defense acquisition programs.

(Added Pub. L. 99–500, § 101(c) [title X, § 910(a)(1)], Oct. 18, 1986, 100 Stat. 1783–82, 1783–143, and Pub. L. 99–591, § 101(c) [title X, § 910(a)(1)], Oct. 30, 1986, 100 Stat. 3341–82, 3341–143; Pub. L. 99–661, div. A, title IX, formerly title IV, § 910(a)(1), Nov. 14, 1986, 100 Stat. 3923, renumbered title IX, Pub. L. 100–26, § 3(5), Apr. 21, 1987, 101 Stat. 273; amended Pub. L. 100–180, div. A, title VIII, § 802, title XII, § 1231(11), Dec. 4, 1987, 101 Stat. 1123, 1160; Pub. L. 100–456, div. A, title XII, § 1233(*l*)(3), Sept. 29, 1988, 102 Stat. 2058; Pub. L. 101–189, div. A, title VIII, §§ 802(c)(1)–(4)(A), 804, Nov. 29, 1989, 103 Stat. 1486, 1488; Pub. L. 101–510, div. A, title XIV, § 1484(h)(7), Nov. 5, 1990, 104 Stat. 1718; Pub. L. 103–160, div. A, title VIII, § 828(d)(2), Nov. 30, 1993, 107 Stat. 1715; Pub. L. 103–355, title III, § 3014, Oct. 13, 1994, 108 Stat. 3332; Pub. L. 104–106, div. A, title XV, § 1502(a)(18), Feb. 10, 1996, 110 Stat. 504; Pub. L. 106–65, div. A, title X, § 1067(1), Oct. 5, 1999, 113 Stat. 774; Pub. L. 107–107, div. A, title VIII, § 821(a), Dec. 28, 2001, 115 Stat. 1181; Pub. L. 107–314, div. A, title VIII, § 818, Dec. 2, 2002, 116 Stat. 2611; Pub. L. 108–136, div. A, title X, § 1043(b)(13), Nov. 24, 2003, 117 Stat. 1611; Pub. L. 110–417, [div. A], title II, § 251(a), (b), Oct. 14, 2008, 122 Stat. 4400.)

CODIFICATION

Pub. L. 99–591 is a corrected version of Pub. L. 99–500. Pub. L. 99–500, Pub. L. 99–591, and Pub. L. 99–661 added identical sections.

AMENDMENTS

2008—Subsec. (d). Pub. L. 110–417, § 251(b), designated existing provisions as par. (1) and added par. (2).

Subsec. (e)(1). Pub. L. 110–417, § 251(a), amended par. (1) generally. Prior to amendment, par. (1) read as follows: ''The term 'covered system' means a vehicle, weapon platform, or conventional weapon system—

''(A) that includes features designed to provide some degree of protection to users in combat; and

''(B) that is a major system within the meaning of that term in section 2302(5) of this title.''

2003—Subsec. (e)(7) to (9). Pub. L. 108–136 redesignated pars. (8) and (9) as (7) and (8), respectively, and struck out former par. (7) which read as follows: ''The term 'congressional defense committees' means—

''(A) the Committee on Armed Services and the Committee on Appropriations of the Senate; and

''(B) the Committee on Armed Services and the Committee on Appropriations of the House of Representatives.''

2002—Subsec. (c)(1). Pub. L. 107–314, § 818(a), amended par. (1) generally. Prior to amendment par. (1) read as

follows: ''The Secretary of Defense may waive the application of the survivability and lethality tests of this section to a covered system, munitions program, missile program, or covered product improvement program if the Secretary, before the system or program enters system development and demonstration, certifies to Congress that live-fire testing of such system or program would be unreasonably expensive and impractical.''

Subsec. (e)(8), (9). Pub. L. 107–314, §818(b), added pars. (8) and (9).

2001—Subsec. (c)(1), (2). Pub. L. 107–107 substituted ''system development and demonstration'' for ''engineering and manufacturing development''.

1999—Subsec. (e)(7)(B). Pub. L. 106–65 substituted ''Committee on Armed Services'' for ''Committee on National Security''.

1996—Subsec. (d). Pub. L. 104–106, §1502(a)(18)(A), substituted ''the congressional defense committees'' for ''the Committees on Armed Services and on Appropriations of the Senate and House of Representatives''.

Subsec. (e)(7). Pub. L. 104–106, §1502(a)(18)(B), added par. (7).

1994—Subsec. (c)(1). Pub. L. 103–355, §3014(a)(2), (b), substituted ''engineering and manufacturing development'' for ''full-scale engineering development'' in first sentence and redesignated second sentence as par. (3).

Subsec. (c)(2). Pub. L. 103–355, §3014(a)(1), (3), added par. (2) and redesignated former par. (2) as (4).

Subsec. (c)(3). Pub. L. 103–355, §3014(a)(2), redesignated second sentence of par. (1) as par. (3) and substituted ''certification under paragraph (1) or (2)'' for ''such certification''.

Subsec. (c)(4). Pub. L. 103–355, §3014(a)(1), redesignated par. (2) as (4).

1993—Subsec. (d). Pub. L. 103–160 substituted ''to the Committees on Armed Services and on Appropriations of the Senate and House of Representatives'' for ''to the defense committees of Congress (as defined in section 2362(e)(3) of this title)''.

1990—Subsec. (a)(1)(A), (B). Pub. L. 101–510 made technical correction to directory language of Pub. L. 101–189, §804(a), see 1989 Amendment note below.

1989—Pub. L. 101–189, §802(c)(4)(A), substituted ''testing and lethality testing required before full-scale production'' for ''and lethality testing; operational testing'' in section catchline.

Subsec. (a)(1)(A). Pub. L. 101–189, §§802(c)(1)(A), 804(a), as amended by Pub. L. 101–510, substituted ''this section and the report required by subsection (d) with respect to that testing is submitted in accordance with that subsection; and'' for ''this section;''.

Subsec. (a)(1)(B). Pub. L. 101–189, §§802(c)(1)(B), 804(a), as amended by Pub. L. 101–510, substituted ''this section and the report required by subsection (d) with respect to that testing is submitted in accordance with that subsection.'' for ''this section; and''.

Subsec. (a)(1)(C). Pub. L. 101–189, §802(c)(1)(C), struck out subpar. (C) which read as follows: ''a major defense acquisition program may not proceed beyond low-rate initial production until initial operational test and evaluation of the program is completed in accordance with this section.''

Subsec. (b)(2), (3). Pub. L. 101–189, §802(c)(2), redesignated par. (3) as (2) and struck out former par. (2) which read as follows: ''In the case of a major defense acquisition program, no person employed by the contractor for the system being tested may be involved in the conduct of the operational test and evaluation required under subsection (a). The limitation in the preceding sentence does not apply to the extent that the Secretary of Defense plans for persons employed by that contractor to be involved in the operation, maintenance, and support of the system being tested when the system is deployed in combat.''

Subsec. (d). Pub. L. 101–189, §804(b), inserted at end ''Each such report shall describe the results of the survivability or lethality testing and shall give the Secretary's overall assessment of the testing.''

Subsec. (e)(3) to (8). Pub. L. 101–189, §802(c)(3), redesignated pars. (4), (5), (6), and (8) as (3), (4), (5), and (6), respectively, and struck out former par. (3) which defined ''major defense acquisition program'' and former par. (7) which defined ''operational test and evaluation''.

1988—Subsec. (a)(2). Pub. L. 100–456 made technical correction to directory language of Pub. L. 100–180, §802(a)(1)(C). See 1987 Amendment note below.

1987—Subsec. (a). Pub. L. 100–180, §802(a)(1), as amended by Pub. L. 100–456, designated existing provisions as par. (1), redesignated former pars. (1) to (3) as subpars. (A) to (C), and added par. (2).

Subsec. (b)(1). Pub. L. 100–180, §802(a)(2), inserted ''(including a covered product improvement program)'' after ''system or program'' and ''(or in the product modification or upgrade to the system, munition, or missile)'' after ''or missile''.

Subsec. (b)(2). Pub. L. 100–180, §802(b), inserted at end ''The limitation in the preceding sentence does not apply to the extent that the Secretary of Defense plans for persons employed by that contractor to be involved in the operation, maintenance, and support of the system being tested when the system is deployed in combat.''

Subsec. (c). Pub. L. 100–180, §802(a)(3), (c), (d)(1), designated existing provisions as par. (1), substituted ''missile program, or covered product improvement program'' for ''or missile program'', and inserted at end ''The Secretary shall include with any such certification a report explaining how the Secretary plans to evaluate the survivability or the lethality of the system or program and assessing possible alternatives to realistic survivability testing of the system or program.''

Pub. L. 100–180, §802(d)(2), designated existing provisions of former subsec. (d) as par. (2) of subsec. (c) and struck out heading of former subsec. (d) ''Waiver in time of war or mobilization''.

Subsec. (d). Pub. L. 100–180, §802(d)(3), added subsec. (d). Former subsec. (d) redesignated subsec. (c)(2).

Subsec. (e)(1)(B). Pub. L. 100–180, §1231(11), substituted ''section 2302(5)'' for ''section 2303(5)''.

Subsec. (e)(4). Pub. L. 100–180, §802(a)(4)(A), (e), inserted ''(or a covered product improvement program for a covered system)'' after ''covered system'', struck out ''and survivability'' after ''for vulnerability'', and substituted ''susceptibility to attack'' for ''operational requirements''.

Subsec. (e)(5). Pub. L. 100–180, §802(a)(4)(B), inserted ''(or a covered product improvement program for such a program)'' after ''missile program''.

Subsec. (e)(8). Pub. L. 100–180, §802(a)(4)(C), added par. (8).

EFFECTIVE DATE OF 1988 AMENDMENT

Pub. L. 100–456, div. A, title XII, §1233(*l*)(5), Sept. 29, 1988, 102 Stat. 2058, provided that: ''The amendments made by this subsection [amending this section and sections 2435 and 8855 of this title and section 301c of Title 37, Pay and Allowances of the Uniformed Services] shall apply as if included in the enactment of Public Law 100–180.''

EFFECTIVE DATE

Pub. L. 99–500, §101(c) [title X, §910(b)], Oct. 18, 1986, 100 Stat. 1783–82, 1783–145, Pub. L. 99–591, §101(c) [title X, §910(b)], Oct. 30, 1986, 100 Stat. 3341–82, 3341–145, and Pub. L. 99–661, div. A, title IX, formerly title IV, §910(b), Nov. 14, 1986, 100 Stat. 3924, renumbered title IX, Pub. L. 100–26, §3(5), Apr. 21, 1987, 101 Stat. 273, provided that: ''Section 2366 of title 10, United States Code (as added by subsection (a)), shall apply with respect to any decision to proceed with a program beyond low-rate initial production that is made—

''(1) after May 31, 1987, in the case of a decision referred to in subsection (a)(1) or (a)(2) of such section; or

''(2) after the date of the enactment of this Act [Oct. 18, 1986], in the case of a decision referred to in subsection (a)(3) of such section.''

§ 2366a. Major defense acquisition programs: determination required before Milestone A approval

(a) RESPONSIBILITIES.—Before granting Milestone A approval for a major defense acquisition program or a major subprogram, the milestone decision authority for the program or subprogram shall ensure that—

(1) information about the program or subprogram is sufficient to warrant entry of the program or subprogram into the risk reduction phase;

(2) the Secretary of the military department concerned and the Chief of the armed force concerned concur in the cost, schedule, technical feasibility, and performance trade-offs that have been made with regard to the program; and

(3) there are sound plans for progression of the program or subprogram to the development phase.

(b) WRITTEN DETERMINATION REQUIRED.—A major defense acquisition program or subprogram may not receive Milestone A approval or otherwise be initiated prior to Milestone B approval until the milestone decision authority determines in writing, after consultation with the Joint Requirements Oversight Council on matters related to program requirements and military needs—

(1) that the program fulfills an approved initial capabilities document;

(2) that the program has been developed in light of appropriate market research;

(3) if the program duplicates a capability already provided by an existing system, the duplication provided by such program is necessary and appropriate;

(4) that, with respect to any identified areas of risk, including risks determined by the identification of critical technologies required under section 2448b(a)(1) of this title or any other risk assessment, there is a plan to reduce the risk;

(5) that planning for sustainment has been addressed and that a determination of applicability of core logistics capabilities requirements has been made;

(6) that an analysis of alternatives has been performed consistent with study guidance developed by the Director of Cost Assessment and Program Evaluation;

(7) that a cost estimate for the program has been submitted, with the concurrence of the Director of Cost Assessment and Program Evaluation, and that the level of resources required to develop, procure, and sustain the program is sufficient for successful program execution;

(8) that, with respect to a program initiated after January 1, 2019, technology shall be developed in the program (after Milestone A approval) only if the milestone decision authority determines with a high degree of confidence that such development will not delay the fielding target of the program, or, if the milestone decision authority does not make such determination for a major system component being developed under the program, the milestone decision authority ensures that the technology related to the major system component shall be sufficiently matured and demonstrated in a relevant environment (after Milestone A approval) separate from the program using the prototyping authorities in subchapter II of chapter 144B of this title or other authorities, as appropriate, and have an effective plan for adoption or insertion by the relevant program; and

(9) that the program or subprogram meets any other considerations the milestone decision authority considers relevant.

(c) SUBMISSIONS TO CONGRESS ON MILESTONE A.—

(1) BRIEF SUMMARY REPORT.—Not later than 15 days after granting Milestone A approval for a major defense acquisition program, the milestone decision authority for the program shall provide to the congressional defense committees and, in the case of intelligence or intelligence-related activities, the congressional intelligence committees a brief summary report that contains the following elements:

(A) The program cost and fielding targets established under section 2448a(a) of this title.

(B) The estimated cost and schedule for the program established by the military department concerned, including—

(i) the dollar values estimated for the program acquisition unit cost and total life-cycle cost; and

(ii) the planned dates for each program milestone and initial operational capability.

(C) The independent estimated cost for the program established pursuant to section 2334(a)(6) of this title, and any independent estimated schedule for the program, including—

(i) as assessment of the major contributors to the program acquisition unit cost and total life-cycle cost; and

(ii) the planned dates for each program milestone and initial operational capability.

(D) A summary of the technical or manufacturing risks associated with the program, as determined by the military department concerned, including identification of any critical technologies or manufacturing processes that need to be matured.

(E) A summary of the independent technical risk assessment conducted or approved under section 2448b of this title, including identification of any critical technologies or manufacturing processes that need to be matured.

(F) A summary of any sufficiency review conducted by the Director of Cost Assessment and Program Evaluation of the analysis of alternatives performed for the program (as referred to in section 2366a(b)(6) of this title).

(G) Any other information the milestone decision authority considers relevant.

(2) ADDITIONAL INFORMATION.—(A) At the request of any of the congressional defense com-