

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. Exchange 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 and Sustainment, 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 and Sustainment, 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;

(2) comment on deficiencies in the methodology or execution of any cost estimate or cost analysis developed by a military department or Defense Agency for a major defense acquisition program or major subprogram;

(3) concur in the choice of a cost estimate within the baseline description or any other cost estimate (including the discussion of risk for any such cost estimate) for use at any event specified in subsection (a)(6); and

(4) participate in the consideration of any decision to request authorization of a multi-year procurement contract for a major defense acquisition program or major subprogram.

(e) DISCUSSION OF RISK IN COST ESTIMATES.—The Director of Cost Assessment and Program Evaluation, and the Secretary of the military department concerned or the head of the Defense Agency concerned (as applicable), shall each—

(1) issue guidance requiring a discussion of risk, the potential impacts of risk on program costs, and approaches to mitigate risk in cost estimates for major defense acquisition programs and major subprograms;

(2) ensure that cost estimates are developed, to the extent practicable, based on historical actual cost information that is based on demonstrated contractor and Government performance and that such estimates provide a high degree of confidence that the program or subprogram can be completed without the need for significant adjustment to program budgets; and

(3) include the information required in the guidance under paragraph (1)—

(A) in any decision documentation approving a cost estimate within the baseline description or any other cost estimate for use at any event specified in subsection (a)(6); and

(B) in the next Selected Acquisition Report pursuant to section 2432 of this title in the case of a major defense acquisition program or major subprogram, or the next quarterly report pursuant to section 2445c of this title in the case of a major automated information system program.

(f) ESTIMATES FOR PROGRAM BASELINE AND ANALYSES AND TARGETS FOR CONTRACT NEGOTIATION PURPOSES.—(1) The policies, procedures, and guidance issued by the Director of Cost Assessment and Program Evaluation in accordance with the requirements of subsection (a) shall provide that cost estimates developed for baseline descriptions and other program purposes conducted pursuant to subsection (a)(6) are not to be used for the purpose of contract negotiations or the obligation of funds.

(2) The Under Secretary of Defense for Acquisition and Sustainment shall, in consultation with the Director of Cost Assessment and Program Evaluation, develop policies, procedures, and guidance to ensure that cost analyses and targets developed for the purpose of contract negotiations and the obligation of funds are based on the Government's reasonable expectation of successful contractor performance in accordance with the contractor's proposal and previous experience.

(3) The Program Manager and contracting officer for each major defense acquisition program and major subprogram shall ensure that cost analyses and targets developed for the purpose of contract negotiations and the obligation of funds are carried out in accordance with the requirements of paragraph (1) and the policies, procedures, and guidance issued by the Under Secretary of Defense for Acquisition and Sustainment under paragraph (2).

(4) Funds that are made available for a major defense acquisition program or major subprogram in accordance with a cost estimate conducted pursuant to subsection (a)(6), but are excess to a cost analysis or target developed pursuant to paragraph (2), shall remain available for obligation in accordance with the terms of applicable authorization and appropriations Acts.

(5) Funds described in paragraph (4)—

(A) may be used—

(i) to cover any increased program costs identified by a revised cost analysis or target developed pursuant to paragraph (2);

(ii) to acquire additional end items in accordance with the requirements of section 2308 of this title; or

(iii) to cover the cost of risk reduction and process improvements; and

(B) may be reprogrammed, in accordance with established procedures, only if determined to be excess to program needs on the basis of a cost estimate developed with the concurrence of the Director of Cost Assessment and Program Evaluation.

(g) GUIDELINES AND COLLECTION OF COST DATA.—(1) The Director of Cost Assessment and Program Evaluation shall, in consultation with the Under Secretary of Defense for Acquisition and Sustainment, develop policies, procedures, guidance, and a collection method to ensure that quality acquisition cost data are collected to facilitate cost estimation and comparison across acquisition programs.

(2) The program manager and contracting officer for each acquisition program in an amount greater than \$100,000,000, in consultation with the cost estimating component of the relevant military department or Defense Agency, shall ensure that cost data are collected in accordance with the requirements of paragraph (1).

(3) The requirement under paragraph (1) may be waived only by the Director of Cost Assessment and Program Evaluation.

(h) STAFF.—The Secretary of Defense shall ensure that the Director of Cost Assessment and Program Evaluation has sufficient professional staff of military and civilian personnel to enable the Director to carry out the duties and responsibilities of the Director under this section.

(Added Pub. L. 111-23, title I, §101(b)(1), May 22, 2009, 123 Stat. 1706; amended Pub. L. 111-383, div. A, title VIII, §811, Jan. 7, 2011, 124 Stat. 4263; Pub. L. 112-81, div. A, title VIII, §833, Dec. 31, 2011, 125 Stat. 1506; Pub. L. 113-66, div. A, title VIII, §812(c), Dec. 26, 2013, 127 Stat. 808; Pub. L. 114-92, div. A, title VIII, §824(b), title X, §1077(a), Nov. 25, 2015, 129 Stat. 907, 998; Pub. L. 114-328, div. A, title VIII, §§842(a), (b), 846(3), Dec. 23, 2016, 130 Stat. 2288, 2289, 2292; Pub. L. 115-91, div. A, title X, §1081(a)(31), Dec. 12, 2017, 131 Stat. 1596; Pub. L. 116-92, div. A, title IX, §902(53), Dec. 20, 2019, 133 Stat. 1549.)

AMENDMENTS

2019—Pub. L. 116-92 substituted “Under Secretary of Defense for Acquisition and Sustainment” for “Under Secretary of Defense for Acquisition, Technology, and Logistics” wherever appearing.

2017—Subsec. (a)(6)(B). Pub. L. 115-91 inserted semicolon at end.

2016—Subsec. (a)(2). Pub. L. 114-328, §846(3), which directed striking out “or a major automated information system under chapter 144A of this title”, was executed by striking out “or a major automated information system program under chapter 144A of this title” before semicolon at end, to reflect the probable intent of Congress.

Pub. L. 114-328, §842(b)(1), inserted “or major subprogram” before “under chapter 144”.

Subsec. (a)(3). Pub. L. 114-328, §842(a)(1), (b)(2), substituted “discussion of risk” for “selection of confidence levels” in two places and “major defense acquisition programs and major subprograms” for “major defense acquisition programs and major automated information system programs”.

Subsec. (a)(4), (5). Pub. L. 114-328, §842(b)(2), substituted “major defense acquisition programs and major subprograms” for “major defense acquisition

programs and major automated information system programs”.

Subsec. (a)(6). Pub. L. 114-328, §842(a)(2)(A), (B), in introductory provisions, inserted “or approve” after “conduct” and substituted “all major defense acquisition programs and major subprograms—” for “major defense acquisition programs and major automated information system programs for which the Under Secretary of Defense for Acquisition, Technology, and Logistics is the Milestone Decision Authority—”.

Subsec. (a)(6)(B). Pub. L. 114-328, §842(a)(2)(C), substituted “, upon the request of the Under Secretary of Defense for Acquisition, Technology, and Logistics, or upon the request of the milestone decision authority” for “or upon the request of the Under Secretary of Defense for Acquisition, Technology, and Logistics;”.

Subsec. (b). Pub. L. 114-328, §842(a)(4), added subsec. (b). Former subsec. (b) redesignated (c).

Subsec. (c). Pub. L. 114-328, §842(a)(3), redesignated subsec. (b) as (c). Former subsec. (c) redesignated (d).

Subsec. (c)(1). Pub. L. 114-328, §842(b)(2), substituted “major defense acquisition programs and major subprograms” for “major defense acquisition programs and major automated information system programs”.

Subsec. (d). Pub. L. 114-328, §842(a)(3), redesignated subsec. (c) as (d). Former subsec. (d) redesignated (e).

Subsec. (d)(1), (2). Pub. L. 114-328, §842(b)(3), substituted “major defense acquisition program or major subprogram” for “major defense acquisition program or major automated information system program”.

Subsec. (d)(3). Pub. L. 114-328, §842(a)(5), substituted “discussion of risk” for “confidence level”.

Subsec. (d)(4). Pub. L. 114-328, §842(b)(4), inserted “or major subprogram” before period at end.

Subsec. (e). Pub. L. 114-328, §842(a)(3), (6)(A), redesignated subsec. (d) as (e) and substituted “Discussion of Risk in Cost Estimates” for “Disclosure of Confidence Levels for Baseline Estimates of Major Defense Acquisition Programs” in heading. Former subsec. (e) redesignated (f).

Subsec. (e)(1). Pub. L. 114-328, §842(a)(6)(B), amended par. (1) generally. Prior to amendment, par. (1) read as follows: “disclose in accordance with paragraph (3) the confidence level used in establishing a cost estimate for a major defense acquisition program or major automated information system program and the rationale for selecting such confidence level;”.

Subsec. (e)(2). Pub. L. 114-328, §842(a)(6)(C), substituted “cost estimates are developed, to the extent practicable, based on historical actual cost information that is based on demonstrated contractor and Government performance and that such estimates provide” for “such confidence level provides” and inserted “or subprogram” after “the program”.

Subsec. (e)(3). Pub. L. 114-328, §842(a)(6)(D), substituted “information required in the guidance under paragraph (1)” for “disclosure required by paragraph (1)” in introductory provisions.

Subsec. (e)(3)(B). Pub. L. 114-328, §842(b)(5), inserted “or major subprogram” after “major defense acquisition program”.

Subsec. (f). Pub. L. 114-328, §842(a)(3), redesignated subsec. (e) as (f). Former subsec. (f) redesignated (h).

Subsec. (f)(3). Pub. L. 114-328, §842(b)(6), substituted “major defense acquisition program and major subprogram” for “major defense acquisition program and major automated information system program”.

Subsec. (f)(4). Pub. L. 114-328, §842(b)(3), substituted “major defense acquisition program or major subprogram” for “major defense acquisition program or major automated information system program”.

Subsec. (g). Pub. L. 114-328, §842(a)(7), added subsec. (g).

Subsec. (h). Pub. L. 114-328, §842(a)(3), redesignated subsec. (f) as (h).

2015—Subsec. (a)(6)(A)(i). Pub. L. 114-92, §824(b), substituted “any decision to grant milestone approval pursuant to” for “any certification under”.

Subsecs. (f), (g). Pub. L. 114-92, §1077(a), redesignated subsec. (g) as (f) and struck out former subsec. (f) which related to annual report on cost assessment activities.

2013—Subsec. (a)(8). Pub. L. 113-66, §812(c)(1), added par. (8).

Subsec. (f)(1). Pub. L. 113-66, §812(c)(2)(A), substituted “report—” for “report, an assessment of—” in introductory provisions.

Subsec. (f)(1)(A) to (C). Pub. L. 113-66, §812(c)(2)(B), inserted “an assessment of” at beginning of subpars. (A) to (C).

Subsec. (f)(1)(D). Pub. L. 113-66, §812(c)(2)(C)–(E), added subpar. (D).

2011—Subsec. (d)(1). Pub. L. 111-383, §811(1)(A), substituted “paragraph (3)” for “paragraph (2)” and “and the rationale for selecting such confidence level;” for “, the rationale for selecting such confidence level, and, if such confidence level is less than 80 percent, the justification for selecting a confidence level of less than 80 percent; and”.

Subsec. (d)(2), (3). Pub. L. 111-383, §811(1)(B), (C), added par. (2) and redesignated former par. (2) as (3).

Subsec. (e). Pub. L. 111-383, §811(3), added subsec. (e). Former subsec. (e) redesignated (f).

Subsec. (e)(1). Pub. L. 112-81, §833(2)(A), (B), substituted “shall provide that” for “shall provide that—”, struck out subpar. (A) designation before “cost estimates”, and substituted period at end for “; and”.

Subsec. (e)(2). Pub. L. 112-81, §833(3), substituted “The Under Secretary of Defense for Acquisition, Technology, and Logistics shall, in consultation with the Director of Cost Assessment and Program Evaluation, develop policies, procedures, and guidance to ensure that cost analyses and targets” for “cost analyses and targets”.

Pub. L. 112-81, §833(2)(C), redesignated par. (1)(B) as (2) and realigned margin. Former par. (2) redesignated (3).

Subsec. (e)(3). Pub. L. 112-81, §833(4), substituted “issued by the Under Secretary of Defense for Acquisition, Technology, and Logistics under paragraph (2)” for “issued by the Director of Cost Assessment and Program Evaluation”.

Pub. L. 112-81, §833(1), redesignated par. (2) as (3). Former par. (3) redesignated (4).

Subsec. (e)(4). Pub. L. 112-81, §833(1), redesignated par. (3) as (4). Former par. (4) redesignated (5).

Subsec. (e)(5). Pub. L. 112-81, §833(5), substituted “paragraph (4)” for “paragraph (3)” in introductory provisions.

Pub. L. 112-81, §833(1), redesignated par. (4) as (5).

Subsecs. (f), (g). Pub. L. 111-383, §811(2), redesignated subsecs. (e) and (f) as (f) and (g), respectively.

EFFECTIVE DATE OF 2016 AMENDMENT

Pub. L. 114-328, div. A, title VIII, §846, Dec. 23, 2016, 130 Stat. 2292, provided that the amendment made by section 846(3) is effective Sept. 30, 2017.

§ 2335. Prohibition on collection of political information

(a) PROHIBITION ON REQUIRING SUBMISSION OF POLITICAL INFORMATION.—The head of an agency may not require a contractor to submit political information related to the contractor or a subcontractor at any tier, or any partner, officer, director, or employee of the contractor or subcontractor—

(1) as part of a solicitation, request for bid, request for proposal, or any other form of communication designed to solicit offers in connection with the award of a contract for procurement of property or services; or

(2) during the course of contract performance as part of the process associated with modifying a contract or exercising a contract option.

(b) SCOPE.—The prohibition under this section applies to the procurement of commercial prod-