

**§ 2436. Major defense acquisition programs: incentive program for contractors to purchase capital assets manufactured in United States**

(a) ESTABLISHMENT OF INCENTIVE PROGRAM.—The Secretary of Defense shall plan and establish an incentive program in accordance with this section for contractors to purchase capital assets manufactured in the United States in part with funds available to the Department of Defense.

(b) DEFENSE INDUSTRIAL CAPABILITIES FUND MAY BE USED.—The Secretary of Defense may use the Defense Industrial Capabilities Fund, established under section 814 of the National Defense Authorization Act for Fiscal Year 2004, for incentive payments under the program established under this section.

(c) APPLICABILITY TO MAJOR DEFENSE ACQUISITION PROGRAM CONTRACTS.—The incentive program shall apply to contracts for the procurement of a major defense acquisition program.

(d) CONSIDERATION.—The Secretary of Defense shall provide consideration in source selection in any request for proposals for a major defense acquisition program for offerors with eligible capital assets.

(Added Pub. L. 108-136, div. A, title VIII, § 822(a)(1), Nov. 24, 2003, 117 Stat. 1546.)

REFERENCES IN TEXT

Section 814 of the National Defense Authorization Act for Fiscal Year 2004, referred to in subsec. (b), is section 814 of Pub. L. 108-136, which is set out in a note under section 2501 of this title.

PRIOR PROVISIONS

A prior section 2436, added Pub. L. 99-500, § 101(c) [title X, § 905(a)(1)], Oct. 18, 1986, 100 Stat. 1783-82, 1783-134, and Pub. L. 99-591, § 101(c) [title X, § 905(a)(1)], Oct. 30, 1986, 100 Stat. 3341-82, 3341-134; Pub. L. 99-661, div. A, title IX, formerly title IV, § 905(a)(1), Nov. 14, 1986, 100 Stat. 3914; renumbered title IX, Pub. L. 100-26, § 3(5), Apr. 21, 1987, 101 Stat. 273; amended Pub. L. 100-26, § 7(b)(7), Apr. 21, 1987, 101 Stat. 280; Pub. L. 100-180, div. A, title VIII, § 803(c), title XII, § 1231(14), Dec. 4, 1987, 101 Stat. 1125, 1160; Pub. L. 101-510, div. A, title XIV, § 1484(h)(4), Nov. 5, 1990, 104 Stat. 1718, related to establishment and conduct of the defense enterprise program, prior to repeal by Pub. L. 103-160, div. A, title VIII, § 821(a)(5), Nov. 30, 1993, 107 Stat. 1704.

EFFECTIVE DATE

Pub. L. 108-136, div. A, title VIII, § 822(c), Nov. 24, 2003, 117 Stat. 1547, provided that: "Section 2436 of title 10, United States Code, as added by subsection (a), shall apply with respect to contracts entered into after the expiration of the 18-month period beginning on the date of the enactment of this Act [Nov. 24, 2003]."

REGULATIONS

Pub. L. 108-136, div. A, title VIII, § 822(b), Nov. 24, 2003, 117 Stat. 1547, provided that:

"(1) The Secretary of Defense shall prescribe regulations as necessary to carry out section 2436 of title 10, United States Code, as added by this section.

"(2) The Secretary may prescribe interim regulations as necessary to carry out such section. For this purpose, the Secretary is excepted from compliance with the notice and comment requirements of section 553 of title 5, United States Code. All interim rules prescribed under the authority of this paragraph that are not earlier superseded by final rules shall expire no later than 270 days after the effective date of section 2436 of title 10, United States Code [see Effective Date note above], as added by this section."

**§ 2437. Development of major defense acquisition programs: sustainment of system to be replaced**

(a) REQUIREMENT FOR SUSTAINING EXISTING FORCES.—(1) The Secretary of Defense shall require that, whenever a new major defense acquisition program begins development, the defense acquisition authority responsible for that program shall develop a plan (to be known as a "sustainment plan") for the existing system that the system under development is intended to replace. Any such sustainment plan shall provide for an appropriate level of budgeting for sustaining the existing system until the replacement system to be developed under the major defense acquisition program is fielded and assumes the majority of responsibility for the mission of the existing system. This section does not apply to a major defense acquisition that reaches initial operational capability before October 1, 2008.

(2) In this section, the term "defense acquisition authority" means the Secretary of a military department or the commander of the United States Special Operations Command.

(b) SUSTAINMENT PLAN.—The Secretary of Defense shall require that each sustainment plan under this section include, at a minimum, the following:

(1) The milestone schedule for the development of the major defense acquisition program, including the scheduled dates for low-rate initial production, initial operational capability, full-rate production, and full operational capability and the date as of when the replacement system is scheduled to assume the majority of responsibility for the mission of the existing system.

(2) An analysis of the existing system to assess the following:

(A) Anticipated funding levels necessary to—

(i) ensure acceptable reliability and availability rates for the existing system; and

(ii) maintain mission capability of the existing system against the relevant threats.

(B) The extent to which it is necessary and appropriate to—

(i) transfer mature technologies from the new system or other systems to enhance the mission capability of the existing system against relevant threats; and

(ii) provide interoperability with the new system during the period from initial fielding until the new system assumes the majority of responsibility for the mission of the existing system.

(c) EXCEPTIONS.—Subsection (a) shall not apply to a major defense acquisition program if the Secretary of Defense determines that—

(1) the existing system is no longer relevant to the mission;

(2) the mission has been eliminated;

(3) the mission has been consolidated with another mission in such a manner that another existing system can adequately meet the mission requirements; or

(4) the duration of time until the new system assumes the majority of responsibility for the

existing system's mission is sufficiently short so that mission availability, capability, interoperability, and force protection requirements are maintained.

(d) **WAIVER.**—The Secretary of Defense may waive the applicability of subsection (a) to a major defense acquisition program if the Secretary determines that, but for such a waiver, the Department would be unable to meet national security objectives. Whenever the Secretary makes such a determination and authorizes such a waiver, the Secretary shall submit notice of such waiver and of the Secretary's determination and the reasons therefor in writing to the congressional defense committees.

(Added Pub. L. 108-375, div. A, title VIII, § 805(a)(1), Oct. 28, 2004, 118 Stat. 2008.)

#### PRIOR PROVISIONS

A prior section 2437, added Pub. L. 99-500, § 101(c) [title X, § 906(a)(1)], Oct. 18, 1986, 100 Stat. 1783-82, 1783-135, and Pub. L. 99-591, § 101(c) [title X, § 906(a)(1)], Oct. 30, 1986, 100 Stat. 3341-82, 3341-135; Pub. L. 99-661, div. A, title IX, formerly title IV, § 906(a)(1), Nov. 14, 1986, 100 Stat. 3915; renumbered title IX, Pub. L. 100-26, § 3(5), Apr. 21, 1987, 101 Stat. 273; amended Pub. L. 100-26, § 7(b)(8), Apr. 21, 1987, 101 Stat. 280; Pub. L. 100-180, div. A, title VIII, § 803(b), Dec. 4, 1987, 101 Stat. 1125; Pub. L. 100-224, § 5(a)(3), Dec. 30, 1987, 101 Stat. 1538, related to designation of defense enterprise programs for milestone authorization, prior to repeal by Pub. L. 103-160, div. A, title VIII, § 821(a)(5), Nov. 30, 1993, 107 Stat. 1704.

#### EFFECTIVE DATE

Pub. L. 108-375, div. A, title VIII, § 805(b), Oct. 28, 2004, 118 Stat. 2009, provided that: "Section 2437 of title 10, United States Code, as added by subsection (a), shall apply with respect to a major defense acquisition program for a system that is under development as of the date of the enactment of this Act [Oct. 28, 2004] and is not expected to reach initial operational capability before October 1, 2008. The Secretary of Defense shall require that a sustainment plan under that section be developed not later than one year after the date of the enactment of this Act for the existing system that the system under development is intended to replace."

### § 2438. Performance assessments and root cause analyses

(a) **DESIGNATION OF SENIOR OFFICIAL RESPONSIBILITY FOR PERFORMANCE ASSESSMENTS AND ROOT CAUSE ANALYSES.**—

(1) **IN GENERAL.**—The Secretary of Defense shall designate a senior official in the Office of the Secretary of Defense as the principal official of the Department of Defense responsible for conducting and overseeing performance assessments and root cause analyses for major defense acquisition programs.

(2) **NO PROGRAM EXECUTION RESPONSIBILITY.**—The Secretary shall ensure that the senior official designated under paragraph (1) is not responsible for program execution.

(3) **STAFF AND RESOURCES.**—The Secretary shall assign to the senior official designated under paragraph (1) appropriate staff and resources necessary to carry out the senior official's function under this section.

(b) **RESPONSIBILITIES.**—The senior official designated under subsection (a) shall be responsible for the following:

(1) Carrying out performance assessments of major defense acquisition programs in accord-

ance with the requirements of subsection (c) periodically or when requested by the Secretary of Defense, the Under Secretary of Defense for Acquisition and Sustainment, the Secretary of a military department, or the head of a Defense Agency.

(2) Conducting root cause analyses for major defense acquisition programs in accordance with the requirements of subsection (d) when required by section 2433a(a)(1) of this title, or when requested by the Secretary of Defense, the Under Secretary of Defense for Acquisition and Sustainment, the Secretary of a military department, or the head of a Defense Agency.

(3) Issuing policies, procedures, and guidance governing the conduct of performance assessments and root cause analyses by the military departments and the Defense Agencies.

(4) Evaluating the utility of performance metrics used to measure the cost, schedule, and performance of major defense acquisition programs, and making such recommendations to the Secretary of Defense as the official considers appropriate to improve such metrics.

(5) Advising acquisition officials on performance issues regarding a major defense acquisition program that may arise—

(A) before certification under section 2433a of this title;

(B) before entry into full-rate production;

or

(C) in the course of consideration of any decision to request authorization of a multi-year procurement contract for the program.

(c) **PERFORMANCE ASSESSMENTS.**—For purposes of this section, a performance assessment with respect to a major defense acquisition program is an evaluation of the following:

(1) The cost, schedule, and performance of the program, relative to current metrics, including performance requirements and baseline descriptions.

(2) The extent to which the level of program cost, schedule, and performance predicted relative to such metrics is likely to result in the timely delivery of a level of capability to the warfighter that is consistent with the level of resources to be expended and provides superior value to alternative approaches that may be available to meet the same military requirement.

(d) **ROOT CAUSE ANALYSES.**—For purposes of this section and section 2433a of this title, a root cause analysis with respect to a major defense acquisition program is an assessment of the underlying cause or causes of shortcomings in cost, schedule, or performance of the program, including the role, if any, of—

(1) unrealistic performance expectations;

(2) unrealistic baseline estimates for cost or schedule;

(3) immature technologies or excessive manufacturing or integration risk;

(4) unanticipated design, engineering, manufacturing, or technology integration issues arising during program performance;

(5) changes in procurement quantities;

(6) inadequate program funding or funding instability;

(7) poor performance by government or contractor personnel responsible for program management; or