

“(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”.

Subsec. (b)(1). Pub. L. 107-107, § 1048(c)(11), substituted “October 30, 2000,” for “the date of the enactment of this section.”

§ 2462. Repealed. Pub. L. 113-291, div. A, title X, § 1060(a)(2)(A), Dec. 19, 2014, 128 Stat. 3502]

Section, added Pub. L. 100-370, § 2(a)(1), July 19, 1988, 102 Stat. 853; amended Pub. L. 109-163, div. A, title III, § 341(c)(1), Jan. 6, 2006, 119 Stat. 3197, related to reports on public-private competition.

§ 2463. Guidelines and procedures for use of civilian employees to perform Department of Defense functions

(a) **GUIDELINES REQUIRED.**—(1) The Under Secretary of Defense for Personnel and Readiness shall devise and implement guidelines and procedures to ensure that consideration is given to using, on a regular basis, Department of Defense civilian employees to perform new functions and functions that are performed by contractors and could be performed by Department of Defense civilian employees. The Secretary of a military department may prescribe supplemental regulations, if the Secretary determines such regulations are necessary for implementing such guidelines within that military department.

(2) The guidelines and procedures required under paragraph (1) may not include any specific limitation or restriction on the number of functions or activities that may be converted to performance by Department of Defense civilian employees.

(b) **SPECIAL CONSIDERATION FOR CERTAIN FUNCTIONS.**—The guidelines and procedures required under subsection (a) shall provide for special consideration to be given to using Department of Defense civilian employees to perform any function that—

(1) is performed by a contractor and—

(A) is a critical function that—

(i) is necessary to maintain sufficient Government expertise and technical capabilities; or

(ii) entails operational risk associated with contractor performance;

(B) is an acquisition workforce function;

(C) is a function closely associated with the performance of an inherently governmental function;

(D) has been performed by Department of Defense civilian employees at any time during the previous 10-year period;

(E) has been performed pursuant to a contract awarded on a non-competitive basis; or

(F) has been performed poorly, as determined by a contracting officer during the 5-year period preceding the date of such determination, because of excessive costs or inferior quality; or

(2) is a new requirement, with particular emphasis given to a new requirement that is similar to a function previously performed by Department of Defense civilian employees or is a function closely associated with the performance of an inherently governmental function.

(c) **EXCLUSION OF CERTAIN FUNCTIONS FROM COMPETITIONS.**—The Secretary of Defense may not conduct a public-private competition under this chapter, Office of Management and Budget Circular A-76, or any other provision of law or regulation before—

(1) in the case of a new Department of Defense function, assigning the performance of the function to Department of Defense civilian employees;

(2) in the case of any Department of Defense function described in subsection (b), converting the function to performance by Department of Defense civilian employees; or

(3) in the case of a Department of Defense function performed by Department of Defense civilian employees, expanding the scope of the function.

(d) **USE OF FLEXIBLE HIRING AUTHORITY.**—(1) The Secretary of Defense may use the flexible hiring authority available to the Secretary pursuant to section 9902 of title 5, to facilitate the performance by Department of Defense civilian employees of functions described in subsection (b).

(2) The Secretary shall make use of the inventory required by section 2330a(c) of this title for the purpose of identifying functions that should be considered for performance by Department of Defense civilian employees pursuant to subsection (b).

(e) **DETERMINATIONS RELATING TO THE CONVERSION OF CERTAIN FUNCTIONS.**—(1) Except as provided in paragraph (2), in determining whether a function should be converted to performance by Department of Defense civilian employees, the Secretary of Defense shall—

(A) develop methodology for determining costs based on the guidance outlined in the Directive-Type Memorandum 09-007 entitled “Estimating and Comparing the Full Costs of Civilian and Military Manpower and Contractor Support” or any successor guidance for the determination of costs when costs are the sole basis for the determination;

(B) take into consideration any supplemental guidance issued by the Secretary of a military department for determinations affecting functions of that military department; and

(C) ensure that the difference in the cost of performing the function by a contractor compared to the cost of performing the function by Department of Defense civilian employees would be equal to or exceed the lesser of—

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

(ii) \$10,000,000.

(2) Paragraph (1) shall not apply to any function that is inherently governmental or any function described in subparagraph (A), (B), or (C) of subsection (b)(1).

(f) **NOTIFICATION RELATING TO THE CONVERSION OF CERTAIN FUNCTIONS.**—The Secretary of Defense shall establish procedures for the timely notification of any contractor who performs a function that the Secretary plans to convert to performance by Department of Defense civilian employees pursuant to subsection (a). The Secretary shall provide a copy of any such notification to the congressional defense committees.

(g) **DEFINITIONS.**—In this section:

(1) The term “functions closely associated with inherently governmental functions” has the meaning given that term in section 2383(b)(3) of this title.

(2) The term “acquisition function” has the meaning given that term under section 1721(a) of this title.

(3) The term “inherently governmental function” has the meaning given that term in the Federal Activities Inventory Reform Act of 1998 (Public Law 105-270; 31 U.S.C. 501 note).

(Added Pub. L. 110-181, div. A, title III, §324(a)(1), Jan. 28, 2008, 122 Stat. 60; amended