

§8105(f), Oct. 13, 1994, 108 Stat. 3392, related to requirements for defense contractors concerning former Department of Defense officials.

EFFECTIVE DATE OF REPEAL

For effective date and applicability of repeal, see section 4401 of Pub. L. 104-106, set out as an Effective Date of 1996 Amendment note under section 2302 of this title.

[§ 2398. Renumbered § 2922c]

[§ 2398a. Renumbered § 2922d]

**§ 2399. Operational test and evaluation of defense acquisition programs**

(a) **CONDITION FOR PROCEEDING BEYOND LOW-RATE INITIAL PRODUCTION.**—(1) The Secretary of Defense shall provide that a covered major defense acquisition program, a covered designated major subprogram, or an element of the ballistic missile defense system may not proceed beyond low-rate initial production until initial operational test and evaluation of the program, subprogram, or element is completed.

(2) In this subsection:

(A) The term “covered major defense acquisition program” means a major defense acquisition program that involves the acquisition of a weapon system that is a major system within the meaning of that term in section 2302(5) of this title.

(B) The term “covered designated major subprogram” means a major subprogram designated under section 2430a(a)(1) of this title that is a major subprogram of a covered major defense acquisition program.

(b) **OPERATIONAL TEST AND EVALUATION.**—(1) Operational testing of a major defense acquisition program may not be conducted until the Director of Operational Test and Evaluation of the Department of Defense approves (in writing) the adequacy of the plans (including the projected level of funding) for operational test and evaluation to be conducted in connection with that program.

(2) The Director shall analyze the results of the operational test and evaluation conducted for each major defense acquisition program. At the conclusion of such testing, the Director shall prepare a report stating—

(A) the opinion of the Director as to—

(i) whether the test and evaluation performed were adequate; and

(ii) whether the results of such test and evaluation confirm that the items or components actually tested are effective and suitable for combat; and

(B) additional information on the operational capabilities of the items or components that the Director considers appropriate based on the testing conducted.

(3) The Director shall submit each report under paragraph (2) to the Secretary of Defense, the Under Secretary of Defense for Acquisition and Sustainment, the Under Secretary of Defense for Research and Engineering, and the congressional defense committees. Each such report shall be submitted to those committees in precisely the same form and with precisely the same content as the report originally was sub-

mitted to the Secretary and Under Secretary and shall be accompanied by such comments as the Secretary may wish to make on the report.

(4) A final decision within the Department of Defense to proceed with a major defense acquisition program beyond low-rate initial production may not be made until the Director has submitted to the Secretary of Defense the report with respect to that program under paragraph (2) and the congressional defense committees have received that report.

(5) If, before a final decision described in paragraph (4) is made for a major defense acquisition program, a decision is made within the Department of Defense to proceed to operational use of that program or to make procurement funds available for that program, the Director shall submit to the Secretary of Defense and the congressional defense committees the report with respect to that program under paragraph (2) as soon as practicable after the decision described in this paragraph is made.

(6) In this subsection, the term “major defense acquisition program” has the meaning given that term in section 139(a)(2)(B) of this title.

(c) **DETERMINATION OF QUANTITY OF ARTICLES REQUIRED FOR OPERATIONAL TESTING.**—The quantity of articles of a new system that are to be procured for operational testing shall be determined by—

(1) the Director of Operational Test and Evaluation of the Department of Defense, in the case of a new system that is a major defense acquisition program (as defined in section 139(a)(2)(B) of this title); or

(2) the operational test and evaluation agency of the military department concerned, in the case of a new system that is not a major defense acquisition program.

(d) **IMPARTIALITY OF CONTRACTOR TESTING PERSONNEL.**—In the case of a major defense acquisition program (as defined in subsection (a)(2)), 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.

(e) **IMPARTIAL CONTRACTED ADVISORY AND ASSISTANCE SERVICES.**—(1) The Director may not contract with any person for advisory and assistance services with regard to the test and evaluation of a system if that person participated in (or is participating in) the development, production, or testing of such system for a military department or Defense Agency (or for another contractor of the Department of Defense).

(2) The Director may waive the limitation under paragraph (1) in any case if the Director determines in writing that sufficient steps have been taken to ensure the impartiality of the contractor in providing the services. The Inspector General of the Department of Defense shall review each such waiver and shall include in the Inspector General’s semi-annual report an assessment of those waivers made since the last such report.

(3)(A) A contractor that has participated in (or is participating in) the development, production, or testing of a system for a military department or Defense Agency (or for another contractor of the Department of Defense) may not be involved (in any way) in the establishment of criteria for data collection, performance assessment, or evaluation activities for the operational test and evaluation.

(B) The limitation in subparagraph (A) does not apply to a contractor that has participated in such development, production, or testing solely in testing for the Federal Government.

(f) SOURCE OF FUNDS FOR TESTING.—The costs for all tests required under subsection (a) shall be paid from funds available for the system being tested.

(g) DIRECTOR'S ANNUAL REPORT.—As part of the annual report of the Director under section 139 of this title, the Director shall describe for each program covered in the report the status of test and evaluation activities in comparison with the test and evaluation master plan for that program, as approved by the Director. The Director shall include in such annual report a description of each waiver granted under subsection (e)(2) since the last such report.

(h) OPERATIONAL TEST AND EVALUATION DEFINED.—In this section, the term “operational test and evaluation” has the meaning given that term in section 139(a)(2)(A) of this title. For purposes of subsection (a), that term does not include an operational assessment based exclusively on—

- (1) computer modeling;
- (2) simulation; or

(3) an analysis of system requirements, engineering proposals, design specifications, or any other information contained in program documents.

(Added Pub. L. 101-189, div. A, title VIII, § 802(a)(1), Nov. 29, 1989, 103 Stat. 1484; amended Pub. L. 102-484, div. A, title VIII, § 819, Oct. 23, 1992, 106 Stat. 2458; Pub. L. 103-160, div. A, title IX, § 904(d)(1), Nov. 30, 1993, 107 Stat. 1728; Pub. L. 103-337, div. A, title X, § 1070(a)(11), (f), Oct. 5, 1994, 108 Stat. 2856, 2859; Pub. L. 104-106, div. A, title XV, § 1502(a)(19), 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 X, § 1048(b)(2), Dec. 28, 2001, 115 Stat. 1225; Pub. L. 107-314, div. A, title X, § 1062(a)(9), Dec. 2, 2002, 116 Stat. 2650; Pub. L. 108-136, div. A, title X, § 1043(b)(14), Nov. 24, 2003, 117 Stat. 1611; Pub. L. 109-364, div. A, title II, § 231(a), Oct. 17, 2006, 120 Stat. 2131; Pub. L. 111-383, div. A, title VIII, § 814(d), Jan. 7, 2011, 124 Stat. 4267; Pub. L. 115-91, div. A, title XVI, § 1677(a), Dec. 12, 2017, 131 Stat. 1774; Pub. L. 116-92, div. A, title IX, § 902(62), Dec. 20, 2019, 133 Stat. 1550.)

#### TRANSFER OF SECTION

*Pub. L. 116-283, div. A, title XVIII, §§ 1801(d), 1845(b), Jan. 1, 2021, 134 Stat. 4151, 4247, provided that, effective Jan. 1, 2022, with additional provisions for delayed implementation and applicability of existing law, this section is transferred to chapter 309 of this title, as amended by section 1845(a) of Pub. L. 116-283, inserted after the table of sections, and redesignated as section 4171 of this title. See Effective Date of 2021 Amendment note below.*

#### PRIOR PROVISIONS

A prior section 2399, added Pub. L. 97-295, § 1(29)(A), Oct. 12, 1982, 96 Stat. 1293, which related to limitation on availability of appropriations to reimburse a contractor for the cost of commercial insurance, was repealed by Pub. L. 100-370, § 1(f)(2)(B), July 19, 1988, 102 Stat. 846, and was restated in section 2324(e)(1)(L) of this title by section 1(f)(2)(A) of Pub. L. 100-370.

#### AMENDMENTS

2019—Subsec. (b)(3). Pub. L. 116-92 substituted “Under Secretary of Defense for Acquisition and Sustainment, the Under Secretary of Defense for Research and Engineering,” for “Under Secretary of Defense for Acquisition, Technology, and Logistics.”

2017—Subsec. (a)(1). Pub. L. 115-91 substituted “, a covered designated major subprogram, or an element of the ballistic missile defense system” for “or a covered designated major subprogram” and “program, subprogram, or element” for “program or subprogram”.

2011—Subsec. (a). Pub. L. 111-383 amended subsec. (a) generally. Prior to amendment, text read as follows:

“(1) The Secretary of Defense shall provide that a major defense acquisition program may not proceed beyond low-rate initial production until initial operational test and evaluation of the program is completed.

“(2) In this subsection, the term ‘major defense acquisition program’ means a conventional weapons system that—

“(A) is a major system within the meaning of that term in section 2302(5) of this title; and

“(B) is designed for use in combat.”

2006—Subsec. (b)(2). Pub. L. 109-364, § 231(a)(1), amended par. (2) generally. Prior to amendment, par. (2) read as follows: “The Director shall analyze the results of the operational test and evaluation conducted for each major defense acquisition program. At the conclusion of such testing, the Director shall prepare a report stating the opinion of the Director as to—

“(A) whether the test and evaluation performed were adequate; and

“(B) whether the results of such test and evaluation confirm that the items or components actually tested are effective and suitable for combat.”

Subsec. (b)(5), (6). Pub. L. 109-364, § 231(a)(2), (3), added par. (5) and redesignated former par. (5) as (6).

2003—Subsec. (h). Pub. L. 108-136 substituted “Operational Test and Evaluation Defined” for “Definitions” in heading, struck out introductory provisions which read “In this section:”, substituted “In this section, the term” for “(1) The term”, redesignated subpars. (A) to (C) of former par. (1) as pars. (1) to (3), respectively, realigned margins, and struck out former par. (2) which defined “congressional defense committees” to mean the Committees on Armed Services and Appropriations of the Senate and the House of Representatives.

2002—Subsec. (a)(2). Pub. L. 107-314 substituted “means a conventional weapons system that” for “means” in introductory provisions and struck out “a conventional weapons system that” before “is a major system” in subpar. (A).

2001—Subsec. (b)(3). Pub. L. 107-107 substituted “Under Secretary of Defense for Acquisition, Technology, and Logistics” for “Under Secretary of Defense for Acquisition and Technology”.

1999—Subsec. (h)(2)(B). Pub. L. 106-65 substituted “Committee on Armed Services” for “Committee on National Security”.

1996—Subsec. (h)(2). Pub. L. 104-106 substituted “means—” and subpars. (A) and (B) for “means the Committees on Armed Services and the Committees on Appropriations of the Senate and House of Representatives.”

1994—Subsecs. (b)(5), (c)(1). Pub. L. 103-337, § 1070(a)(11)(A), substituted “139(a)(2)(B)” for “138(a)(2)(B)”.

Subsec. (e)(3)(B). Pub. L. 103-337, § 1070(f), substituted “solely in testing for” for “solely as a representative of”.

Subsec. (g). Pub. L. 103-337, §1070(a)(11)(B), substituted “139” for “138”.

Subsec. (h)(1). Pub. L. 103-337, §1070(a)(11)(C), substituted “139(a)(2)(A)” for “138(a)(2)(A)”.

1993—Subsec. (b)(3). Pub. L. 103-160 substituted “Under Secretary of Defense for Acquisition and Technology” for “Under Secretary of Defense for Acquisition”.

1992—Subsec. (e)(3). Pub. L. 102-484 designated existing provisions as subpar. (A) and added subpar. (B).

#### EFFECTIVE DATE OF 2021 AMENDMENT

Amendment by Pub. L. 116-283 effective Jan. 1, 2022, with additional provisions for delayed implementation and applicability of existing law, see section 1801(d) of Pub. L. 116-283, set out as a note preceding section 3001 of this title.

#### TERMINATION OF REPORTING REQUIREMENTS

For termination, effective Dec. 31, 2021, of provisions in subsec. (g) of this section requiring submittal of annual report to Congress, see section 1061 of Pub. L. 114-328, set out as a note under section 111 of this title.

#### ENHANCEMENTS TO TRANSPARENCY IN TEST AND EVALUATION PROCESSES AND DATA

Pub. L. 115-91, div. A, title VIII, §839, Dec. 12, 2017, 131 Stat. 1475, provided that:

“(a) ADDITIONAL TEST AND EVALUATION DUTIES OF MILITARY SECRETARIES AND DEFENSE AGENCY HEADS.—

“(1) REPORT ON COMPARISON OF OPERATIONAL TEST AND EVALUATION RESULTS TO LEGACY ITEMS OR COMPONENTS.—Concurrent with the submission of a report required under section 2399(b)(2) of title 10, United States Code, the Secretary of a military department or the head of a Defense Agency may provide to the congressional defense committees [Committees on Armed Services and Appropriations of the Senate and the House of Representatives] and the Secretary of Defense a report describing of the performance of the items or components evaluated as part of the operational test and evaluation for each major defense acquisition program conducted under such section by the Director of Operational Test and Evaluation in relation to comparable legacy items or components, if such items or components exist and relevant data are available without requiring additional testing.

“(2) ADDITIONAL REPORT ON OPERATIONAL TEST AND EVALUATION ACTIVITIES.—Within 45 days after the submission of an annual report required by section 139(h) of title 10, United States Code, the Secretaries of the military departments may each submit to the congressional defense committees a report addressing any concerns related to information included in the annual report, or providing updated or additional information, as appropriate.

“(b) REQUIREMENTS FOR COLLECTION OF COST DATA ON TEST AND EVALUATION.—

“(1) IN GENERAL.—Not later than one year after the date of the enactment of this Act [Dec. 12, 2017] and subject to paragraph (2), the Director of Operational Test and Evaluation, the senior official of the Department of Defense with responsibility for developmental testing, and the Director of the Test Resource Management Center shall jointly develop policies, procedures, guidance, and a method to collect data that ensures that consistent and high quality data are collected on the full range of estimated and actual developmental, live fire, and operational testing costs for major defense acquisition programs.

“(2) CONCURRENCE AND COORDINATION REQUIRED.—Before implementing the policies, procedures, guidance, and method developed under paragraph (1), the Director of Operational Test and Evaluation, the senior official of the Department of Defense with responsibility for developmental testing, and the Director of the Test Resource Management Center shall—

“(A) obtain the concurrence of the Director for Cost Assessment and Program Evaluation; and

“(B) coordinate with the Secretaries of the military departments.

“(3) DATA REQUIREMENTS.—

“(A) ELECTRONIC DATABASE.—Data on estimated and actual developmental, live fire, and operational testing costs shall be maintained in an electronic database maintained by the Director for Cost Assessment and Program Evaluation or another appropriate official of the Department of Defense, and shall be made available for analysis by testing, acquisition, and other appropriate officials of the Department of Defense, as determined by the Director of Operational Test and Evaluation, the senior official of the Department of Defense with responsibility for developmental testing, or the Director of the Test Resource Management Center.

“(B) DIAGGREGATION [sic] BY COSTS.—To the maximum extent practicable, data collected under this subsection shall be set forth separately by costs for developmental testing, operational testing, and training.

“(c) MAJOR DEFENSE ACQUISITION PROGRAM DEFINED.—In this section, the term ‘major defense acquisition program’ has the meaning provided in section 2430 of title 10, United States Code.’”

#### ASSESSMENT OF RISK IN CONCURRENT DEVELOPMENT OF MAJOR DEFENSE ACQUISITION SYSTEMS

Pub. L. 101-189, div. A, title VIII, §801, Nov. 29, 1989, 103 Stat. 1483, which related to the assessment of risk in concurrent development of major defense acquisition systems and establishment of guidelines, was repealed by Pub. L. 115-232, div. A, title VIII, §812(b)(33), Aug. 13, 2018, 132 Stat. 1849.

#### § 2400. Low-rate initial production of new systems

(a) DETERMINATION OF QUANTITIES TO BE PROCURED FOR LOW-RATE INITIAL PRODUCTION.—(1) In the course of the development of a major system, the determination of what quantity of articles of that system should be procured for low-rate initial production (including the quantity to be procured for preproduction verification articles) shall be made—

(A) when the milestone B decision with respect to that system is made; and

(B) by the official of the Department of Defense who makes that decision.

(2) In this section, the term “milestone B decision” means the decision to approve the system development and demonstration of a major system by the official of the Department of Defense designated to have the authority to make that decision.

(3) Any increase from a quantity determined under paragraph (1) may only be made with the approval of the official making the determination.

(4) The quantity of articles of a major system that may be procured for low-rate initial production may not be less than one operationally configured production unit unless another quantity is established at the milestone B decision.

(5) The Secretary of Defense shall include a statement of the quantity determined under paragraph (1) in the first SAR submitted with respect to the program concerned after that quantity is determined. If the quantity exceeds 10 percent of the total number of articles to be produced, as determined at the milestone B decision with respect to that system, the Secretary shall include in the statement the reasons for such quantity. For purposes of this paragraph,