

provide an actual count. The report shall fully disclose the extent to which estimates are used in lieu of an actual count.

“SEC. 864. DEFINITIONS AND OTHER GENERAL PROVISIONS.

“(a) DEFINITIONS.—In this subtitle:

“(1) MATTERS RELATING TO CONTRACTING.—The term ‘matters relating to contracting’, with respect to contracts in Iraq and Afghanistan, means all matters relating to awarding, funding, managing, tracking, monitoring, and providing oversight to contracts and contractor personnel.

“(2) CONTRACT IN IRAQ OR AFGHANISTAN.—The term ‘contract in Iraq or Afghanistan’ means a contract with the Department of Defense, the Department of State, or the United States Agency for International Development, a subcontract at any tier issued under such a contract, a task order or delivery order at any tier issued under such a contract, a grant, or a cooperative agreement (including a contract, subcontract, task order, delivery order, grant, or cooperative agreement issued by another Government agency for the Department of Defense, the Department of State, or the United States Agency for International Development), if the contract, subcontract, task order, delivery order, grant, or cooperative agreement involves work [sic] performed in Iraq or Afghanistan for a period longer than 30 days.

“(3) COVERED CONTRACT.—The term ‘covered contract’ means—

“(A) a contract of a Federal agency for the performance of services in an area of combat operations, as designated by the Secretary of Defense under subsection (c) of section 862;

“(B) a subcontract at any tier under such a contract;

“(C) a task order or delivery order issued under such a contract or subcontract;

“(D) a grant for the performance of services in an area of combat operations, as designated by the Secretary of Defense under subsection (c) of section 862; or

“(E) a cooperative agreement for the performance of services in such an area of combat operations.

“(4) CONTRACTOR.—The term ‘contractor’, with respect to a covered contract, means—

“(A) in the case of a covered contract that is a contract, subcontract, task order, or delivery order, the contractor or subcontractor carrying out the covered contract;

“(B) in the case of a covered contract that is a grant, the grantee; and

“(C) in the case of a covered contract that is a cooperative agreement, the recipient.

“(5) CONTRACTOR PERSONNEL.—The term ‘contractor personnel’ means any person performing work under contract for the Department of Defense, the Department of State, or the United States Agency for International Development, in Iraq or Afghanistan, including individuals and subcontractors at any tier.

“(6) PRIVATE SECURITY FUNCTIONS.—The term ‘private security functions’ means activities engaged in by a contractor under a covered contract as follows:

“(A) Guarding of personnel, facilities, or property of a Federal agency, the contractor or subcontractor, or a third party.

“(B) Any other activity for which personnel are required to carry weapons in the performance of their duties.

“(7) RELEVANT COMMITTEES OF CONGRESS.—The term ‘relevant committees of Congress’ means each of the following committees:

“(A) The Committees on Armed Services of the Senate and the House of Representatives.

“(B) The Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Oversight and Government Reform of the House of Representatives.

“(C) The Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives.

“(D) For purposes of contracts relating to the National Foreign Intelligence Program, the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives.

“(b) CLASSIFIED INFORMATION.—Nothing in this subtitle shall be interpreted to require the handling of classified information or information relating to intelligence sources and methods in a manner inconsistent with any law, regulation, executive order, or rule of the House of Representatives or of the Senate relating to the handling or protection of such information.”

CHAPTER 341—ACQUISITION OF SERVICES GENERALLY

- Sec.
4501. Procurement of contract services: management structure.
4502. Procurement of contract services: senior officials responsible for management of acquisition of contract services.
4503. [Reserved].
4504. [Reserved].
4505. Procurement of services: tracking of purchases.
4506. Procurement of services: data analysis and requirements validation.
4507. Procurement of services: contracts for professional and technical services.
4508. Contractor performance of acquisition functions closely associated with inherently governmental functions.
4509. Contracts for advisory and assistance services: cost comparison studies.

Editorial Notes

PRIOR PROVISIONS

A prior chapter 341 “CONTRACTING FOR PERFORMANCE OF CIVILIAN COMMERCIAL OR INDUSTRIAL TYPE FUNCTIONS”, consisting of reserved section 4501, was repealed by Pub. L. 116-283, div. A, title XVIII, §1856(b), Jan. 1, 2021, 134 Stat. 4273.

Another prior chapter 341 was renumbered chapter 721 of this title.

Statutory Notes and Related Subsidiaries

CONTRACTS FOR STUDIES, ANALYSIS, OR CONSULTING SERVICES ENTERED INTO WITHOUT COMPETITION ON THE BASIS OF AN UNSOLICITED PROPOSAL

Pub. L. 114-113, div. C, title VIII, §8039, Dec. 18, 2015, 129 Stat. 2359, provided that:

“None of the funds appropriated by this Act [div. C of Pub. L. 114-113, see Tables for classification] and hereafter shall be available for a contract for studies, analysis, or consulting services entered into without competition on the basis of an unsolicited proposal unless the head of the activity responsible for the procurement determines—

“(1) as a result of thorough technical evaluation, only one source is found fully qualified to perform the proposed work;

“(2) the purpose of the contract is to explore an unsolicited proposal which offers significant scientific or technological promise, represents the product of original thinking, and was submitted in confidence by one source; or

“(3) the purpose of the contract is to take advantage of unique and significant industrial accomplishment by a specific concern, or to insure that a new product or idea of a specific concern is given financial support: *Provided*, That this limitation shall not apply to contracts in an amount of less than \$25,000, contracts related to improvements of equipment that is in development or production, or contracts as to which a civilian official of the Department of Defense, who has been confirmed by the Senate, deter-

mines that the award of such contract is in the interest of the national defense.”

COMPETITION FOR RELIGIOUS SERVICES CONTRACTS

Pub. L. 114-92, div. A, title VIII, §898, Nov. 25, 2015, 129 Stat. 955, provided that: “The Department of Defense may not preclude a non-profit organization from competing for a contract for religious related services on a United States military installation.”

REQUIREMENTS FOR RISK ASSESSMENTS RELATED TO CONTRACTOR PERFORMANCE

Pub. L. 112-239, div. A, title VIII, §846, Jan. 2, 2013, 126 Stat. 1848, provided that:

“(a) RISK ASSESSMENTS FOR CONTRACTOR PERFORMANCE IN OPERATIONAL OR CONTINGENCY PLANS.—The Secretary of Defense shall require that a risk assessment on reliance on contractors be included in operational or contingency plans developed by a commander of a combatant command in executing the responsibilities prescribed in section 164 of title 10, United States Code. Such risk assessments shall address, at a minimum, the potential risks listed in subsection (c).

“(b) COMPREHENSIVE RISK ASSESSMENTS AND MITIGATION PLANS FOR CONTRACTOR PERFORMANCE IN SUPPORT OF OVERSEAS CONTINGENCY OPERATIONS.—

“(1) IN GENERAL.—Subject to paragraphs (2) and (3), not later than six months after the commencement or designation of a contingency operation outside the United States that includes or is expected to include combat operations, the head of each covered agency shall perform a comprehensive risk assessment and develop a risk mitigation plan for operational and political risks associated with contractor performance of critical functions in support of the operation for such covered agency.

“(2) EXCEPTIONS.—Except as provided in paragraph (3), a risk assessment and risk mitigation plan shall not be required under paragraph (1) for an overseas contingency operation if—

“(A) the operation is not expected to continue for more than one year; and

“(B) the total amount of obligations for contracts for support of the operation for the covered agency is not expected to exceed \$250,000,000.

“(3) TERMINATION OF EXCEPTIONS.—Notwithstanding paragraph (2), the head of a covered agency shall perform a risk assessment and develop a risk mitigation plan under paragraph (1) for an overseas contingency operation with regard to which a risk assessment and risk mitigation plan has not previously been performed under paragraph (1) not later than 60 days after the date on which—

“(A) the operation has continued for more than one year; or

“(B) the total amount of obligations for contracts for support of the operation for the covered agency exceeds \$250,000,000.

“(c) COMPREHENSIVE RISK ASSESSMENTS.—A comprehensive risk assessment under subsection (b) shall consider, at a minimum, risks relating to the following:

“(1) The goals and objectives of the operation (such as risks from contractor behavior or performance that may injure innocent members of the local population or offend their sensibilities).

“(2) The continuity of the operation (such as risks from contractors refusing to perform or being unable to perform when there may be no timely replacements available).

“(3) The safety of military and civilian personnel of the United States if the presence or performance of contractor personnel creates unsafe conditions or invites attack.

“(4) The safety of contractor personnel employed by the covered agency.

“(5) The managerial control of the Government over the operation (such as risks from over-reliance on contractors to monitor other contractors or inad-

equately means for Government personnel to monitor contractor performance).

“(6) The critical organic or core capabilities of the Government, including critical knowledge or institutional memory of key operations areas and subject-matter expertise.

“(7) The ability of the Government to control costs, avoid organizational or personal conflicts of interest, and minimize waste, fraud, and abuse.

“(d) RISK MITIGATION PLANS.—A risk mitigation plan under subsection (b) shall include, at a minimum, the following:

“(1) For each high-risk area identified in the comprehensive risk assessment for the operation performed under subsection (b)—

“(A) specific actions to mitigate or reduce such risk, including the development of alternative capabilities to reduce reliance on contractor performance of critical functions;

“(B) measurable milestones for the implementation of planned risk mitigation or risk reduction measures; and

“(C) a process for monitoring, measuring, and documenting progress in mitigating or reducing risk.

“(2) A continuing process for identifying and addressing new and changed risks arising in the course of the operation, including the periodic reassessment of risks and the development of appropriate risk mitigation or reduction plans for any new or changed high-risk area identified.

“(e) CRITICAL FUNCTIONS.—For purposes of this section, critical functions include, at a minimum, the following:

“(1) Private security functions, as that term is defined in section 864(a)(6) of the National Defense Authorization Act for Fiscal Year 2008 [Pub. L. 110-181] (10 U.S.C. 2302 note) [now 10 U.S.C. 4571 note prec.].

“(2) Training and advising Government personnel, including military and security personnel, of a host nation.

“(3) Conducting intelligence or information operations.

“(4) Any other functions that are closely associated with inherently governmental functions, including the functions set forth in section 7.503(d) of the Federal Acquisition Regulation.

“(5) Any other functions that are deemed critical to the success of the operation.

“(f) COVERED AGENCY.—In this section, the term ‘covered agency’ means the Department of Defense, the Department of State, and the United States Agency for International Development.”

REQUIREMENTS FOR THE ACQUISITION OF SERVICES

Pub. L. 111-383, div. A, title VIII, §863(a)-(h), Jan. 7, 2011, 124 Stat. 4293, 4294, as amended by Pub. L. 112-81, div. A, title IX, §933(c), Dec. 31, 2011, 125 Stat. 1544; Pub. L. 112-239, div. A, title X, §1076(a)(18), Jan. 2, 2013, 126 Stat. 1949, provided that:

“(a) ESTABLISHMENT OF REQUIREMENTS PROCESSES FOR THE ACQUISITION OF SERVICES.—The Secretary of Defense shall ensure that the military departments and Defense Agencies each establish a process for identifying, assessing, reviewing, and validating requirements for the acquisition of services.

“(b) OPERATIONAL REQUIREMENTS.—With regard to requirements for the acquisition of services in support of combatant commands and military operations, the Secretary shall ensure—

“(1) that the Chief of Staff of the Army, the Chief of Naval Operations, the Chief of Staff of the Air Force, and the Commandant of the Marine Corps implement and bear chief responsibility for carrying out, within the Armed Force concerned, the process established pursuant to subsection (a) for such Armed Force; and

“(2) that commanders of unified combatant commands and other officers identified or designated as joint qualified officers have an opportunity to par-

ticipate in the process of each military department to provide input on joint requirements for the acquisition of services.

“(c) SUPPORTING REQUIREMENTS.—With regard to requirements for the acquisition of services not covered by subsection (b), the Secretary shall ensure that the secretaries of the military departments and the heads of the Defense Agencies implement and bear chief responsibility for carrying out, within the military department or Defense Agency concerned, the process established pursuant to subsection (a) for such military department or Defense Agency.

“(d) IMPLEMENTATION PLANS REQUIRED.—The Secretary shall ensure that an implementation plan is developed for each process established pursuant to subsection (a) that addresses, at a minimum, the following:

“(1) The organization of such process.

“(2) The level of command responsibility required for identifying, assessing, reviewing, and validating requirements for the acquisition of services in accordance with the requirements of this section and the categories established under section 2330(a)(1)(C) of title 10, United States Code [now 10 U.S.C. 4501(d)].

“(3) The composition of positions necessary to operate such process.

“(4) The training required for personnel engaged in such process.

“(5) The relationship between doctrine and such process.

“(6) Methods of obtaining input on joint requirements for the acquisition of services.

“(7) Procedures for coordinating with the acquisition process.

“(8) Considerations relating to opportunities for strategic sourcing.

“(9) Considerations relating to total force management policies and procedures established under section 129a of title 10, United States Code.

“(e) MATTERS REQUIRED IN IMPLEMENTATION PLAN.—Each plan required under subsection (d) shall provide for initial implementation of a process for identifying, assessing, reviewing, and validating requirements for the acquisition of services not later than one year after the date of the enactment of this Act [Jan. 7, 2011] and shall provide for full implementation of such process at the earliest date practicable.

“(f) CONSISTENCY WITH JOINT GUIDANCE.—Whenever, at any time, guidance is issued by the Chairman of the Joint Chiefs of Staff relating to requirements for the acquisition of services in support of combatant commands and military operations, each process established pursuant to subsection (a) shall be revised in accordance with such joint guidance.

“(g) DEFINITION.—The term ‘requirements for the acquisition of services’ means objectives to be achieved through acquisitions primarily involving the procurement of services.

“(h) REVIEW OF SUPPORTING REQUIREMENTS TO IDENTIFY SAVINGS.—The secretaries of the military departments and the heads of the Defense Agencies shall review and validate each requirement described in subsection (c) with an anticipated cost in excess of \$10,000,000 with the objective of identifying unneeded or low priority requirements that can be reduced or eliminated, with the savings transferred to higher priority objectives. Savings identified and transferred to higher priority objectives through review and revalidation under this subsection shall count toward the savings objectives established in the June 4, 2010, guidance of the Secretary of Defense on improved operational efficiencies and the annual reduction in funding for service support contractors required by the August 16, 2010, guidance of the Secretary of Defense on efficiency initiatives. As provided by the Secretary, cost avoidance shall not count toward these objectives.”

INDEPENDENT MANAGEMENT REVIEWS OF CONTRACTS FOR SERVICES

Pub. L. 110-181, div. A, title VIII, §808, Jan. 28, 2008, 122 Stat. 215, as amended by Pub. L. 111-383, div. A, title

X, §1075(f)(3), Jan. 7, 2011, 124 Stat. 4376; Pub. L. 115-232, div. A, title VIII, §812(b)(23), Aug. 13, 2018, 132 Stat. 1849, provided that:

“(a) GUIDANCE AND INSTRUCTIONS.—Not later than 180 days after the date of the enactment of this Act [Jan. 28, 2008], the Secretary of Defense shall issue guidance, with detailed implementation instructions, for the Department of Defense to provide for periodic independent management reviews of contracts for services. The independent management review guidance and instructions issued pursuant to this subsection shall be designed to evaluate, at a minimum—

“(1) contract performance in terms of cost, schedule, and requirements;

“(2) the use of contracting mechanisms, including the use of competition, the contract structure and type, the definition of contract requirements, cost or pricing methods, the award and negotiation of task orders, and management and oversight mechanisms;

“(3) the contractor’s use, management, and oversight of subcontractors;

“(4) the staffing of contract management and oversight functions; and

“(5) the extent of any pass-throughs, and excessive pass-through charges (as defined in section 852 of the John Warner National Defense Authorization Act for Fiscal Year 2007 [Pub. L. 109-364, 10 U.S.C. 3761 note prec.]), by the contractor.

“(b) ADDITIONAL SUBJECT OF REVIEW.—In addition to the matters required by subsection (a), the guidance and instructions issued pursuant to subsection (a) shall provide for procedures for the periodic review of contracts under which one contractor provides oversight for services performed by other contractors. In particular, the procedures shall be designed to evaluate, at a minimum—

“(1) the extent of the agency’s reliance on the contractor to perform acquisition functions closely associated with inherently governmental functions as defined in section 2383(b)(3) of title 10, United States Code [now 10 U.S.C. 4508(b)(3)]; and

“(2) the financial interest of any prime contractor performing acquisition functions described in paragraph (1) in any contract or subcontract with regard to which the contractor provided advice or recommendations to the agency.

“(c) ELEMENTS.—The guidance and instructions issued pursuant to subsection (a) shall address, at a minimum—

“(1) the contracts subject to independent management reviews, including any applicable thresholds and exceptions;

“(2) the frequency with which independent management reviews shall be conducted;

“(3) the composition of teams designated to perform independent management reviews;

“(4) any phase-in requirements needed to ensure that qualified staff are available to perform independent management reviews;

“(5) procedures for tracking the implementation of recommendations made by independent management review teams; and

“(6) procedures for developing and disseminating lessons learned from independent management reviews.”

[(d) Repealed. Pub. L. 115-232, div. A, title VIII, §812(b)(23), Aug. 13, 2018, 132 Stat. 1849.]

LIMITATION ON CONTRACTS FOR THE ACQUISITION OF CERTAIN SERVICES

Pub. L. 109-364, div. A, title VIII, §832, Oct. 17, 2006, 120 Stat. 2331, as amended by Pub. L. 110-181, div. A, title VIII, §883, Jan. 28, 2008, 122 Stat. 264; Pub. L. 110-417, [div. A], title X, §1061(b)(5), Oct. 14, 2008, 122 Stat. 4613; Pub. L. 113-291, div. A, title X, §1071(b)(3)(A), Dec. 19, 2014, 128 Stat. 3506, provided that:

“(a) LIMITATION.—Except as provided in subsection (b), the Secretary of Defense may not enter into a service contract to acquire a military flight simulator.

“(b) WAIVER.—The Secretary of Defense may waive subsection (a) with respect to a contract if the Secretary—

“(1) determines that a waiver is in the national interest; and

“(2) provides to the congressional defense committees [Committees on Armed Services and Appropriations of the Senate and the House of Representatives] an economic analysis as described in subsection (c) at least 30 days before the waiver takes effect.

“(c) ECONOMIC ANALYSIS.—The economic analysis provided under subsection (b) shall include, at a minimum, the following:

“(1) A clear explanation of the need for the contract.

“(2) An examination of at least two alternatives for fulfilling the requirements that the contract is meant to fulfill, including the following with respect to each alternative:

“(A) A rationale for including the alternative.

“(B) A cost estimate of the alternative and an analysis of the quality of each cost estimate.

“(C) A discussion of the benefits to be realized from the alternative.

“(D) A best value determination of each alternative and a detailed explanation of the life-cycle cost calculations used in the determination.

“(d) DEFINITIONS.—In this section:

“(1) The term ‘military flight simulator’ means any major system to simulate the form, fit, and function of a military aircraft that has no commonly available commercial variant.

“(2) The term ‘service contract’ means any contract entered into by the Department of Defense the principal purpose of which is to furnish services in the United States through the use of service employees.

“(3) The term ‘service employees’ has the meaning provided in section 6701(3) of title 41, United States Code.

“(e) EFFECT ON EXISTING CONTRACTS.—The limitation in subsection (a) does not apply to any service contract of a military department to acquire a military flight simulator, or to any renewal or extension of, or follow-on contract to, such a contract, if—

“(1) the contract was in effect as of October 17, 2006;

“(2) the number of flight simulators to be acquired under the contract (or renewal, extension, or follow-on) will not result in the total number of flight simulators acquired by the military department concerned through service contracts to exceed the total number of flight simulators to be acquired under all service contracts of such department for such simulators in effect as of October 17, 2006; and

“(3) in the case of a renewal or extension of, or follow-on contract to, the contract, the Secretary of the military department concerned provides to the congressional defense committees a written notice of the decision to exercise an option to renew or extend the contract, or to issue a solicitation for bids or proposals using competitive procedures for a follow-on contract, and an economic analysis as described in subsection (c) supporting the decision, at least 30 days before carrying out such decision.”

IMPROVEMENTS IN PROCUREMENTS OF SERVICES

Pub. L. 106-398, § 1 [div. A], title VIII, § 821, Oct. 30, 2000, 114 Stat. 1654, 1654A-217, as amended by Pub. L. 108-136, div. A, title XIV, § 1431(c), Nov. 24, 2003, 117 Stat. 1672; Pub. L. 115-232, div. A, title VIII, § 836(f)(2), Aug. 13, 2018, 132 Stat. 1871, provided that:

“(a) PREFERENCE FOR PERFORMANCE-BASED SERVICE CONTRACTING.—Not later than 180 days after the date of the enactment of this Act [Oct. 30, 2000], the Federal Acquisition Regulation issued in accordance with sections 6 and 25 of the Office of Federal Procurement Policy Act ([former] 41 U.S.C. 405 and 421) [see 41 U.S.C. 1121 and 1303] shall be revised to establish a preference for use of contracts and task orders for the purchase of services in the following order of precedence:

“(1) A performance-based contract or performance-based task order that contains firm fixed prices for the specific tasks to be performed.

“(2) Any other performance-based contract or performance-based task order.

“(3) Any contract or task order that is not a performance-based contract or a performance-based task order.

“[(b) Repealed. Pub. L. 108-136, div. A, title XIV, § 1431(c), Nov. 24, 2003, 117 Stat. 1672.]

“(c) CENTERS OF EXCELLENCE IN SERVICE CONTRACTING.—Not later than 180 days after the date of the enactment of this Act [Oct. 30, 2000], the Secretary of each military department shall establish at least one center of excellence in contracting for services. Each center of excellence shall assist the acquisition community by identifying, and serving as a clearinghouse for, best practices in contracting for services in the public and private sectors.

“(d) ENHANCED TRAINING IN SERVICE CONTRACTING.—(1) The Secretary of Defense shall ensure that classes focusing specifically on contracting for services are offered by the Defense Acquisition University and the Defense Systems Management College and are otherwise available to contracting personnel throughout the Department of Defense.

“(2) The Secretary of each military department and the head of each Defense Agency shall ensure that the personnel of the department or agency, as the case may be, who are responsible for the awarding and management of contracts for services receive appropriate training that is focused specifically on contracting for services.

“(e) DEFINITIONS.—In this section:

“(1) The term ‘performance-based’, with respect to a contract, a task order, or contracting, means that the contract, task order, or contracting, respectively, includes the use of performance work statements that set forth contract requirements in clear, specific, and objective terms with measurable outcomes.

“(2) The term ‘Defense Agency’ has the meaning given the term in section 101(a)(11) of title 10, United States Code.”

§ 4501. Procurement of contract services: management structure

(a) REQUIREMENT FOR MANAGEMENT STRUCTURE.—The Secretary of Defense shall establish and implement a management structure for the procurement of contract services for the Department of Defense. The management structure shall provide, at a minimum, for the matters specified in subsections (b), (c), (d), and (e).

(b) POLICIES, PROCEDURES, AND BEST PRACTICES GUIDELINES.—The management structure implemented pursuant to subsection (a) shall provide that the Under Secretary of Defense for Acquisition and Sustainment shall develop and maintain (in consultation with the service acquisition executives) policies, procedures, and best practices guidelines addressing the procurement of contract services, including policies, procedures, and best practices guidelines for—

- (1) acquisition planning;
- (2) solicitation and contract award;
- (3) requirements development and management;
- (4) contract tracking and oversight;
- (5) performance evaluation; and
- (6) risk management.

(c) PERSONNEL AND SUPPORT.—The management structure implemented pursuant to subsection (a) shall provide that the Under Secretary shall work with the service acquisition executives and other appropriate officials of the Department of Defense—

- (1) to identify the critical skills and competencies needed to carry out the procurement of contract services on behalf of the Department of Defense;