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DoD IG Report to Congress on Section 324 of the National Defense Authorization Act for Fiscal Year 2008

Review of DoD Guidelines on Considering Civilians for New and Contracted Functions

Report No. D-2008-111
(Project No. D2008-D000CH-0165.000)

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Special Warning

This document contains information provided as a nonaudit service. Therefore, any work performed was not done in accordance with Generally Accepted Government Auditing Standards.

Background

Section 324 of Public Law 110-181, “National Defense Authorization Act for Fiscal Year 2008,” January 28, 2008, requires the Under Secretary of Defense for Personnel and Readiness (USD[P&R]) to develop guidelines and procedures to ensure that consideration is given to using DoD civilian employees to perform new functions or functions that are performed by contractors. The section requires the Inspector General of the Department of Defense to submit a report to Congress, not later than 180 days after the enactment of the Act, addressing the implementation of this section and the amendments made by it. This section also repeals section 343 of the FY 2006 National Defense Authorization Act.

Section 343 of the FY 2006 National Defense Authorization Act required DoD to issue guidelines and procedures for ensuring that consideration was given to Federal Government employees for work performed under DoD contracts. The Under Secretary of Defense for Acquisition, Technology, and Logistics (USD[AT&L]) issued the guidance on July 27, 2007. The guidelines allowed the conversion of contracted activities or functions for up to 3 percent of a Component’s authorizations coded as “commercial reviewable,” required prior notification of the DoD Competitive Sourcing Official for actions that would exceed the 3-percent limit, and gave the DoD Competitive Sourcing Official authority to intervene or stop a section 343 action. As required by section 324 of the FY 2008 National Defense Authorization Act, on April 4, 2008, the Deputy Secretary of Defense canceled the section 343 guidance.

Results

In accordance with section 324 of the FY 2008 National Defense Authorization Act, the Deputy Secretary of Defense issued guidelines and procedures on in-sourcing new and contracted functions on April 4, 2008. The guidelines and procedures were developed to ensure that the Department gives special consideration to using DoD civilian employees to perform certain categories of functions and uses the inventory of contracts for services required by section 807 of the FY 2008 National Defense Authorization Act to identify those functions. DoD Components can use DoD civilian employees to perform new functions or functions that are performed by a contractor if an economic analysis shows that DoD civilian employees are the low-cost provider, or the DoD Component has determined that the function under review is inherently governmental or exempt from private sector performance.

Supplemental Guidance. Section 324 allows the Military Department Secretaries to prescribe supplemental regulations for implementing the guidance on in-sourcing new and contracted functions. The Army issued supplemental guidance on May 8, 2008. The Navy and the Air Force plan to issue supplemental guidance; however, neither has drafted supplemental guidance.

Examples of DoD In-Sourcing Under Previous Guidance. DoD Components have not begun in-sourcing actions under section 324 guidance. However, the Army, Navy, and Air Force stated they conducted in-sourcing under the previous section 343 rules. We discussed two in-sourcing actions with the Army and the Navy for this report. In February 2008, the Army Office of the Deputy Chief of Staff, G-37 Force Management approved a concept plan to convert 99 contractor positions to civilian positions to

ensure that inherently governmental functions were performed by Government personnel. The Army calculated that this action would save \$4.8 million in FY 2009 and \$34.3 million in the program objective memorandum for FYs 2010 through 2015. In September 2007, the Naval Supply Systems Command, Fleet and Industrial Supply Center Puget Sound evaluated contractor cost at the Naval Undersea Warfare Center, Keyport Support Division, and determined that converting the supply support function to a civilian workforce would save the customer \$2.7 million over a 5-year period.

Inventories and Reviews of Service Contracts. Section 807 of the FY 2008 National Defense Authorization Act requires DoD to submit annual inventories and reviews of contracts for services. On May 16, 2008, the Deputy Under Secretary of Defense for Acquisition and Technology issued implementing guidelines and stated that, because of the magnitude of the task of conducting inventories and reviews for all service contracts, DoD would implement section 807 in phases. The Army submitted its draft initial inventory on June 13, 2008, and will deliver its annual inventory in FY 2009. The Navy and the Air Force will deliver annual inventories in FY 2010, and all Military Departments and Defense agencies will deliver annual inventories in full compliance with section 807 in FY 2011.

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FY 2008 National Defense Authorization Act

Section 324, “Guidelines on InSourcing New and Contracted Out Functions,” of Public Law 110-181, “National Defense Authorization Act for Fiscal Year 2008,” January 28, 2008, requires the Inspector General of the Department of Defense to submit a report to Congress, not later than 180 days after the enactment of the Act, addressing the implementation of this section and the amendments made by this section.

SEC. 324. GUIDELINES ON INSOURCING NEW AND CONTRACTED OUT FUNCTIONS.

(a) CODIFICATION AND REVISION OF REQUIREMENT FOR GUIDELINES.—

(1) IN GENERAL.—Chapter 146 of title 10, United States Code, is amended by inserting after section 2462 the following new section:

§ 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) has been performed by Department of Defense civilian employees at any time during the previous 10 years; (B) is a function closely associated with the performance of an inherently governmental function; (C) has been performed pursuant to a contract awarded on a non-competitive basis; or (D) 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 under the National Security Personnel System, as established 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) DEFINITIONS.—In this section the term ‘functions closely associated with inherently governmental functions’ has the meaning given that term in section 2383(b)(3) of this title.

(2) CLERICAL AMENDMENT.—The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 2462 the following new item:

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

(3) DEADLINE FOR ISSUANCE OF GUIDELINES AND PROCEDURES.—The Secretary of Defense shall implement the guidelines and procedures required under section 2463 of title 10, United States Code, as added by paragraph (1), by not later than 60 days after the date of the enactment of this Act.

(b) INSPECTOR GENERAL REPORT.—Not later than 180 days after the date of the enactment of this Act, the Inspector General of the Department of Defense shall submit to the congressional defense committees a report on the implementation of this section and the amendments made by this section.

(c) CONFORMING REPEAL.—The National Defense Authorization Act for Fiscal Year 2006 (Public Law 109–163) is amended by striking section 343.

DoD Guidance on Section 324

In accordance with section 324 of the FY 2008 National Defense Authorization Act, the Deputy Secretary of Defense issued guidelines and procedures on in-sourcing new and contracted functions on April 4, 2008. The guidelines stated that DoD Components should consider using DoD civilian employees to perform new functions and functions that are performed by contractors but could be performed by Government employees. Special consideration should be given to using DoD civilian employees to perform any function that is performed under contract and:

- has been performed by DoD civilian employees at any time during the previous 10 years;
- is closely associated with the performance of an inherently governmental function;
- has been performed pursuant to a contract awarded on a noncompetitive basis; or
- has been determined by a contracting officer to have been performed poorly during the 5 years preceding the date of such determination because of excessive costs or inferior quality.

The guidelines require DoD Components to make use of the inventory of service contracts required by subsection (c) of section 2330a, title 10, United States Code (10 U.S.C. 2330a), as amended by section 807 of the FY 2008 National Defense Authorization Act, to identify contracted functions that should be considered for performance by DoD civilian employees. However, DoD Components should not delay implementing section 324 until the inventory is completed. For more information on the inventory, see the “Section 807 of the FY 2008 National Defense Authorization Act” section of this report. In addition, DoD Components are to review the contracts and functions in the inventory to ensure that the inventory does not include any personal services contracts that were entered into or are being performed in a manner that is inconsistent with applicable statutory and regulatory requirements, any inherently governmental functions, or any functions closely associated with inherently governmental functions.

Manpower Management. USD(P&R) guidelines and procedures require DoD Components to comply with 10 U.S.C. 129a,¹ as implemented by DoD Instruction 1100.22, “Guidance for Determining Workforce Mix,”² when considering whether to use DoD civilian employees to perform new or expanded mission requirements, or functions that are performed by contractors but could be performed by DoD civilian employees. Manpower managers are to follow standard manpower management procedures (consistent with 10 U.S.C. 129a) to determine and validate the manpower requirements when a DoD Component has a new or expanded mission

¹ 10 U.S.C. 129a requires the Secretary of Defense to use the least costly form of personnel, consistent with military requirements and other needs of the Department.

² DoD Instruction 1100.22 implements policy for determining the appropriate mix of manpower (military and civilian) and private sector support necessary to accomplish Defense missions consistent with applicable laws, policies, and regulations.

requirement or is considering whether to convert from contractor to Government performance. The DoD Component's principal official for manpower management may prescribe supplemental regulations if they are needed for the effective management of section 324 actions. The principal official for manpower management is required to include a complete justification for converting contracted functions to functions performed by DoD civilians in the Component's annual submission for the Defense Manpower Requirements Report. For the full text of the guidelines, see the Appendix.

Costing Guidance. According to USD(P&R) guidelines and procedures, DoD Components are to perform an economic analysis to determine whether DoD civilians or private sector contractors are the low-cost provider and should perform the work. Additional guidance on cost factors and cost models that address the full costs of manpower will be provided by a working group established at the direction of the Deputy Secretary of Defense in Program Decision Memorandum IV, dated December 13, 2006. The working group is being led by the Office of the Director, Program Analysis and Evaluation (PA&E), Under Secretary of Defense (Comptroller)/Chief Financial Officer, and USD(P&R), in coordination with the USD(AT&L).

According to the Office of the Director, PA&E, the working group is developing business rules, that cover identifying cost factors and addressing the full costs of manpower, to use in conducting economic analyses. According to the Office of the Director, PA&E, to make well-informed manpower decisions, one must recognize that fully burdened costs of manpower are essential for understanding the actual costs of DoD manpower and that noncash compensation is significant. The coleaders of the working group issued the draft business rules and corresponding policy memorandum for informal coordination in June 2008 and requested comments by July 11, 2008. We will not be able to assess the business rules until they are finalized. The Office of the Director, PA&E and the USD(P&R) are also jointly sponsoring a contract to create a costing software program; however, they are not expected to issue the contract until the summer of 2009.

Section 324 Supplemental Guidance

Section 324 of the FY 2008 National Defense Authorization Act allows the Secretary of a Military Department to prescribe supplemental regulations to the guidelines and procedures on in-sourcing new and contracted functions. We discussed the status of supplemental guidance with personnel from the Army, the Navy, and the Air Force.

Army—The Army issued supplemental guidance on May 8, 2008. The supplemental guidance includes documenting the rationale for applying a manpower-mix criterion and associated function code for the in-sourced function based on DoD Instruction 1100.22, eliminates the exclusion of contracts awarded as a result of an Office of Management and Budget Circular No. A-76 competition, and lists actions that must be included in the quarterly status report to the Secretary of the Army on in-sourcing.

Navy—The Navy plans to issue supplemental guidance. According to the Acting Director, Navy Competitive Sourcing/Manpower Optimization Branch, Office of the Chief of Naval Operations, the Navy has not started formal development of supplemental guidance, but is in the process of coordinating as appropriate with the Assistant Secretary of the Navy (Manpower and Reserve Affairs) and the Office of Civilian Human Resources. The Navy plans to address accountability, tracking, and justification for converting work from contract to Government performance in the supplemental guidance.

Air Force—The Air Force plans to issue supplemental guidance. According to the Deputy, Strategic Sourcing Division, Directorate of Manpower, Organization, and Resources, the Air Force still has to decide whether the supplemental guidelines should be issued as a policy memorandum or an Air Force Instruction. The Deputy stated that the Air Force plans to address procedures for conducting economic analyses, a process for determining which contracts are candidates for conversion, and a method for validating savings in the supplemental guidance. In addition, the Air Force plans to take into consideration lessons learned from converted functions under the section 343 guidelines when drafting supplemental guidance for section 324.

In addition, the Office of the Director of Administration and Management, Office of the Secretary of Defense, plans to issue supplemental guidance in the summer of 2008, as allowed by the DoD guidelines implementing section 324. The guidance will apply only to Office of the Secretary of Defense staff.

Section 343 of the FY 2006 National Defense Authorization Act

Section 343, “Performance of Certain Work by Federal Government Employees,” of Public Law 109-163, “National Defense Authorization Act for Fiscal Year 2006,” January 6, 2006, required the Secretary of Defense to issue guidelines and procedures for ensuring consideration was given to Federal Government employees for work performed under DoD contracts. The guidelines and procedures were required to ensure special consideration was given to contracts that had been performed by Federal Government employees at any time on or after October 1, 1980; were associated with the performance of inherently governmental functions; were not awarded competitively; or had been determined by a contracting officer to be poorly performed because of excessive costs or inferior quality.

DoD Guidance. On July 27, 2007, the USD(AT&L) issued guidance to the DoD Components implementing section 343 of the FY 2006 National Defense Authorization Act. The USD(AT&L) stated that, to ensure DoD is spending taxpayer dollars wisely, it is important for DoD Components to consider the advantages of converting from one form of personnel (military, civilian, or private contract) to another for the performance of commercial activities or functions when reprioritizing programs, assessing risk, and building program and budget submissions, consistent with 10 U.S.C. 129a.

The USD(AT&L) guidance allowed the use of the section 343 guidelines on converting contracted activities or functions for up to 3 percent of a Component’s authorizations coded as “commercial reviewable” in the DoD Component’s approved inherently governmental and commercial activities inventory for the previous fiscal year. Actions exceeding the 3-percent limit required prior notification of the DoD Competitive Sourcing Official. The guidance also stated that the DoD Competitive Sourcing Official could intervene or stop a section 343 action.

Conforming Repeal. Section 324 of the FY 2008 National Defense Authorization Act repealed section 343 of the FY 2006 National Defense Authorization Act, and the April 4, 2008, Deputy Secretary of Defense memorandum implementing section 324 canceled the July 27, 2007, USD(AT&L) memorandum.

DoD In-Sourcing Under Section 343

The Military Departments stated that they took advantage of the section 343 guidelines to convert contracted functions that were associated with the performance of inherently governmental functions; had not been awarded competitively; or had been determined by a contracting officer to be poorly performed because of excessive costs or inferior quality. We spoke with individuals from the Army, the Navy, and the Air Force regarding in-sourcing actions under the section 343 guidance. All three Military Departments stated that they conducted in-sourcing using the section 343 guidelines. The following are examples of successful in-sourcing actions by the Army and the Navy. Although Air Force officials stated that they had converted contracted functions using section 343, they did not provide an example of an in-sourcing action for this report.

Army—The Army is using the section 343 guidance to convert a contracted function associated with the performance of an inherently governmental function. In December 2007, the Office of the Deputy Chief of Staff, G-3/5/7 submitted a conversion concept plan to the Office of the Deputy Chief of Staff, G-37 Force Management to provide G-3/5/7 with an improved mix of Government civilian, military, and contract personnel to better perform its required missions; ensure governmental personnel conduct inherently governmental duties; and maintain continuity while reducing overall personnel costs. G-3/5/7 planned to accomplish this by converting 99 contractor positions to civilian positions. G-3/5/7 conducted a manpower analysis showing a cost savings of 26.7 percent to the Government, and determined that the current level of manpower and ability to accomplish assigned missions could be maintained with reduced funding. Also, this action would ensure that all associated inherently governmental functions are performed by Government personnel. The Director of Force Management approved the plan on February 13, 2008, and stated that the conversion will provide a savings of \$4.8 million in FY 2009 and \$34.3 million in the program objective memorandum for FYs 2010 through 2015. The concept plan will be implemented in October 2008.

Navy—The Navy used the section 343 guidance to convert contract support services that had been determined by the Fleet and Industrial Supply Center Puget Sound Business Office and the contracting officer to be significantly higher in cost than those for similar operations managed by the Navy. In September 2007, the Naval Supply Systems Command, Fleet and Industrial Supply Center Puget Sound conducted a detailed economic analysis of contractor cost at the Naval Undersea Warfare Center, Keyport Support Division, and determined that civilian personnel represented the least costly form of labor to meet the military requirements and the needs of the Navy. The Fleet and Industrial Supply Center Puget Sound estimated that using 65 civilians to perform the supply support function originally executed by contractors would save the customer \$2.7 million or 10 percent over a 5-year period. The Fleet and Industrial Supply Center Puget Sound implemented this operation in November 2007 and stated that the costs of the function are now comparable with those of other Navy warehousing and supply support functions in the region.

Section 807 of the FY 2008 National Defense Authorization Act

Section 807, “Inventories and Reviews of Contracts for Services,” of the FY 2008 National Defense Authorization Act amends 10 U.S.C. 2330a and requires annual inventories and reviews of contracts for services. Specifically, section 807 requires the Secretary of Defense to submit an annual inventory to Congress by the end of the third quarter of each fiscal year, beginning in FY 2008, of the functions performed during the preceding fiscal year pursuant to contracts for services for or on behalf of DoD. In addition, section 807 requires that the inventory be made available to the public 30 days after it is submitted to Congress. The following must be included in the inventory:

- A. the functions and missions performed by the contractor;
- B. the contracting organization, the DoD Component administering the contract, and the organization whose requirements are being met through contractor performance of the function;
- C. the funding source for the contract under which the function is performed, by appropriation and operating agency;
- D. the fiscal year for which the activity first appeared on an inventory under this section;
- E. the number of full-time contractor employees (or equivalent) paid for the performance of the activity;
- F. a determination whether the contract pursuant to which the activity is performed is a personal services contract; and
- G. a summary of the other data required to be collected for the activity by 10 U.S.C. 2330a.

Finally, section 807 requires the Military Department Secretaries or Directors of Defense agencies to review the inventoried contracts within 90 days of submission to Congress. The reviews must ensure that each personal services contract on the inventory is being performed in accordance with applicable statutory and regulatory requirements; the functions performed are not inherently governmental; and, to the maximum extent practicable, the functions performed are not closely associated with inherently governmental functions.³ When the reviews are completed, section 807 requires the Military Departments and Defense agencies to identify functions that should be considered for conversion to performance by DoD civilian employees, pursuant to section 324, or to an acquisition approach that would be more advantageous to DoD. The Military Departments and Defense agencies must develop a plan to provide for appropriate consideration of the conversion of functions identified within a reasonable period of time.

³ To comply with the review requirement, on June 13, 2008, the Army began requiring senior leaders to complete checklists and certifications before initiating or renewing a services contract.

Implementation Requirement. Prior to the section 807 amendment, the Federal Procurement Data System – Next Generation met the requirements of 10 U.S.C. 2330a. However, according to an official from the Office of Defense Procurement, Acquisition Policy, and Strategic Sourcing, the Federal Procurement Data System – Next Generation cannot be used to fully meet the requirements of section 807. This is because of the requirement to enter into the system the number of full-time contractor employees (or equivalent) paid for the performance of the activity. Within DoD, only the Army has a data system that tracks full-time equivalents. The Army Contract Manpower Reporting Application captures contractor full-time equivalents for most Army contracts for services; therefore, the Army is using it, in conjunction with existing procurement data systems, to populate its inventory.

Implementation Schedule. On May 16, 2008, the Deputy Under Secretary of Defense for Acquisition and Technology issued direction for implementing section 807. Because of the magnitude of the task of conducting inventories and reviews for all service contracts, the Deputy Under Secretary of Defense for Acquisition and Technology proposed to Congress that DoD implement section 807 in phases. The implementation schedule follows.

Phase I—FY 2008. The Department of the Army will deliver the following:

- an initial inventory that addresses the reporting criteria set forth in section 807 (items A through F listed above) no later than June 13, 2008;⁴ and
- a fully compliant inventory with the methodology and cost for developing, delivering, and publicizing the prototype inventory no later than September 19, 2008. This information is for distribution to the other Military Departments, Defense agencies, and Congress.

Phase II—FY 2009. The Army will deliver its annual inventory in full compliance with section 807. The Departments of the Air Force and the Navy will deliver initial inventories for review and approval.

Phase III—FY 2010. The Departments of the Air Force and the Navy will deliver their annual inventories in full compliance with section 807. The Defense agencies will deliver initial inventories for review and approval.

Phase IV—FY 2011. All Military Departments and Defense agencies will deliver their annual inventories in full compliance with section 807.

⁴ According to the Office of Defense Procurement, Acquisition Policy, and Strategic Sourcing, on June 13, 2008, the Army submitted its draft inventory, which addresses the reporting criteria.

Appendix. DoD Section 324 Guidance



THE DEPUTY SECRETARY OF DEFENSE
WASHINGTON, D.C. 20301

APR 04 2008

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
DIRECTOR, ADMINISTRATION AND MANAGEMENT
DIRECTOR, JOINT STAFF
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Implementation of Section 324 of the National Defense Authorization Act for
Fiscal Year 2008 (FY 2008 NDAA)—Guidelines and Procedures on
In-sourcing New and Contracted Out Functions

Section 324 of the FY 2008 NDAA, Public Law No. 110-181, January 28, 2008 (attached), added a new section 2463 to title 10, United States Code (U.S.C.) that requires the Under Secretary of Defense for Personnel and Readiness (USD(P&R)) to develop guidelines and procedures to ensure that the Department considers using DoD civilian employees to perform new functions or functions that are performed by contractors. It also requires these guidelines and procedures to be issued no later than 60 days after the enactment of the FY 2008 NDAA, directs the DoD Inspector General to submit a report on implementation of section 2463 to the congressional defense committees within 180 days of enactment of the Act, and repeals section 343 of the National Defense Authorization Act for Fiscal Year 2006 (FY 2006 NDAA).

This memorandum issues the 10 U.S.C. §2463 guidelines and procedures prepared by USD(P&R) (attached). The July 27, 2007, Under Secretary of Defense for Acquisition, Technology and Logistics (USD (AT&L)) policy memorandum (attached) that implemented section 343 of the FY 2006 NDAA which has now been repealed, is cancelled.

Section 2463 of title 10, U.S.C., directs the Department to give special consideration to using DoD civilian employees to perform certain categories of functions and to use the inventory of contractors (required by section 807 of the FY 2008 NDAA) to identify those functions. It also precludes the Department from conducting public-private competitions to implement 10 U.S.C. §2463 and prohibits the Department from placing limitations or restrictions on the number of functions that may be converted to performance by DoD civilian employees. The USD(P&R) is implementing the guidelines and procedures as part of the Manpower Management program consistent with 10 U.S.C. §129a. The guidelines and procedures state that DoD Components can use DoD civilian employees to perform new functions or functions that are performed by a contractor if an economic analysis shows that DoD civilian employees are the low cost

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provider, or the DoD Component has determined, consistent with DoD Instruction 1100.22, "Guidance for Determining Workforce Mix," that the function under review is inherently governmental or exempt from private sector performance. This guidance will help ensure that when DoD Components make decisions to use DoD civilian employees, the decisions are fiscally informed and analytically based.

This new legislation should improve our ability to reduce costs and manage the Defense workforce. However, as DoD Components decide to use DoD civilian employees to perform new and expanded mission requirements and to in-source contracted work, the size of the Department's in-house workforce will increase. This will have the attention of Congress. If we are to retain the authority provided under 10 U.S.C. §2463 and continue to benefit from its flexibility, the Department must demonstrate to Congress how it is being used to reduce workforce costs, realign inherently governmental and exempt functions for government performance, and manage more efficiently and effectively. The attached guidelines and procedures call on you to manage closely 10 U.S.C. §2463 actions to ensure responsible stewardship of Defense resources and to assist the USD(P&R) with reporting to Congress on the Department's progress with implementing section 324 of the FY 2008 NDAA and 10 U.S.C. §2463.

If there are questions on the attached guidelines and procedures please contact Pam Bartlett in the OUSD(P&R) at Pam.Bartlett@osd.mil.



Attachments:
As stated

cc:
USD(AT&L)
USD(P&R)
D, PA&E
DoD IG

PUBLIC LAW NO. 110-181

SEC. 324. GUIDELINES ON INSOURCING NEW AND CONTRACTED
OUT FUNCTIONS.

<< 10 USCA § 2463 >>

(a) CODIFICATION AND REVISION OF REQUIREMENT FOR GUIDELINES.--

(1) IN GENERAL.--Chapter 146 of title 10, United States Code, is amended by inserting after section 2462 the following new section:

"§ 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) has been performed by Department of Defense civilian employees at any time during the previous 10 years;

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

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

"(D) 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 under the National Security Personnel System, as established 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) DEFINITIONS.--In this section the term 'functions closely associated with inherently governmental functions' has the meaning given that term in section 2383(b)(3) of this title."

(2) CLERICAL AMENDMENT.--The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 2462 the following new item:

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

(3) DEADLINE FOR ISSUANCE OF GUIDELINES AND PROCEDURES.--The Secretary of Defense shall implement the guidelines and procedures required under section 2463 of title 10, United States Code, as added by paragraph (1), by not later than 60 days after the date of the enactment of this Act.

(b) INSPECTOR GENERAL REPORT.--Not later than 180 days after the date of the enactment of this Act, the Inspector General of the Department of Defense shall submit to the congressional defense committees a report on the implementation of this section and the amendments made by this section.

(c) CONFORMING REPEAL.--The National Defense Authorization Act for Fiscal Year 2006 (Public Law 109-163) is amended by striking section 343.

**Under Secretary of Defense (Personnel and Readiness)'s
Guidelines and Procedures for Implementation of 10 U.S.C. §2463
(as added to the U.S.C. by Section 324 of the FY 2008 NDAA)**

1. CONSIDERATION FOR THE USE OF CIVILIAN EMPLOYEES. DoD Components are to ensure consideration is given, on a regular basis, to using DoD civilian employees to perform new functions and functions that are performed by contractors but that could be performed by government employees.

2. SPECIAL CONSIDERATION FOR CERTAIN CATEGORIES OF FUNCTIONS. Special consideration shall be given to using DoD civilian employees to perform any function that is performed under contract and: (A) has been performed by DoD civilian employees at any time during the previous ten years; (B) is closely associated with the performance of an Inherently Governmental (IG) function; (C) has been performed pursuant to a contract awarded on a non-competitive basis; or (D) has been determined by a contracting officer (CO) to have been performed poorly during the five years preceding the date of such determination, because of excessive costs or inferior quality. In addition, special consideration shall be given to using DoD civilian employees to perform new mission requirements, particularly if the new requirements entail functions that are similar to functions previously performed by DoD civilian employees or are closely associated with the performance of an IG function.

3. IDENTIFICATION OF CONTRACTED FUNCTIONS.

3.1. DoD Components shall make use of the inventory required by 10 U.S.C. §2330a(c), as amended by section 807 of the FY 2008 NDAA, to identify functions that should be considered for performance by DoD civilian employees in accordance with paragraph 2 above. However, DoD Components shall not delay implementation of 10 U.S.C. §2463 until the inventory required by section §2330a(c) is finished, but should proceed with identifying functions that should be considered for DoD civilian employee performance and proceed with conversions as provided by P&R's guidelines and procedures.

3.2. 10 U.S.C. §2330a(e), as amended by section 807 of the FY 2008 NDAA, requires DoD Components to review the contracts and activities in the inventory to ensure that the inventory: (1) does not include any personal services contracts that were entered into or are being performed in a manner that is inconsistent with applicable statutory and regulatory requirements; (2) does not include any inherently governmental functions; and (3) to the maximum extent practicable, does not include any functions closely associated with inherently governmental functions. If there are functions or activities under contract that are determined to be inherently governmental or exempt from private sector performance, they should be converted to government performance consistent with DoD Instruction 1100.22 or, if no longer required, eliminated.

3.3. Section 2330a(e) also requires DoD Components to review the inventory to identify activities that should be considered for conversion: (1) to performance by DoD civilian

employees as required by section 2463; or (2) to an acquisition approach that would be more advantageous to the DoD. In addition, section 2330a(e) requires DoD Components to develop a plan to provide for appropriate consideration to be given to the conversion of these activities within a reasonable period of time.

4. CONSIDERATIONS GOVERNING 10 U.S.C. §2463 ACTIONS. DoD Components shall comply with 10 U.S.C. §129a, as implemented by DoD Instruction 1100.22, "Guidance for Determining Workforce Mix," when considering whether to use DoD civilian employees to perform new or expanded mission requirements, and functions that are performed by contractors but that could be performed by DoD civilian employees.

4.1. If functions/activities are no longer required, they shall be eliminated.

4.2. If new or expanded mission requirements or functions performed under contract are determined to be IG or exempt from private sector performance for reasons stated in DoD Instruction 1100.22, the functions shall be converted to government performance. In such cases, an economic analysis need not be performed.

4.3. For all other new or expanded mission requirements, and for all other functions that are performed under contract but that could be performed by DoD civilian employees, DoD Components shall perform an economic analysis to determine whether DoD civilians or private sector contractors are the low cost provider and should perform the work. Qualified cost analysts/experts shall perform the analyses using cost factors/models that account for the full costs of manpower, as appropriate, and make "like comparisons" of all relevant costs. Decisions on which costs to include (e.g., overhead, facilities, equipment, supplies, health and retirement benefits) shall depend on what is needed to achieve "like comparisons" and whether the costs are of sufficient magnitude to influence the final decision. Additional guidance on cost factors and cost models that address the full costs of manpower and "like comparisons" will be provided by a working group established at the direction of the Deputy Secretary of Defense in the Program Decision Memorandum IV, dated December 13, 2006. The working group is being led by the Office of the Director, Program Analysis and Evaluation, OUSD(Comptroller), and OUSD(Personnel and Readiness), in coordination with OUSD(Acquisition, Technology and Logistics).

4.4. If a decision is made to use DoD civilians, but the Director of the local Human Resources Office (HRO) determines that qualified DoD civilians cannot be hired to perform the function, officials may contract (or continue to contract) for the services provided the function is not IG or exempt from private sector performance.

5. EXCLUSION OF FUNCTIONS FROM COMPETITION. Consistent with 10 U.S.C. §2463, DoD Components may not conduct public-private competitions under chapter 146 of title 10, U.S.C; Office of Management and Budget Circular A-76; or any other provision of law or regulation before: (A) assigning DoD civilian employees to perform a new mission requirement; (B) converting functions performed by contractors (covered in paragraph 2 above) to performance by DoD civilian employees; or (C) expanding the scope of functions performed by DoD civilian employees. Consistent with current policy, DoD Components shall not perform a

public-private competition when converting a contracted function to government performance that is determined to be inherently governmental or exempt from private sector performance based on the guidance in DoD Instruction 1100.22.

6. NO LIMITATIONS OR RESTRICTIONS. No limitations or restrictions are to be placed on the number of functions or activities that may be converted from contractor to DoD civilian performance.

7. PROCEDURES GOVERNING 10 U.S.C. §2463 ACTIONS. Requests for manpower shall be fiscally informed and closely managed to ensure responsible stewardship of Defense resources.

7.1. When a DoD Component has a new or expanded mission requirement or is considering whether to convert from contractor to government performance, manpower managers shall follow standard manpower management procedures to determine and validate the manpower requirements. This shall include verifying the mission, functions, and tasks to be performed, required level of performance, and (consistent with title 10 U.S.C. §129) workload necessary for mission success. Also, the effectiveness, efficiency, and economy of the activity shall be assessed to determine if improvements can be made to reduce workload. Officials shall ensure that performance requirements (i.e., required capability or outcome) are accurately stated and directly relate to mission priority, available resources, and acceptable risk. In addition, the workforce mix (i.e., mix of military and civilian manpower and contract support) shall be determined consistent with policy in DoD Instruction 1100.22 and this memorandum. However, in certain cases, workforce mix decisions may depend on the availability of DoD civilian personnel as indicated in paragraph 4.4 above.

7.2. DoD Component officials are accountable for the management and employment of their resources. Defense officials shall prioritize workforce requirements (to include manpower and contract support) according to the criticality of the mission and acceptable level of risk so that requests for resources can be considered relative to other competing needs. Requests for additional manpower shall be fully justified, prioritized, and include a funding source or offset based on a reprioritization of other manpower/contract support or program requirements.

7.3. Manpower managers shall reassess their manpower and workforce mix every four years. If activities have not been fully resourced for several years, manpower managers shall assist officials in determining whether mission or performance requirements are overstated or have marginal benefit and should be tailored or eliminated. This will help ensure that manpower requirements are not overstated and reflective of mission priorities and acceptable risk.

7.4. The DoD Component's principal official for manpower management may prescribe supplemental regulations if it is determined they are needed for effective management of 10 U.S.C. §2463 actions.

8. GUIDELINES FOR DOCUMENTATION OF 10 U.S.C. §2463 ACTIONS.

8.1. DoD Components shall make every effort to determine the workforce mix and priority of the activity in sufficient time to document the full-time equivalents and funding source or offset to pay for the DoD civilian employees in their program/budget submissions. However, DoD Components may authorize over-hire positions to preclude a gap in service provided the manpower requirements have been documented/validated and sufficient funds are available to pay for the civilian positions.

8.2. The DoD Component's principal official for manpower management shall maintain oversight of 10 U.S.C. §2463 actions and (as required by 10 U.S.C. §129a) include in the official's annual submissions for the Defense Manpower Requirements Report (DMRR) a complete justification for converting contracted functions to DoD civilian employee performance. DMRR submissions shall separately report the number of civilian authorizations that were established because the functions were determined to be inherently governmental or exempt from private sector performance and the number established because DoD civilian employees were determined to be the low cost provider or it was determined by the contracting officer (as provided in paragraph 2 above) that the functions under contract were performed poorly. The DoD Component's principal official for manpower management shall justify in DMRR submissions any significant increases in DoD civilian authorizations that result from 10 U.S.C. §2463 actions for new or expanded mission requirements and summarize plans for converting additional functions from contractor to DoD civilian employee performance.

8.3. Increases to the Defense workforce at Major Department of Defense Headquarters activities that result from 10 U.S.C. §2463 actions shall be reported to Congress consistent with section 901 of the FY 2008 NDAA.

8.4. Supporting documentation for 10 U.S.C. §2463 decisions (to include copies of economic analyses, decisions made by local HRO Directors, and determinations made by the contracting officers) shall be retained for four calendar years so that DoD Components can justify their 10 U.S.C. §2463 decisions in the event of a Government Accountability Office (GAO) audit or other similar review.

9. GUIDELINES FOR USE OF FLEXIBLE HIRING AUTHORITY. Components shall leverage all available hiring and compensation flexibilities to facilitate the performance by DoD civilian employees of functions described in paragraph 2 above. This shall include flexibilities available through the National Security Personnel System (NSPS). Mission requirements (to include any mission essential tasks) and performance objectives shall be used to help officials establish employee performance plans, performance criteria, and job objectives, as appropriate.



ACQUISITION,
TECHNOLOGY
AND LOGISTICS

THE UNDER SECRETARY OF DEFENSE
3010 DEFENSE PENTAGON
WASHINGTON, DC 20301-3010

JUL 27 2007

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
DIRECTOR, ADMINISTRATION AND MANAGEMENT
DIRECTOR, JOINT STAFF
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Implementation of Section 343 of the 2006 National Defense Authorization Act

This memorandum implements Section 343 of the National Defense Authorization Act for Fiscal Year 2006, Pub. L. 109-163 (Attachment). Section 343 requires the Secretary of Defense to prescribe guidelines and procedures for ensuring that consideration is given to using federal government employees for work that is currently performed, or would otherwise be performed, under Department of Defense contracts. Special consideration shall be given to contracts that: (A) have been performed by federal government employees at any time on or after October 1, 1980; (B) are associated with the performance of inherently governmental functions; (C) were not awarded on a competitive basis; or, (D) have been determined by a contracting officer to be poorly performed due to excessive costs or inferior quality.

As reported in the FY 2007 President's Budget, the Department spent over \$105 billion on Service Contract Support in FY 2005. To ensure the Department is spending taxpayer dollars wisely, it is important for DoD Components to consider the advantages of converting from one form of personnel (military, civilian, or private contract) to another for the performance of commercial activities when reprioritizing programs, assessing risk, and building program and budget submissions, consistent with section 129a of title 10, United States Code and this policy memorandum. Section 129a requires the Secretary of Defense to use the least costly form of personnel, consistent with military requirements and other needs of the Department.

Section 343 of the National Defense Authorization Act for Fiscal Year 2006, Pub. L. 109-163 authorizes the guidelines to provide for the use of federal government employees without first conducting a public-private competition under the A-76 Circular, when appropriate. The use of federal government employees is appropriate under the following circumstances.

Federal employees may be used to perform commercial activities not otherwise exempted under the DoD Manpower Mix Criteria when an economic analysis shows that they are the low cost provider for contracts that: (A) have been performed by federal



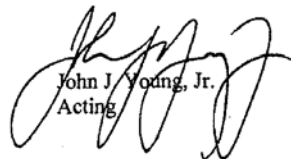
[Attachment 3]

government employees at any time on or after October 1, 1980; (B) are associated with the performance of inherently governmental functions; (C) were not awarded on a competitive basis; or (D) have been determined by a contracting officer to be poorly performed due to excessive costs or inferior quality. For new requirements and for work that is contracted (unless the contract was awarded through public-private competition), an economic analysis may be used in lieu of recompeting the contract or of performing a public-private competition under OMB Circular A-76 to determine the low cost provider. In such cases, DoD Components shall use COMPARE costing software and 343 costing rules to perform the economic analysis. Variances to COMPARE may be approved by the DoD Competitive Sourcing Official (CSO). Activities that are returned to government performance as a result of such economic analyses will be reported in the DoD Commercial Activities Management Information System.

When converting contracted activities, DoD Components may use this authority until such actions exceed 3% of a Component's authorizations coded under OMB reason code B (commercial reviewable) in the DoD Component's approved Inherently Governmental/Commercial Activities (IG/CA) Inventory for the previous fiscal year. Actions exceeding this limit require prior notification of the DoD CSO. At any time, the DoD CSO may intervene or stop a section 343 action. All such actions shall be in compliance with sections 129 and 129a of Title 10, U.S.C. For new requirements and when converting contracted activities to Government performance, DoD Components will use the flexible hiring authority available through the National Security Personnel System wherever possible.

DoD Components shall document and report all DoD authorizations established as a result of converting contract performance to government performance via a separate column identified in the FY2007 IG/CA Inventory Guidance and explained in the accompanying narrative. The Office of Under Secretary of Defense for Personnel and Readiness and my office will review the Department's annual IG/CA inventory to improve the inventory process.

This policy will be reviewed 18 months after implementation to identify possible procedural changes. The review will identify the scope of Section 343 implementation and allow for changes ensuring maximum flexibility as the Department makes reasonable sourcing decisions to meet mission requirements using the most cost effective and efficient sources.


John J. Young, Jr.
Acting

Attachments:
As stated

[Attachment 3]