

Calendar No. 234

115TH CONGRESS }
1st Session

SENATE

{ REPORT
115-165

REDUCING DHS ACQUISITION COST
GROWTH ACT

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

S. 906

TO AMEND THE HOMELAND SECURITY ACT OF 2002 TO
PROVIDE FOR CONGRESSIONAL NOTIFICATION REGARDING MAJOR
ACQUISITION PROGRAM BREACHES, AND FOR OTHER PURPOSES



OCTOBER 5, 2017.—Ordered to be printed

U.S. GOVERNMENT PUBLISHING OFFICE

79-010

WASHINGTON : 2017

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REDUCING DHS ACQUISITION COST GROWTH ACT

OCTOBER 5, 2017.—Ordered to be printed

Mr. JOHNSON, from the Committee on Homeland Security and
Governmental Affairs, submitted the following

R E P O R T

[To accompany S. 906]

[Including cost estimate of the Congressional Budget Office]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 906) to amend the Homeland Security Act of 2002 to provide for congressional notification regarding major acquisition program breaches, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill, as amended, do pass.

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I. PURPOSE AND SUMMARY

S. 906, the Reducing DHS Acquisition Cost Growth Act, amends the Homeland Security Act of 2002 to provide for greater oversight of major acquisition programs within the Department of Homeland Security (DHS or the Department) that fail to meet cost, schedule, or performance requirements (*i.e.*, breach). The bill assists DHS in its efforts to improve management of its major acquisition programs by ensuring that breaches are reported in a timely manner to the appropriate Department officials. Additionally, S. 906 requires DHS to develop a remediation plan and perform a root cause

analysis for each major acquisition program in breach. Finally, this bill requires the DHS Office of Inspector General (OIG) to conduct a comprehensive study on the prevalence and impact of bid protests on the DHS acquisition process, particularly those protests filed with the Government Accountability Office (GAO) and the U.S. Court of Federal Claims.

II. BACKGROUND AND THE NEED FOR LEGISLATION

DHS spends approximately \$18 billion annually on its acquisition programs.¹ From the screening of passengers at our nation's airports to the detection of illegal border crossings, acquisition programs play critical roles in fulfilling the Department's missions and ensuring frontline operators have the tools and capabilities necessary to protect and secure the homeland.

DHS continues to face scrutiny from independent government watchdogs due to improper management and excessive cost growth of its major acquisitions programs. For instance, both the GAO and the DHS OIG have found that DHS's acquisition programs "continue to cost more than expected, take longer to deploy than planned, or deliver less capability than promised."²

The Committee held a hearing in March 2016, entitled *DHS Management and Acquisition Reform*.³ During the hearing, DHS Inspector General John Roth testified that, "[a]lthough the Department has improved its acquisition processes and taken steps to strengthen oversight of major acquisition programs, challenges to cost effectiveness and efficiency remain."⁴ One of the specific ongoing challenges identified by the OIG included that DHS "lacks acquisition management tools to consistently determine whether major acquisitions are on track to achieve their cost, schedule, and capability goals."⁵ The Inspector General's testimony highlighted GAO's findings in April 2015 that "about half of DHS's major [acquisition] programs lacked an approved baseline, and 77 percent lacked approved life cycle cost estimates."⁶ Without the critical tools necessary to evaluate potential shortcomings, major acquisition programs can falter, and subsequently breach their cost, schedule, and performance requirements.⁷ When a breach does occur, it is imperative that DHS act swiftly to mitigate potential damage to the program's success and to save taxpayer money.⁸

¹*DHS Management and Acquisition Reform: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 114th Cong. (2016) (written testimony of Russell Deyo, Under Sec'y of Mgmt., U.S. Dep't of Homeland Sec., and Charles Fulghum, Chief Financial Officer, U.S. Dep't of Homeland Sec.), available at <https://www.dhs.gov/news/2016/03/16/written-testimony-mgmt-under-secretary-and-deputy-under-secretary-senate-committee>.

²*DHS Management and Acquisition Reform: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 114th Cong. 1 (2016) (written testimony of John Roth, Inspector General, U.S. Dep't of Homeland Sec.), available at <https://www.oig.dhs.gov/assets/TM/2016/OIGtm-JR-031616.pdf>; see also U.S. Gov't Accountability Office, GAO-17-346SP, *Homeland Security Acquisitions: Earlier Requirements Definition and Clear Documentation of Key Decisions Could Facilitate Ongoing Progress* 45 (2017), <http://www.gao.gov/assets/690/683977.pdf>.

³*DHS Management and Acquisition Reform: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 114th Cong. (2016), available at <https://www.hsgac.senate.gov/hearings/dhs-management-and-acquisition-reform>.

⁴*Id.* (testimony of John Roth, Inspector General, U.S. Dep't of Homeland Sec.), available at <https://www.oig.dhs.gov/sites/default/files/assets/TM/2016/OIGtm-JR-031616.pdf> at 1.

⁵*Id.* at 12.

⁶*Id.*; see also U.S. Gov't Accountability Office, GAO-15-171SP, *Homeland Security Acquisitions: Major Program Assessments Reveal Actions Needed to Improve Accountability* (2015), <http://www.gao.gov/assets/670/669791.pdf>.

⁷*Id.* at 7.

⁸*Id.* at 13.

Another potential impediment to the efficient and effective management of acquisition program resources is the bid protest process. Under the Federal Acquisition Regulation (FAR), a private company bidding on a contract with a Federal agency may file a bid protest with either the GAO or the U.S. Court of Federal Claims on the basis of the criteria set forth in the FAR.⁹ The number of bid protests filed by private industry has continued to increase in recent years.¹⁰ This has been evidenced by an increase in the GAO's bid protest activity, which went from 2,429 cases in fiscal year 2013 to 2,789 cases in fiscal year 2016.¹¹ The bid protest process may be seen as a mechanism for competing for new contracts and maintaining existing contracts.¹² While the bid protest process serves a valuable oversight function, constant focus on the likelihood of a protest and compliance during the procurement process may create a risk-averse culture among Federal acquisitions officials that may stymie innovation and contribute to the overall inefficiency of the procurement process.¹³

S. 906 aims to prevent unnecessary cost growth by holding DHS accountable when the Department fails to meet program baseline requirements. Specifically, this bill requires greater Departmental and congressional oversight of major DHS acquisition programs when a major acquisition program—defined as those with total expenditures of \$300 million or more—fails to meet any cost, schedule, or performance thresholds specified in the program's most recently approved acquisition program baseline. Lastly, the bill as amended in Committee requires the OIG to study the impact of the bid protest process on, among other things, DHS's acquisition management processes, and report the findings to this Committee and the House Homeland Security Committee. The report would assess the bid protest process, including reviewing the number of bid protests filed across the Federal Government and Federal courts, the effectiveness of each forum, and how the bid protest process affects the cost and schedule of major acquisition programs.

III. LEGISLATIVE HISTORY

Senators Claire McCaskill (D–MO) and Steve Daines (R–MT) introduced S. 906, the Reducing DHS Acquisition Cost Growth Act, on April 7, 2017. The bill was referred to the Committee on Homeland Security and Governmental Affairs.

The Committee considered S. 906 at a business meeting on July 26, 2017. During the business meeting, a McCain substitute amendment that required an OIG study and report on bid protests

⁹ See Federal Acquisition Regulation, 48 C.F.R. § 33.104–105 (2005).

¹⁰ Jason Miller, *Bid Protests Continue to Rise as Agencies Take Corrective Action More Quickly*, Federal News Radio (Nov. 20, 2014), <https://federalnewsradio.com/congress/2014/11/bid-protests-continue-to-rise-as-agencies-take-corrective-action-more-quickly>; Andy Medici, *Defense Bill Asks If Contractors Are Gaming Bid Protests*, Federal Times (May 4, 2015), <http://www.federaltimes.com/acquisition/2015/05/04/defense-bill-asks-if-contractors-are-gaming-bid-protests>.

¹¹ Letter from Susan A. Poling, General Counsel, U.S. Gov't Accountability Office, to Congressional Committees on the GAO Bid Protest Annual Report to Congress for Fiscal Year 2013 (Jan. 2, 2014), available at <http://www.gao.gov/assets/660/659993.pdf>; Letter from Susan A. Poling, General Counsel, U.S. Gov't Accountability Office, to Congressional Committees on the GAO Bid Protest Annual Report to Congress for Fiscal Year 2016 (Dec. 15, 2016), available at <http://www.gao.gov/assets/690/681662.pdf>.

¹² Bruce Tsai, *Targeting Frivolous Bid Protests by Revisiting the Competition in Contracting Act's Automatic Stay Provision* (2015), <http://www.ncmahq.org/docs/default-source/default-document-library/articles/jcm15---article-07>.

¹³ *Id.*

was adopted by voice vote *en bloc*. Senators present for the vote were Johnson, Portman, Lankford, Daines, McCaskill, Tester, Heitkamp, Peters, Hassan, and Harris.

The Committee favorably reported the bill, as amended by the McCain substitute amendment, by voice vote *en bloc*. Senators present for the vote were Johnson, Portman, Lankford, Daines, McCaskill, Tester, Heitkamp, Peters, Hassan, and Harris. Consistent with Committee Rule 11, the Committee reports the bill with a technical amendment by mutual agreement of the Chairman and Ranking Member.

IV. SECTION-BY-SECTION ANALYSIS OF THE BILL, AS REPORTED

Section 1. Short title

This section names the bill the “Reducing DHS Acquisition Cost Growth Act.”

Sec. 2. Congressional notification for major acquisition programs

Section 2 adds a new section 836 following the end of Subtitle D of title VIII of the Homeland Security Act of 2002.

New subsection 836(a) provides definitions for the terms “acquisition,” “acquisition program,” “acquisition program baseline,” “appropriate committees of Congress,” “best practices,” “breach,” “component acquisition executive,” and “major acquisition program.”

New subsection 836(b) details the steps that DHS must take in the event of a breach of a major acquisition program. Paragraph (b)(1) requires the program manager of a major acquisition program in breach to notify the appropriate DHS authorities, such as the Under Secretary for Management (USM), no later than 30 days after the breach is identified. If, however, the breach results in a cost overrun greater than 15 percent, a schedule delay greater than 180 days, or a failure to meet any of the performance thresholds detailed in the most recently approved acquisition program baseline for the program, the Component Acquisition Executive for the program is also required to notify the Secretary of DHS and the DHS Inspector General no later than 5 days after notification of the breach is received.

Paragraph (b)(2) requires a remediation plan and root cause analysis to be performed on major acquisition programs in breach. Program managers are required to develop a plan to remediate the breach, which must, among other things, propose corrective actions for addressing the breach and conduct an analysis identifying potential root causes behind the breach. This plan must be submitted to the head of the relevant DHS component, the Department’s Program Accountability and Risk Management division, and the USM.

Paragraph (b)(3) requires the USM to review the corrective actions and either approve the plan or provide alternative corrective actions for addressing the breach. The USM must submit a copy of the remediation plan, root cause analysis, and a description of actions taken to address the breach to the appropriate committees of Congress no later than 30 days after completing the review.

New subsection 836(c) requires the USM to notify Congress of a breach in a major acquisition program in the next quarterly Comprehensive Acquisition Status Report, and details what information must be included in the event the likely cost overrun is greater

than 20 percent or likely delay is greater than 12 months from the acquisition program baseline.

Sec. 3. Report on bid protests

Section 3 of the bill requires the OIG to conduct a single comprehensive study on the prevalence and impact of bid protests performed by GAO and the Federal courts on DHS's acquisition process. Specifically, this section requires the OIG to report on the time DHS spends at each phase of the procurement process attempting to prevent a protest, addressing a protest, or taking corrective action in response to a protest. Additionally, the report is to include information on the extent the bid protest process affects or may affect a company's decision to offer a bid or proposal.

V. EVALUATION OF REGULATORY IMPACT

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of this bill and determined that the bill will have no regulatory impact within the meaning of the rules. The Committee agrees with the Congressional Budget Office's statement that the bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

VI. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

AUGUST 18, 2017.

Hon. RON JOHNSON,
Chairman, Committee on Homeland Security and Governmental Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 906, the Reducing DHS Acquisition Cost Growth Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Jacob Fabian.

Sincerely,

KEITH HALL.

Enclosure.

S. 906—Reducing DHS Acquisition Cost Growth Act

S. 906 would specify procedures to be followed by the Department of Homeland Security (DHS) if it fails to meet certain timelines or other performance standards for its major acquisition programs. Additionally, the bill would require an Inspector General report to be submitted to the Congress on the prevalence and impact of bid protests on the acquisition process of DHS. Based on information from DHS, CBO estimates that implementing the new administrative procedures would cost less than \$500,000 annually; such spending would be subject to the availability of appropriated funds.

Enacting the legislation would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply. CBO estimates that enacting S. 906 would not increase net direct spending

or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

S. 906 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

On March 22, 2017, CBO transmitted a cost estimate for H.R. 1294, the Reducing DHS Acquisition Cost Growth Act, as passed by the U.S. House of Representatives on March 20, 2017. The two pieces of legislation are similar and CBO's estimates of their costs are the same.

The CBO staff contact for this estimate is Jacob Fabian. The estimate was approved by Theresa Gullo, Assistant Director for Budget Analysis.

VII. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill as reported are shown as follows (existing law proposed to be omitted is enclosed in brackets, new matter is printed in *italic*, and existing law in which no change is proposed is shown in *roman*):

HOMELAND SECURITY ACT OF 2002

* * * * *

TITLE VIII—COORDINATION WITH NON-FEDERAL ENTITIES; INSPECTOR GENERAL; UNITED STATES SECRET SERVICE; COAST GUARD; GENERAL PROVISIONS

* * * * *

Subtitle D—Acquisitions

* * * * *

SEC. 836. CONGRESSIONAL NOTIFICATION AND OTHER REQUIREMENTS FOR MAJOR ACQUISITION PROGRAM BREACH.

(a) *DEFINITIONS.—In this section:*

(1) *ACQUISITION.—The term “acquisition” has the meaning given the term in section 131 of title 41, United States Code.*

(2) *ACQUISITION PROGRAM.—The term “acquisition program” means the process by which the Department acquires, with any appropriated amounts, by contract for purchase or lease, property or services (including construction) that support the missions and goals of the Department.*

(3) *ACQUISITION PROGRAM BASELINE.—The term “acquisition program baseline”, with respect to an acquisition program, means a summary of the cost, schedule, and performance parameters, expressed in standard, measurable, quantitative terms, which shall be met in order to accomplish the goals of the program.*

(4) *APPROPRIATE COMMITTEES OF CONGRESS.*—The term “appropriate committees of Congress” has the meaning given the term in section 226(a).

(5) *BEST PRACTICES.*—The term “best practices”, with respect to acquisition, means a knowledge-based approach to capability development that includes—

- (A) identifying and validating needs;
- (B) assessing alternatives to select the most appropriate solution;
- (C) clearly establishing well-defined requirements;
- (D) developing realistic cost assessments and schedules;
- (E) securing stable funding that matches resources to requirements;
- (F) demonstrating technology, design, and manufacturing maturity;
- (G) using milestones and exit criteria or specific accomplishments that demonstrate progress;
- (H) adopting and executing standardized processes with known success across programs;
- (I) establishing an adequate workforce that is qualified and sufficient to perform necessary functions; and
- (J) integrating the capabilities described in subparagraphs (A) through (I) into the mission and business operations of the Department.

(6) *BREACH.*—The term “breach”, with respect to a major acquisition program, means a failure to meet any cost, schedule, or performance threshold specified in the most recently approved acquisition program baseline.

(7) *COMPONENT ACQUISITION EXECUTIVE.*—The term “Component Acquisition Executive” means the senior acquisition official within a component who is designated in writing by the Under Secretary for Management, in consultation with the component head, with authority and responsibility for leading a process and staff to provide acquisition and program management oversight, policy, and guidance to ensure that statutory, regulatory, and higher level policy requirements are fulfilled, including compliance with Federal law, the Federal Acquisition Regulation, and Department acquisition management directives established by the Under Secretary for Management.

(8) *MAJOR ACQUISITION PROGRAM.*—The term “major acquisition program” means an acquisition program of the Department that is estimated by the Secretary to require an eventual total expenditure of at least \$300,000,000 (based on fiscal year 2017 constant dollars) over the life cycle cost of the program.

(b) *REQUIREMENTS WITHIN DEPARTMENT IN EVENT OF BREACH.*—

(1) *NOTIFICATIONS.*—

(A) *NOTIFICATION OF BREACH.*—If a breach occurs in a major acquisition program, the program manager for the program shall notify the Component Acquisition Executive for the program, the head of the component concerned, the Executive Director of the Program Accountability and Risk Management division, the Under Secretary for Management, and the Deputy Secretary not later than 30 calendar days after the date on which the breach is identified.

(B) *NOTIFICATION TO SECRETARY.*—If a breach occurs in a major acquisition program and the breach results in a cost overrun greater than 15 percent, a schedule delay greater than 180 days, or a failure to meet any of the performance thresholds from the cost, schedule, or performance parameters specified in the most recently approved acquisition program baseline for the program, the Component Acquisition Executive for the program shall notify the Secretary and the Inspector General of the Department not later than 5 business days after the date on which the Component Acquisition Executive for the program, the head of the component concerned, the Executive Director of the Program Accountability and Risk Management Division, the Under Secretary for Management, and the Deputy Secretary are notified of the breach under subparagraph (A).

(2) *REMEDATION PLAN AND ROOT CAUSE ANALYSIS.*—

(A) *IN GENERAL.*—If a breach occurs in a major acquisition program, the program manager for the program shall submit in writing to the head of the component concerned, the Executive Director of the Program Accountability and Risk Management division, and the Under Secretary for Management, at a date established by the Under Secretary for Management, a remediation plan and root cause analysis relating to the breach and program.

(B) *REMEDATION PLAN.*—The remediation plan required under subparagraph (A) shall—

- (i) explain the circumstances of the breach at issue;
- (ii) provide prior cost estimating information;
- (iii) include a root cause analysis that determines the underlying cause or causes of shortcomings in cost, schedule, or performance of the major acquisition program with respect to which the breach has occurred, including the role, if any, of—
 - (I) unrealistic performance expectations;
 - (II) unrealistic baseline estimates for cost or schedule or changes in program requirements;
 - (III) immature technologies or excessive manufacturing or integration risk;
 - (IV) unanticipated design, engineering, manufacturing, or technology integration issues arising during program performance;
 - (V) changes to the scope of the program;
 - (VI) inadequate program funding or changes in planned out-year funding from one 5-year funding plan to the next 5-year funding plan as outlined in the Future Years Homeland Security Program required under section 874;
 - (VII) legislative, legal, or regulatory changes; or
 - (VIII) inadequate program management personnel, including lack of sufficient number of staff, training, credentials, certifications, or use of best practices;
- (iv) propose corrective action to address cost growth, schedule delays, or performance issues;

(v) explain the rationale for why a proposed corrective action is recommended; and

(vi) in coordination with the Component Acquisition Executive for the program, discuss all options considered, including—

(I) the estimated impact on cost, schedule, or performance of the program if no changes are made to current requirements;

(II) the estimated cost of the program if requirements are modified; and

(III) the extent to which funding from other programs will need to be reduced to cover the cost growth of the program.

(3) REVIEW OF CORRECTIVE ACTIONS.—

(A) IN GENERAL.—The Under Secretary for Management—

(i) shall review each remediation plan required under paragraph (2); and

(ii) not later than 30 days after submission of a remediation plan under paragraph (2), may approve the plan or provide an alternative proposed corrective action.

(B) SUBMISSION TO CONGRESS.—Not later than 30 days after the date on which the Under Secretary for Management completes a review of a remediation plan under subparagraph (A), the Under Secretary for Management shall submit to the appropriate committees of Congress—

(i) a copy of the remediation plan; and

(ii) a statement describing the corrective action or actions that have occurred pursuant to paragraph (2)(B)(iv) for the major acquisition program at issue, with a justification for each action.

(c) REQUIREMENTS RELATING TO CONGRESSIONAL NOTIFICATION IF BREACH OCCURS.—

(1) NOTIFICATION TO CONGRESS.—If a notification to the Secretary is made under subsection (b)(1)(B) relating to a breach in a major acquisition program, the Under Secretary for Management shall notify the appropriate committees of Congress of the breach in the next quarterly Comprehensive Acquisition Status Report, as required in the matter under the heading “Office of the Under Secretary for Management” in title I of division F of the Consolidated Appropriations Act of 2016 (Public Law 114–113; 129 Stat. 2493), after receipt by the Under Secretary for Management of notification under that subsection.

(2) SIGNIFICANT VARIANCES IN COSTS OR SCHEDULE.—If a likely cost overrun is greater than 20 percent or a likely delay is greater than 12 months from the costs and schedule specified in the acquisition program baseline for a major acquisition program, the Under Secretary for Management shall include in the notification required in paragraph (1) a written certification, with supporting explanation, that—

(A) the program is essential to the accomplishment of the mission of the Department;

(B) there are no alternatives to the capability or asset provided by the program that will provide equal or greater capability in a more cost-effective and timely manner;

(C) the new acquisition schedule and estimates for total acquisition cost are reasonable; and

(D) the management structure for the program is adequate to manage and control cost, schedule, and performance.

* * * * *

