

ment of Defense under such section, including criteria based on dollar thresholds, program criticality, or other appropriate measures.

“(B) Appropriate key decision points at which those reviews should take place.

“(C) A description of the specific matters that should be reviewed.

“(e) COMPTROLLER GENERAL REVIEW.—Not later than 90 days after the date on which the Secretary issues the policy required by subsection (d) and the Under Secretary of Defense for Acquisition, Technology, and Logistics issues the guidance required by subsection (b)(2) [set out as a note above], the Comptroller General shall submit to the Committees on Armed Services of the Senate and the House of Representatives an assessment of the compliance with the requirements of this section [enacting this section and section 2330a of this title, amending sections 133 and 2331 of this title, and enacting provisions set out as a note under this section] and the amendments made by this section.

“(f) DEFINITIONS.—In this section:

“(1) The term ‘senior procurement executive’ means the official designated as the senior procurement executive under section 16(3) of the Office of Federal Procurement Policy Act ([former] 41 U.S.C. 414(3)) [see 41 U.S.C. 1702(c)].

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

PERFORMANCE GOALS FOR PROCUREMENTS OF SERVICES

Pub. L. 107–107, div. A, title VIII, §802, Dec. 28, 2001, 115 Stat. 1178, as amended by Pub. L. 107–314, div. A, title VIII, §805, Dec. 2, 2002, 116 Stat. 2605, provided that:

“(a) GOALS.—(1) It shall be an objective of the Department of Defense to achieve efficiencies in procurements of services pursuant to multiple award contracts through the use of—

“(A) performance-based services contracting;

“(B) appropriate competition for task orders under services contracts;

“(C) program review, spending analyses, and improved management of services contracts.

“(2) In furtherance of such objective, the Department of Defense shall have the following goals:

“(A) To increase, as a percentage of all of the individual purchases of services made by or for the Department of Defense under multiple award contracts for a fiscal year (calculated on the basis of dollar value), the volume of the individual purchases of services that are made on a competitive basis and involve receipt of more than one offer from qualified contractors to a percentage as follows:

“(i) For fiscal year 2003, a percentage not less than 40 percent.

“(ii) For fiscal year 2004, a percentage not less than 50 percent.

“(iii) For fiscal year 2011, a percentage not less than 75 percent.

“(B) To increase, as a percentage of all of the individual purchases of services made by or for the Department of Defense under multiple award contracts for a fiscal year (calculated on the basis of dollar value), the use of performance-based purchasing specifying firm fixed prices for the specific tasks to be performed to a percentage as follows:

“(i) For fiscal year 2003, a percentage not less than 25 percent.

“(ii) For fiscal year 2004, a percentage not less than 35 percent.

“(iii) For fiscal year 2005, a percentage not less than 50 percent.

“(iv) For fiscal year 2011, a percentage not less than 70 percent.

“(3) The Secretary of Defense may adjust any percentage goal established in paragraph (2) if the Sec-

retary determines in writing that such a goal is too high and cannot reasonably be achieved. In the event that the Secretary chooses to adjust such a goal, the Secretary shall—

“(A) establish a percentage goal that the Secretary determines would create an appropriate incentive for Department of Defense components to use competitive procedures or performance-based services contracting, as the case may be; and

“(B) submit to the congressional defense committees [Committees on Armed Services and Appropriations of the Senate and the House of Representatives] a report containing an explanation of the reasons for the Secretary’s determination and a statement of the new goal that the Secretary has established.

“(b) ANNUAL REPORT.—Not later than March 1, 2002, and annually thereafter through March 1, 2011, the Secretary of Defense shall submit to the congressional defense committees [Committees on Armed Services and Appropriations of the Senate and the House of Representatives] a report on the progress made toward meeting the objective and goals established in subsection (a). Each report shall include, at a minimum, the following information:

“(1) A summary of the steps taken or planned to be taken in the fiscal year of the report to improve the management of procurements of services.

“(2) A summary of the steps planned to be taken in the following fiscal year to improve the management of procurements of services.

“(3) An estimate of the amount that will be expended by the Department of Defense for procurements of services in the fiscal year of the report.

“(4) An estimate of the amount that will be expended by the Department of Defense for procurements of services in the following fiscal year.

“(5) Regarding the individual purchases of services that were made by or for the Department of Defense under multiple award contracts in the fiscal year preceding the fiscal year in which the report is required to be submitted, information (determined using the data collection system established under section 2330a of title 10, United States Code) as follows:

“(A) The percentage (calculated on the basis of dollar value) of such purchases that are purchases that were made on a competitive basis and involved receipt of more than one offer from qualified contractors.

“(B) The percentage (calculated on the basis of dollar value) of such purchases that are performance-based purchases specifying firm fixed prices for the specific tasks to be performed.

“(c) DEFINITIONS.—(1) In this section, the terms ‘individual purchase’ and ‘multiple award contract’ have the meanings given such terms in section 803(c) of this Act [10 U.S.C. 2304 note].

“(2) For the purposes of this section, an individual purchase of services is made on a competitive basis only if it is made pursuant to procedures described in paragraphs (2), (3), and (4) of section 803(b) of this Act [10 U.S.C. 2304 note].”

§ 2330a. Procurement of services: tracking of purchases

(a) DATA COLLECTION REQUIRED.—The Secretary of Defense shall establish a data collection system to provide management information with regard to each purchase of services by a military department or Defense Agency in excess of the simplified acquisition threshold, regardless of whether such a purchase is made in the form of a contract, task order, delivery order, military interdepartmental purchase request, or any other form of interagency agreement.

(b) DATA TO BE COLLECTED.—The data required to be collected under subsection (a) includes the following:

- (1) The services purchased.
- (2) The total dollar amount of the purchase.
- (3) The form of contracting action used to make the purchase.
- (4) Whether the purchase was made through—
 - (A) a performance-based contract, performance-based task order, or other performance-based arrangement that contains firm fixed prices for the specific tasks to be performed;
 - (B) any other performance-based contract, performance-based task order, or performance-based arrangement; or
 - (C) any contract, task order, or other arrangement that is not performance based.
- (5) In the case of a purchase made through an agency other than the Department of Defense, the agency through which the purchase is made.
- (6) The extent of competition provided in making the purchase and whether there was more than one offer.
- (7) Whether the purchase was made from—
 - (A) a small business concern;
 - (B) a small business concern owned and controlled by socially and economically disadvantaged individuals; or
 - (C) a small business concern owned and controlled by women.

(c) INVENTORY.—(1) Not later than the end of the third quarter of each fiscal year, the Secretary of Defense shall submit to Congress an annual inventory of the activities performed during the preceding fiscal year pursuant to contracts for services (and pursuant to contracts for goods to the extent services are a significant component of performance as identified in a separate line item of a contract) for or on behalf of the Department of Defense. The guidance for compiling the inventory shall be issued by the Under Secretary of Defense for Personnel and Readiness, the Under Secretary of Defense (Comptroller), and the Under Secretary of Defense for Acquisition, Technology, and Logistics, as follows:

(A) The Under Secretary of Defense for Personnel and Readiness, as supported by the Under Secretary of Defense (Comptroller), shall be responsible for developing guidance for—

- (i) the collection of data regarding functions and missions performed by contractors in a manner that is comparable to the manpower data elements used in inventories of functions performed by Department of Defense employees;
- (ii) the calculation of contractor full-time equivalents for direct labor, using direct labor hours in a manner that is comparable to the calculation of Department of Defense civilian full-time employees; and
- (iii) the conduct and completion of the annual review required under subsection (e)(1).

(B) The Under Secretary of Defense for Acquisition, Technology, and Logistics shall be responsible for developing guidance on other data elements and implementing procedures for requirements relating to acquisition.

(2) The entry for an activity on an inventory under this subsection shall include, for the fiscal year covered by such entry, the following:

(A) The functions and missions performed by the contractor.

(B) The contracting organization, the component of the Department of Defense 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 contractor employees, expressed as full-time equivalents for direct labor, using direct labor hours and associated cost data collected from contractors (except that estimates may be used where such data is not available and cannot reasonably be made available in a timely manner for the purpose of the inventory).

(F) A determination whether the contract pursuant to which the activity is performed is a personal services contract.

(G) A summary of the data required to be collected for the activity under subsection (a).

(3) The inventory required under this subsection shall be submitted in unclassified form, but may include a classified annex.

(d) PUBLIC AVAILABILITY OF INVENTORIES.—Not later than 30 days after the date on which an inventory under subsection (c) is required to be submitted to Congress, the Secretary shall—

(1) make the inventory available to the public; and

(2) publish in the Federal Register a notice that the inventory is available to the public.

(e) REVIEW AND PLANNING REQUIREMENTS.—Within 90 days after the date on which an inventory is submitted under subsection (c), the Secretary of the military department or head of the Defense Agency responsible for activities in the inventory shall—

(1) review the contracts and activities in the inventory for which such Secretary or agency head is responsible;

(2) ensure that—

(A) each contract on the list that is a personal services contract has been entered into, and is being performed, in accordance with applicable statutory and regulatory requirements;

(B) the activities on the list do not include any inherently governmental functions; and

(C) to the maximum extent practicable, the activities on the list do not include any functions closely associated with inherently governmental functions; and

(3) identify activities that should be considered for conversion—

(A) to performance by civilian employees of the Department of Defense pursuant to section 2463 of this title; or

(B) to an acquisition approach that would be more advantageous to the Department of Defense.

(f) DEVELOPMENT OF PLAN AND ENFORCEMENT AND APPROVAL MECHANISMS.—The Secretary of

the military department or head of the Defense Agency responsible for activities in the inventory shall develop a plan, including an enforcement mechanism and approval process, to—

(1) provide for the use of the inventory by the military department or Defense Agency to implement the requirements of section 129a of this title;

(2) ensure the inventory is used to inform strategic workforce planning;

(3) facilitate use of the inventory for compliance with section 235 of this title; and

(4) provide for appropriate consideration of the conversion of activities identified under subsection (e)(3) within a reasonable period of time.

(g) **RULE OF CONSTRUCTION.**—Nothing in this section shall be construed to authorize the performance of personal services by a contractor except where expressly authorized by a provision of law other than this section.

(h) **DEFINITIONS.**—In this section:

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

(2) The definitions set forth in section 2225(f) of this title for the terms “simplified acquisition threshold”, “small business concern”, “small business concern owned and controlled by socially and economically disadvantaged individuals”, and “small business concern owned and controlled by women” shall apply.

(3) **FUNCTION CLOSELY ASSOCIATED WITH INHERENTLY GOVERNMENTAL FUNCTIONS.**—The term “function closely associated with inherently governmental functions” has the meaning given that term in section 2383(b)(3) of this title.

(4) **INHERENTLY GOVERNMENTAL FUNCTIONS.**—The term “inherently governmental functions” has the meaning given that term in section 2383(b)(2) of this title.

(5) **PERSONAL SERVICES CONTRACT.**—The term “personal services contract” means a contract under which, as a result of its terms or conditions or the manner of its administration during performance, contractor personnel are subject to the relatively continuous supervision and control of one or more Government officers or employees, except that the giving of an order for a specific article or service, with the right to reject the finished product or result, is not the type of supervision or control that makes a contract a personal services contract.

(Added Pub. L. 107–107, div. A, title VIII, § 801(c), Dec. 28, 2001, 115 Stat. 1176; amended Pub. L. 110–181, div. A, title VIII, § 807(a), Jan. 28, 2008, 122 Stat. 213; Pub. L. 111–84, div. A, title VIII, § 803(b), Oct. 28, 2009, 123 Stat. 2402; Pub. L. 111–383, div. A, title III, § 321, Jan. 7, 2011, 124 Stat. 4183; Pub. L. 112–81, div. A, title IX, § 936, Dec. 31, 2011, 125 Stat. 1545.)

AMENDMENTS

2011—Subsec. (c). Pub. L. 111–383, § 321(2) to (4), substituted “The guidance for compiling the inventory

shall be issued by the Under Secretary of Defense for Personnel and Readiness, the Under Secretary of Defense (Comptroller), and the Under Secretary of Defense for Acquisition, Technology, and Logistics, as follows:” for “The entry for an activity on an inventory under this subsection shall include, for the fiscal year covered by such entry, the following:” in par. (1), added new subpars. (A) and (B) to par. (1), inserted par. (2) designation and introductory provisions before former subpars. (A) to (G) of par. (1) thereby making them part of par. (2), added subpar. (E), and struck out former subpar. (E) which read as follows: “The number of full-time contractor employees (or its equivalent) paid for the performance of the activity.”

Subsec. (c)(1). Pub. L. 112–81, § 936(a)(1), inserted “(and pursuant to contracts for goods to the extent services are a significant component of performance as identified in a separate line item of a contract)” after “pursuant to contracts for services” in introductory provisions.

Subsec. (c)(1)(A)(ii), (iii). Pub. L. 112–81, § 936(a)(2), added cls. (ii) and (iii) and struck out former cl. (ii) which read as follows: “the calculation of contractor manpower equivalents in a manner that is comparable to the calculation of full-time equivalents for use in inventories of functions performed by Department of Defense employees.”

Subsec. (c)(1)(B). Pub. L. 112–81, § 936(a)(3), inserted “for requirements relating to acquisition” before period at end.

Subsec. (c)(2), (3). Pub. L. 111–383, § 321(1), redesignated par. (2) as (3).

Subsec. (e)(2) to (4). Pub. L. 112–81, § 936(b), inserted “and” at end of par. (2), substituted period for “; and” at end of par. (3), and struck out par. (4) which read as follows: “develop a plan, including an enforcement mechanism and approval process, to provide for appropriate consideration of the conversion of activities identified under paragraph (3) within a reasonable period of time.”

Subsec. (f) to (h). Pub. L. 112–81, § 936(c), added subsec. (f) and redesignated former subsecs. (f) and (g) as (g) and (h), respectively.

2009—Subsec. (e)(4). Pub. L. 111–84 inserted “, including an enforcement mechanism and approval process,” after “plan”.

2008—Subsecs. (c) to (g). Pub. L. 110–181, § 807(a)(1), (2), added subsecs. (c) to (f), redesignated former subsec. (d) as (g), and struck out heading and text of former subsec. (c). Former text read as follows: “To the maximum extent practicable, a single data collection system shall be used to collect data under this section and information under section 2225 of this title.”

Subsec. (g)(3) to (5). Pub. L. 110–181, § 807(a)(3), added pars. (3) to (5).

EFFECTIVE DATE OF 2008 AMENDMENT

Pub. L. 110–181, div. A, title VIII, § 807(b), Jan. 28, 2008, 122 Stat. 215, provided that:

“(1) The amendments made by subsection (a) [amending this section] shall be effective upon the date of the enactment of this Act [Jan. 28, 2008].

“(2) The first inventory required by section 2330a(c) of title 10, United States Code, as added by subsection (a), shall be submitted not later than the end of the third quarter of fiscal year 2008.”

DEVELOPMENT OF GUIDANCE ON PERSONAL SERVICES CONTRACTS

Pub. L. 110–417, [div. A], title VIII, § 831, Oct. 14, 2008, 122 Stat. 4534, provided that:

“(a) **GUIDANCE REQUIRED.**—Not later than 270 days after the date of the enactment of this Act [Oct. 14, 2008], the Secretary of Defense shall develop guidance related to personal services contracts to—

“(1) require a clear distinction between employees of the Department of Defense and employees of Department of Defense contractors;

“(2) provide appropriate safeguards with respect to when, where, and to what extent the Secretary may

enter into a contract for the procurement of personal services; and

“(3) assess and take steps to mitigate the risk that, as implemented and administered, non-personal services contracts may become personal services contracts.

“(b) DEFINITION OF PERSONAL SERVICES CONTRACT.—In this section, the term ‘personal services contract’ has the meaning given that term in section 2330a(g)(5) [now 2330a(h)(5)] of title 10, United States Code.”

§ 2331. Procurement of services: contracts for professional and technical services

(a) IN GENERAL.—The Secretary of Defense shall prescribe regulations to ensure, to the maximum extent practicable, that professional and technical services are acquired on the basis of the task to be performed rather than on the basis of the number of hours of services provided.

(b) CONTENT OF REGULATIONS.—With respect to contracts to acquire services on the basis of the number of hours of services provided, the regulations described in subsection (a) shall—

- (1) include standards and approval procedures to minimize the use of such contracts;
- (2) establish criteria to ensure that proposals for contracts for technical and professional services are evaluated on a basis which does not encourage contractors to propose uncompensated overtime;
- (3) ensure appropriate emphasis on technical and quality factors in the source selection process;
- (4) require identification of any hours in excess of 40-hour weeks included in a proposal;
- (5) ensure that offerors are notified that proposals which include unrealistically low labor rates or which do not otherwise demonstrate cost realism will be considered in a risk assessment and evaluated appropriately; and
- (6) provide guidance to contracting officers to ensure that any use of uncompensated overtime will not degrade the level of technical expertise required to perform the contract.

(Added Pub. L. 101–510, div. A, title VIII, § 834(a)(1), Nov. 5, 1990, 104 Stat. 1613; amended Pub. L. 102–25, title VII, § 701(a), Apr. 6, 1991, 105 Stat. 113; Pub. L. 103–355, title I, § 1004(c), Oct. 13, 1994, 108 Stat. 3253; Pub. L. 107–107, div. A, title VIII, § 801(g)(1), Dec. 28, 2001, 115 Stat. 1177.)

PRIOR PROVISIONS

A prior section 2331 was renumbered section 2350 of this title.

AMENDMENTS

2001—Pub. L. 107–107 substituted “Procurement of services: contracts” for “Contracts” in section catchline.

1994—Subsec. (c). Pub. L. 103–355 struck out text and heading of subsec. (c). Text read as follows:

“(1) The Secretary of Defense may waive the limitation in section 2304(j)(4) of this title on the total value of task orders for specific contracting activities to the extent the Secretary considers the use of master agreements necessary in order to further the policy set forth in subsection (a).

“(2) During any fiscal year, such a waiver may not increase the total value of task orders under master agreements of a contracting activity by more than 20 percent of the value of all contracts for advisory and assistance services awarded by that contracting activity during fiscal year 1989.

“(3) Such a waiver shall not become effective until 60 days after the Secretary of Defense has published notice thereof in the Federal Register.”

1991—Subsec. (c)(1). Pub. L. 102–25 struck out “on a case-by-case basis” after “value of task orders”, substituted “considers the use of master agreements necessary” for “considers necessary the use of master agreements”, and struck out “of this section” before period at end.

EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103–355, see section 10001 of Pub. L. 103–355, set out as a note under section 2302 of this title.

REGULATIONS

Section 834(b) of Pub. L. 101–510 provided that: “Not later than 180 days after the date of the enactment of this Act [Nov. 5, 1990], the Secretary of Defense shall publish for public comment new regulations to carry out the requirements in this section [enacting this section]. The Secretary shall promulgate final regulations to carry out such requirements not later than 270 days after the date of the enactment of this Act.”

PROVISIONS NOT AFFECTED BY PUB. L. 103–355

Repeal of subsec. (c) of this section by Pub. L. 103–355 not to be construed as modifying or superseding, or as intended to impair or restrict, authorities or responsibilities under former 40 U.S.C. 759 or chapter 11 of Title 40, Public Buildings, Property, and Works, see section 1004(d) of Pub. L. 103–355, set out as a note under section 2304a of this title.

§ 2332. Share-in-savings contracts

(a) AUTHORITY TO ENTER INTO SHARE-IN-SAVINGS CONTRACTS.—(1) The head of an agency may enter into a share-in-savings contract for information technology (as defined in section 11101(6) of title 40) in which the Government awards a contract to improve mission-related or administrative processes or to accelerate the achievement of its mission and share with the contractor in savings achieved through contract performance.

(2)(A) Except as provided in subparagraph (B), a share-in-savings contract shall be awarded for a period of not more than five years.

(B) A share-in-savings contract may be awarded for a period greater than five years, but not more than 10 years, if the head of the agency determines in writing prior to award of the contract that—

(i) the level of risk to be assumed and the investment to be undertaken by the contractor is likely to inhibit the government from obtaining the needed information technology competitively at a fair and reasonable price if the contract is limited in duration to a period of five years or less; and

(ii) usage of the information technology to be acquired is likely to continue for a period of time sufficient to generate reasonable benefit for the government.

(3) Contracts awarded pursuant to the authority of this section shall, to the maximum extent practicable, be performance-based contracts that identify objective outcomes and contain performance standards that will be used to measure achievement and milestones that must be met before payment is made.

(4) Contracts awarded pursuant to the authority of this section shall include a provision con-