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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Logistics (USD (AT&L)) policy memorandum (attached) that implemented section 343 of the FY 2006 NDAA which has now been repealed, is cancelled.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.

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

ACQUISITION,
TECHNOLOGY
AND LOGISTICS

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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

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