

§2461. Commercial or industrial type functions: required studies and reports before conversion to contractor performance

(a) **Reporting and analysis requirements as precondition to change in performance-** A commercial or industrial type function of the Department of Defense that, as of October 1, 1980, was being performed by Department of Defense civilian employees may not be changed to performance by the private sector until the Secretary of Defense fully complies with the reporting and analysis requirements specified in subsections (b) and (c).

(b) **Notification and elements of analysis-** (1) Before commencing to analyze a commercial or industrial type function described in subsection (a) for possible change to performance by the private sector, the Secretary of Defense shall submit to Congress a report containing the following:

- (A) The function to be analyzed for possible change.
- (B) The location at which the function is performed by Department of Defense civilian employees.
- (C) The number of civilian employee positions potentially affected.
- (D) The anticipated length and cost of the analysis.
- (E) A certification that a proposed performance of the commercial or industrial type function by persons who are not civilian employees of the Department of Defense is not a result of a decision by an official of a military department or Defense Agency to impose predetermined constraints or limitations on such employees in terms of man years, end strengths, full-time equivalent positions, or maximum number of employees.

(2) The duty to prepare a report under paragraph (1) may be delegated. A report prepared below the major command or claimant level of a military department, or below the equivalent level in a Defense Agency, pursuant to any such delegation shall be reviewed at the major command, claimant level, or equivalent level, as the case may be, before submission to Congress.

(3) An analysis of a commercial or industrial type function for possible change to performance by the private sector shall include the following:

- (A) An examination of the cost of performance of the function by Department of Defense civilian employees and by one or more private contractors to demonstrate whether change to performance by the private sector will result in savings to the Government over the life of the contract, including in the examination the following:
 - (i) The cost to the Government, estimated by the Secretary of Defense (based on offers received), for performance of the function by the private sector.
 - (ii) The estimated cost to the Government of Department of Defense civilian employees performing the function.
 - (iii) In addition to the costs referred to in clause (i), an estimate of all other costs and expenditures that the Government would incur because of the award of such a contract.

(B) An examination of the potential economic effect of performance of the function by the private sector on the following:

- (i) Employees of the Department of Defense who would be affected by such a change in performance.
- (ii) The local community and the Government, if more than 75 employees of the Department of Defense perform the function.

(C) An examination of the effect of performance of the function by the private sector on the military mission associated with the performance of the function.

(4)(A) A representative individual or entity at a facility where a commercial or industrial type function is analyzed for possible change in performance may submit to the Secretary of Defense an objection to the analysis on the grounds that the report required by paragraph (1) has not been submitted or that the certification required by paragraph (1)(E) is not included in the report submitted as a condition for the analysis. The objection shall be in writing and shall be submitted within 90 days after the following date:

- (i) In the case of a failure to submit the report when required, the date on which the representative individual or an official of the representative entity authorized to pose the objection first knew or should have known of that failure.
- (ii) In the case of a failure to include the certification in a submitted report, the date on which the report was submitted to Congress.

(B) If the Secretary determines that the report required by paragraph (1) was not submitted or that the required certification was not included in the submitted report, the commercial or industrial type function covered by the analysis to which objected may not be the subject of a solicitation of offers for, or award of, a contract until,

respectively, the report is submitted or a report containing the certification in full compliance with the certification requirement is submitted.

(c) NOTIFICATION OF DECISION- (1) If, as a result of the completion of the examinations under subsection (b)(3), a decision is made to change the commercial or industrial type function that was the subject of the analysis to performance by the private sector, the Secretary of Defense shall submit to Congress a report describing that decision. The report shall contain the following:

(A) An indication that the examinations required under subsection (b)(3) have been completed.

(B) The Secretary's certification that the Government calculation of the cost of performance of the function by Department of Defense civilian employees is based on an estimate of the most cost effective manner for performance of the function by Department of Defense civilian employees.

(C) The Secretary's certification that the examination required by subsection (b)(3)(A) as part of the analysis demonstrates that the performance of the function by the private sector will result in savings to the Government over the life of the contract.

(D) The Secretary's certification that the entire analysis is available for examination.

(E) A schedule for completing the change to performance of the function by the private sector.

(2) The change of the function to contractor performance may not begin until after the submission of the report required by this subsection.

(d) Waiver for small functions. Subsections (a) through (c) and subsection (g) shall not apply to a commercial or industrial type function of the Department of Defense that is being performed by 50 or fewer Department of Defense civilian employees.

(e) Waiver for the purchase of products and services of the blind and other severely handicapped persons. Subsections (a) through (c) and subsection (g) shall not apply to a commercial or industrial type function of the Department of Defense that--

(1) is included on the procurement list established pursuant to section 2 of the Javits-Wagner-O'Day Act (41 U.S.C. 47); or

(2) is planned to be changed to performance by a qualified nonprofit agency for the blind or by a qualified nonprofit agency for other severely handicapped persons in accordance with that Act.

(f) Additional limitations.

(1) A commercial or industrial type function of the Department of Defense that on October 1, 1980, was being performed by Department of Defense civilian employees may not be changed to performance by a private contractor to circumvent a civilian personnel ceiling.

(2) In no case may a commercial or industrial type function being performed by Department of Defense personnel be modified, reorganized, divided, or in any way changed for the purpose of exempting from the requirements of subsection (a) the change of all or any part of such function to performance by a private contractor.

(g) Annual reports. Not later than February 1 of each fiscal year, the Secretary of Defense shall submit to Congress a written report describing the extent to which commercial and industrial type functions were performed by Department of Defense contractors during the preceding fiscal year. The Secretary shall include in each such report an estimate of the percentage of commercial and industrial type functions of the Department of Defense that will be performed by Department of Defense civilian employees, and the percentage of such functions that will be performed by private contractors, during the fiscal year during which the report is submitted.

(h) Inapplicability during war or emergency. The provisions of this section shall not apply during war or during a period of national emergency declared by the President or Congress.

NOTE

DoD Appropriations Act for FY 99
PUBLIC LAW 105-262 [H.R. 4103]
OCT. 17, 1998

SEC. 8014. None of the funds appropriated by this Act shall be

available to convert to contractor performance an activity or function of the Department of Defense that, on or after the date of the enactment of this Act, is performed by more than ten Department of Defense civilian employees until a most efficient and cost-effective organization analysis is completed on such activity or function and certification of the analysis is made to the Committees on Appropriations of the House of Representatives and the Senate: Provided, That this section and subsections (a), (b), and (c) of 10 U.S.C. 2461 shall not apply to a commercial or industrial type function of the Department of Defense that: (1) is included on the procurement list established pursuant to section 2 of the Act of June 25, 1938 (41 U.S.C. 47), popularly referred to as the Javits-Wagner-O'Day Act; (2) is planned to be converted to performance by a qualified nonprofit agency for the blind or by a qualified nonprofit agency for other severely handicapped individuals in accordance with that Act; or (3) is planned to be converted to performance by a qualified firm under 51 per centum Native American ownership..

10 USCS § 2462 (1998)

§ 2462. Contracting for certain supplies and services required when cost is lower

(a) In general. Except as otherwise provided by law, the Secretary of Defense shall procure each supply or service necessary for or beneficial to the accomplishment of the authorized functions of the Department of Defense (other than functions which the Secretary of Defense determines must be performed by military or Government personnel) from a source in the private sector if such a source can provide such supply or service to the Department at a cost that is lower (after including any cost differential required by law, Executive order, or regulation) than the cost at which the Department can provide the same supply or service.

(b) Realistic and fair cost comparisons. For the purpose of determining whether to contract with a source in the private sector for the performance of a Department of Defense function on the basis of a comparison of the costs of procuring supplies or services from such a source with the costs of providing the same supplies or services by the Department of Defense, the Secretary of Defense shall ensure that all costs considered (including the costs of quality assurance, technical monitoring of the performance of such function, liability insurance, employee retirement and disability benefits, and all other overhead costs) are realistic and fair.

10 USCS § 2463 (1998)

§ 2463. Collection and retention of cost information data on converted services and functions

(a) Requirements in connection with conversion to contractor performance. With respect to each contract converting the performance of a service or function of the Department of Defense to contractor performance (and any extension of such a contract), the Secretary of Defense shall collect, during the term of the contract or extension, but not to exceed five years, cost information data regarding performance of the service or function by private contractor employees.

(b) Requirements in connection with return to employee performance. Whenever the performance of a commercial or industrial type activity of the Department of Defense that is being performed by 50 or more employees of a private contractor is changed to performance by civilian employees of the Department of Defense, the Secretary of Defense shall collect, for a five-year period, cost information data comparing--

(1) the estimated costs of continued performance of such activity by private contractor employees; and

(2) the costs of performance of such activity by civilian employees of the Department of Defense.

(c) Retention of information. With regard to the conversion to or from contractor performance of a particular service or function of the Department of Defense, the Secretary of Defense shall provide for the retention of information collected under

this section for at least a 10-year period beginning at the end of the final year in which the information is collected.

10 USCS § 2464 (1998)

§ 2464. Core logistics capabilities

(a) Necessity for core logistics capabilities.

(1) It is essential for the national defense that the Department of Defense maintain a core logistics capability that is Government-owned and Government-operated (including Government personnel and Government-owned and Government-operated equipment and facilities) to ensure a ready and controlled source of technical competence and resources necessary to ensure effective and timely response to a mobilization, national defense contingency situations, and other emergency requirements.

(2) The Secretary of Defense shall identify the core logistics capabilities described in paragraph (1) and the workload required to maintain those capabilities.

(3) The core logistics capabilities identified under paragraphs (1) and (2) shall include those capabilities that are necessary to maintain and repair the weapon systems and other military equipment (including mission-essential weapon systems or materiel not later than four years after achieving initial operational capability, but excluding systems and equipment under special access programs, nuclear aircraft carriers, and commercial items described in paragraph (5)) that are identified by the Secretary, in consultation with the Chairman of the Joint Chiefs of Staff, as necessary to enable the armed forces to fulfill the strategic and contingency plans prepared by the Chairman of the Joint Chiefs of Staff under section 153(a) of this title.

(4) The Secretary of Defense shall require the performance of core logistics workloads necessary to maintain the core logistics capabilities identified under paragraphs (1), (2), and (3) at Government-owned, Government-operated facilities of the Department of Defense (including Government-owned, Government-operated facilities of a military department) and shall assign such facilities sufficient workload to ensure cost efficiency and technical competence in peacetime while preserving the surge capacity and reconstitution capabilities necessary to support fully the strategic and contingency plans referred to in paragraph (3).

(5) The commercial items covered by paragraph (3) are commercial items that have been sold or leased in substantial quantities to the general public and are purchased without modification in the same form that they are sold in the commercial marketplace, or with minor modifications to meet Federal Government requirements.

(b) Limitation on contracting.

(1) Except as provided in paragraph (2), performance of workload needed to maintain a logistics capability identified by the Secretary under subsection (a)(2) may not be contracted for performance by non-Government personnel under the procedures and requirements of Office of Management and Budget Circular A-76 or any successor administrative regulation or policy (hereinafter in this section referred to as OMB Circular A-76).

(2) The Secretary of Defense may waive paragraph (1) in the case of any such logistics capability and provide that performance of the workload needed to maintain that capability shall be considered for conversion to contractor performance in accordance with OMB Circular A-76. Any such waiver shall be made under regulations prescribed by the Secretary and shall be based on a determination by the Secretary that Government performance of the workload is no longer required for national defense reasons. Such regulations shall include criteria for determining whether Government performance of any such workload is no longer required for national defense reasons.

(3) (A) A waiver under paragraph (2) may not take effect until the expiration of the first period of 30 days of continuous session of Congress that begins on or after the date on which the Secretary submits a report on the waiver to the Committee on Armed Services and the Committee on Appropriations of the Senate and the Committee on National Security and the Committee on Appropriations of the House of Representatives.

(B) For the purposes of subparagraph (A)--

(i) continuity of session is broken only by an adjournment of Congress sine die; and

(ii) the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of any period of time in which Congress is in continuous session.

(c) Notification of determinations regarding certain commercial items- The first time that a weapon system or other item of military equipment described in subsection (a)(3) is determined to be a commercial item for the purposes of the exception contained in that subsection, the Secretary of Defense shall submit to Congress a notification of the determination, together with the justification for the determination. The justification for the determination shall include, at a minimum, the following:

(1) The estimated percentage of commonality of parts of the version of the item that is sold or leased in the commercial marketplace and the Government's version of the item.

(2) The value of any unique support and test equipment and tools that are necessary to support the military requirements if the item were maintained by the Government.

(3) A comparison of the estimated life cycle logistics support costs that would be incurred by the Government if the item were maintained by the private sector with the estimated life cycle logistics support costs that would be incurred by the Government if the item were maintained by the Government.

**Note
FY 99 DoD Authorization Act**

SEC. 346. CONDITIONS ON EXPANSION OF FUNCTIONS PERFORMED UNDER PRIME VENDOR CONTRACTS FOR DEPOT-LEVEL MAINTENANCE AND REPAIR.

(a) CONDITIONS ON EXPANDED USE- The Secretary of Defense or the Secretary of a military department, as the case may be, may not enter into a prime vendor contract for depot-level maintenance and repair of a weapon system or other military equipment described in section 2464(a)(3) of title 10, United States Code, before the end of the 30-day period beginning on the date on which the Secretary submits to Congress a report, specific to the proposed contract, that--

(1) describes the competitive procedures to be used to award the prime vendor contract; and

(2) contains an analysis of costs and benefits that demonstrates that use of the prime vendor contract will result in savings to the Government over the life of the contract.

(b) DEFINITIONS- In this section:

(1) The term 'prime vendor contract' means an innovative contract that gives a defense contractor the responsibility to manage, store, and distribute inventory, manage and provide services, or manage and perform research, on behalf of the Department of Defense on a frequent, regular basis, for users within the Department on request. The term includes contracts commonly referred to as prime vendor support contracts, flexible sustainment contracts, and direct vendor delivery contracts.

(2) The term 'depot-level maintenance and repair' has the meaning given such term in section 2460 of title 10, United States Code.

(c) RELATIONSHIP TO OTHER LAWS- Nothing in this section shall be construed to exempt a prime vendor contract from the requirements of section 2461 of title 10, United States Code, or any other provision of chapter 146 of such title.

10 USCS § 2460 (1998)

§ 2460. Definition of depot-level maintenance and repair

(a) In general. In this chapter [10 USCS §§ 2460 et seq.], the term "depot-level maintenance and repair" means (except as provided in subsection (b)) material maintenance or repair requiring the overhaul, upgrading, or rebuilding of parts, assemblies, or subassemblies, and the testing and reclamation of equipment as necessary, regardless of the source of funds for the maintenance or repair or the location at which the maintenance or repair is performed. The term includes (1) all aspects of software maintenance classified by the Department of Defense as of July 1, 1995, as depot-level maintenance and repair, and (2) interim contractor support or contractor logistics support (or any similar contractor support), to the extent that such support is for the performance of services described in the preceding sentence.

(b) Exceptions.

(1) The term does not include the procurement of major modifications or upgrades of weapon systems that are designed to improve program performance or the nuclear

refueling of an aircraft carrier. A major upgrade program covered by this exception could continue to be performed by private or public sector activities.

(2) The term also does not include the procurement of parts for safety modifications. However, the term does include the installation of parts for that purpose.

10 USCS § 2465 (1998)

§ 2465. Prohibition on contracts for performance of firefighting or security-guard functions

(a) Except as provided in subsection (b), funds appropriated to the Department of Defense may not be obligated or expended for the purpose of entering into a contract for the performance of firefighting or security-guard functions at any military installation or facility.

(b) The prohibition in subsection (a) does not apply--

(1) to a contract to be carried out at a location outside the United States (including its commonwealths, territories, and possessions) at which members of the armed forces would have to be used for the performance of a function described in subsection (a) at the expense of unit readiness;

(2) to a contract to be carried out on a Government-owned but privately operated installation; or

(3) to a contract (or the renewal of a contract) for the performance of a function under contract on September 24, 1983.

10 USCS § 2466 (1998)

§ 2466. Limitations on the performance of depot-level maintenance of materiel

(a) **Percentage limitation.** Not more than 50 percent of the funds made available in a fiscal year to a military department or a Defense Agency for depot-level maintenance and repair workload may be used to contract for the performance by non-Federal Government personnel of such workload for the military department or the Defense Agency. Any such funds that are not used for such a contract shall be used for the performance of depot-level maintenance and repair workload by employees of the Department of Defense.

(b) **[Unchanged][Transferred]**

(c) **Waiver of limitation.** The Secretary of the military department concerned and, with respect to a Defense Agency, the Secretary of Defense may waive the applicability of subsection (a) for a fiscal year, to a particular workload, or to a particular depot-level activity if the Secretary determines that the waiver is necessary for reasons of national security and notifies Congress regarding the reasons for the waiver.

(d) **Exception.** Subsection (a) shall not apply with respect to the Sacramento Army Depot, Sacramento, California.

(e) **Report.**

(1) Not later than February 1 of each year, the Secretary of Defense shall submit to Congress a report identifying, for each military department and Defense Agency, the percentage of the funds referred to in subsection (a) that were expended during the preceding fiscal year for performance of depot-level maintenance and repair workloads by the public and private sectors as required by section 2466 of this title.

(2) Not later than 90 days after the date on which the Secretary submits the annual report under paragraph (1), the Comptroller General shall submit to Congress the Comptroller General's views on whether the Department of Defense has complied with the requirements of subsection (a) for the fiscal year covered by the report.

10 USCS § 2467 (1998)

§ 2467. Cost comparisons: requirements with respect to retirement costs and consultation with employees

(a) Requirement to include retirement costs.

(1) In any comparison conducted by the Department of Defense under Office of Management and Budget Circular A-76 (or any successor administrative regulation or policy) of the cost of performing commercial activities by Department of Defense personnel and the cost of performing such activities by contractor personnel, the Secretary of Defense shall include retirement system costs (as described in paragraphs (2) and (3)) of both the Department of Defense and the contractor.

(2) The retirement system costs of the Department of Defense shall include (to the extent applicable) the following:

(A) The cost of the Federal Employees' Retirement System, valued by using the normal-cost percentage (as defined by section 8401(23) of title 5, United States Code).

(B) The cost of the Civil Service Retirement System under subchapter III of chapter 83 of such title 5 [5 USCS §§ 8331 et seq.].

(C) The cost of the thrift savings plan under subchapter III of chapter 84 of such title 5 [5 USCS §§ 8431 et seq.].

(D) The cost of the old age, survivors, and disability insurance taxes imposed under section 3111(a) of the Internal Revenue Code of 1986 [26 USCS § 3111(a)].

(3) The retirement system costs of the contractor shall include the cost of the old age, survivors, and disability insurance taxes imposed under section 3111(a) of the Internal Revenue Code of 1986 [26 USCS § 3111(a)], the cost of thrift or other retirement savings plans, and other relevant retirement costs.

(b) Requirement to consult DOD employees.

(1) Each officer or employee of the Department of Defense responsible for determining under Office of Management and Budget Circular A-76 whether to convert to contractor performance any commercial activity of the Department--

(A) shall, at least monthly during the development and preparation of the performance work statement and the management efficiency study used in making that determination, consult with civilian employees who will be affected by that determination and consider the views of such employees on the development and preparation of that statement and that study; and

(B) may consult with such employees on other matters relating to that determination.

(2) (A) In the case of employees represented by a labor organization accorded exclusive recognition under section 7111 of title 5, United States Code, consultation with representatives of that labor organization shall satisfy the consultation requirement in paragraph (1).

(B) In the case of employees other than employees referred to in subparagraph (A), consultation with appropriate representatives of those employees shall satisfy the consultation requirement in paragraph (1).

(3) The Secretary of Defense shall prescribe regulations to carry out this subsection. The regulations shall include provisions for the selection or designation of appropriate representatives of employees referred to in paragraph (2)(B) for purposes of consultation required by paragraph (1).

10 USCS § 2468 (1998)

§ 2468. Military installations: authority of base commanders over contracting for commercial activities

(a) Authority of base commander. The Secretary of Defense shall direct that the commander of each military installation shall have the authority and the responsibility to enter into contracts in accordance with this section for the performance of a commercial activity on the military installation.

(b) Yearly duties of base commander. To enter into a contract under subsection (a) for a fiscal year, the commander of a military installation shall--

(1) prepare an inventory for that fiscal year of commercial activities carried out by Government personnel on the military installation;

(2) decide which commercial activities shall be reviewed under the procedures and requirements of Office of Management and Budget Circular A-76 (or any successor administrative regulation or policy); and

(3) conduct a solicitation for contracts for the performance of those commercial activities selected for conversion to contractor performance under the Circular A-76 process.

(c) Limitations.

(1) The Secretary of Defense shall prescribe regulations under which the commander of each military installation may exercise the authority and responsibility provided under subsection (a).

(2) The authority and responsibility provided under subsection (a) are subject to the authority, direction, and control of the Secretary.

(d) Assistance to displaced employees. If the commander of a military installation enters into a contract under subsection (a), the commander shall, to the maximum extent practicable, assist in finding suitable employment for any employee of the Department of Defense who is displaced because of that contract.

(e) Military installation defined. In this section, the term "military installation" means a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department which is located within the United States, the Commonwealth of Puerto Rico, or Guam.

(f) Termination of authority. The authority provided to commanders of military installations by subsection (a) shall terminate on September 30, 1995.

10 USCS § 2469 (1998)

§ 2469. Contracts to perform workloads previously performed by depot-level activities of the Department of Defense: requirement of competition

(a) Requirement for competition. The Secretary of Defense shall ensure that the performance of a depot-level maintenance and repair workload described in subsection (b) is not changed to performance by a contractor or by another depot-level activity of the Department of Defense unless the change is made using--

(1) merit-based selection procedures for competitions among all depot-level activities of the Department of Defense; or

(2) competitive procedures for competitions among private and public sector entities.

(b) Scope. Subsection (a) applies to any depot-level maintenance and repair workload that has a value of not less than \$3,000,000 and is being performed by a depot-level activity of the Department of Defense.

(c) Inapplicability of OMB Circular A-76. Office of Management and Budget Circular A-76 (or any successor administrative regulation or policy) does not apply to a performance change to which subsection (a) applies.

Federal Activities Inventory Reform Act of 1998

PUBLIC LAW 105-270 [S. 314]

OCT. 19, 1998

An Act

To provide a process for identifying the functions of the Federal Government that are not inherently governmental functions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Federal Activities Inventory Reform Act of 1998".

SEC. 2. ANNUAL LISTS OF GOVERNMENT ACTIVITIES NOT INHERENTLY GOVERNMENTAL IN NATURE.

(a) Lists Required.--Not later than the end of the third quarter of each fiscal year, the head of each executive agency shall submit to the Director of the Office of Management and Budget a list of activities performed by Federal Government sources for the executive agency that, in the judgment of the head of the executive agency, are not inherently governmental functions. The entry for an activity on the list shall include the following:

(1) The fiscal year for which the activity first appeared on a list prepared under this section.

(2) The number of full-time employees (or its equivalent) that are necessary for the performance of the activity by a Federal Government source.

(3) The name of a Federal Government employee responsible for the activity from whom additional information about the activity may be obtained.

(b) OMB Review and Consultation.--The Director of the Office of Management and Budget shall review the executive agency's list for a fiscal year and consult with the head of the executive agency regarding the content of the final list for that fiscal year.

(c) Public Availability of Lists.--

(1) Publication.-- Upon the completion of the review and consultation regarding a list of an executive agency--

(A) the head of the executive agency shall promptly transmit a copy of the list to Congress and make the list available to the public; and

(B) the Director of the Office of Management and Budget shall promptly publish in the Federal Register a notice that the list is available to the public.

(2) Changes.-- If the list changes after the publication of the notice as a result of the resolution of a challenge under section 3, the head of the executive agency shall promptly--

(A) make each such change available to the public and transmit a copy of the change to Congress; and

(B) publish in the Federal Register a notice that the change is available to the public.

(d) Competition Required.--Within a reasonable time after the date on which a notice of the public availability of a list is published under subsection (c), the head of the executive agency concerned shall review the activities on the list. Each time that the head of the executive agency considers contracting with a private sector source for the performance of such an activity, the head of the executive agency shall use a competitive process to select the source (except as may otherwise be provided in a law other than this Act, an Executive order, regulations, or any executive branch circular setting forth requirements or guidance that is issued by competent executive authority). The Director of the Office of Management and Budget shall issue guidance for the administration of this subsection.

(e) Realistic and Fair Cost Comparisons.--For the purpose of determining whether to contract with a source in the private sector for the performance of an executive agency activity on the list on the basis of a comparison of the costs of procuring services from such a source with the costs of performing that activity by the executive agency, the head of the executive agency shall ensure that all costs (including the costs of quality assurance, technical monitoring of the performance of such function, liability insurance, employee retirement and disability benefits, and all other overhead costs) are considered and that the costs considered are realistic and fair.

SEC. 3. CHALLENGES TO THE LIST.

(a) Challenge Authorized.--An interested party may submit to an executive agency a challenge of an omission of a particular activity from, or an inclusion of a particular activity on, a list for which a notice of public availability has been published under section 2.

(b) Interested Party Defined.--For the purposes of this section, the term "interested party", with respect to an activity referred to in subsection (a), means the following:

(1) A private sector source that--

(A) is an actual or prospective offeror for any contract, or other form of agreement, to perform the activity; and

(B) has a direct economic interest in performing the activity that would be adversely affected by a determination not to procure the performance of the activity from a private sector source.

(2) A representative of any business or professional association that includes within its membership private sector sources referred to in paragraph (1).

(3) An officer or employee of an organization within an executive agency that is an actual or prospective offeror to perform the activity.

(4) The head of any labor organization referred to in section 7103(a)(4) of title 5, United States Code, that includes within its membership officers or employees of an organization referred to in paragraph (3).

(c) Time for Submission.--A challenge to a list shall be submitted to the executive agency concerned within 30 days after the publication of the notice of the public availability of the list under section 2.

(d) Initial Decision.--Within 28 days after an executive agency receives a challenge, an official designated by the head of the executive agency shall--

(1) decide the challenge; and

(2) transmit to the party submitting the challenge a written notification of the decision together with a discussion of the rationale for the decision and an explanation of the party's right to appeal under subsection (e).

(e) Appeal.--

(1) Authorization of appeal.-- An interested party may appeal an adverse decision of the official to the head of the executive agency within 10 days after receiving a notification of the decision under subsection (d).

(2) Decision on appeal.-- Within 10 days after the head of an executive agency receives an appeal of a decision under paragraph (1), the head of the executive agency shall decide the appeal and transmit to the party submitting the appeal a written notification of the decision together with a discussion of the rationale for the decision.

SEC. 4. APPLICABILITY.

(a) Executive Agencies Covered.--Except as provided in subsection (b), this Act applies to the following executive agencies:

(1) Executive department.-- An executive department named in section 101 of title 5, United States Code.

(2) Military department.-- A military department named in section 102 of title 5, United States Code.

(3) Independent establishment.-- An independent establishment, as defined in section 104 of title 5, United States Code.

(b) Exceptions.--This Act does not apply to or with respect to the following:

(1) General accounting office.-- The General Accounting Office.

(2) Government corporation.-- A Government corporation or a Government controlled corporation, as those terms are defined in section 103 of title 5, United States Code.

(3) Nonappropriated funds instrumentality.-- A part of a department or agency if all of the employees of that part of the department or agency are employees referred to in section 2105(c) of title 5, United States Code.

(4) Certain depot-level maintenance and repair.-- Depot-level maintenance and repair of the Department of Defense (as defined in section 2460 of title 10, United States Code).

SEC. 5. DEFINITIONS.

In this Act:

(1) Federal government source.-- The term "Federal Government source", with respect to performance of an activity, means any organization within an executive agency that uses Federal Government employees to perform the activity.

(2) Inherently governmental function.----

(A) Definition.--The term "inherently governmental function" means a function that is so intimately related to the public interest as to require performance by Federal Government employees.

(B) Functions included.--The term includes activities that require either the exercise of discretion in applying Federal Government authority or the making of value judgments in making decisions for the Federal Government, including judgments relating to monetary transactions and entitlements. An inherently governmental function involves, among other things, the interpretation and execution of the laws of the United States so as--

(i) to bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;

(ii) to determine, protect, and advance United States economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;

(iii) to significantly affect the life, liberty, or property of private persons;

(iv) to commission, appoint, direct, or control officers or employees of the United States; or

(v) to exert ultimate control over the acquisition, use, or disposition of the property, real or personal, tangible or intangible, of the United States, including the collection, control, or disbursement of appropriated and other Federal funds.

(C) Functions excluded.--The term does not normally include--

(i) gathering information for or providing advice, opinions, recommendations, or ideas to Federal Government officials; or

(ii) any function that is primarily ministerial and internal in nature (such as building security, mail operations, operation of cafeterias, housekeeping, facilities operations and maintenance, warehouse operations, motor vehicle fleet management operations, or other routine electrical or mechanical services).

SEC. 6. EFFECTIVE DATE.

This Act shall take effect on October 1, 1998.

PUBLIC LAW 103-226 [H.R. 3345]
MARCH 30, 1994
FEDERAL WORKFORCE RESTRUCTURING ACT OF 1994

An Act

To provide temporary authority to Government agencies relating to voluntary separation incentive payments, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

[*1] SECTION 1. <5 USC 2101 note> SHORT TITLE.

This Act may be cited as the "Federal Workforce Restructuring Act of 1994".

[*2] SEC. 2. TRAINING.

(a) In General.--Chapter 41 of title 5, United States Code, is amended--

(1) in section 4101(4) by striking "fields" and all that follows through the semicolon and inserting "fields which will improve individual and organizational performance and assist in achieving the agency's mission and performance goals;"

(2) in section 4103--

(A) in subsection (a)--

(i) by striking "In" and all that follows through "maintain" and inserting "In order to assist in achieving an agency's mission and performance goals by improving employee and organizational performance, the head of each agency, in conformity with this chapter, shall establish, operate, maintain, and evaluate";

(ii) by striking "and" at the end of paragraph (2);

(iii) by redesignating paragraph (3) as paragraph (4); and

(iv) by inserting after paragraph (2) the following:

"(3) provide that information concerning the selection and assignment of employees for training and the applicable training limitations and restrictions be made available to employees of the agency; and"; and

(B) in subsection (b)--

(i) in paragraph (1) by striking "determines" and all that follows through the period and inserting "determines that such training would be in the interests of the Government.";

(ii) by striking paragraph (2) and redesignating paragraph (3) as paragraph (2); and

(iii) in subparagraph (C) of paragraph (2) (as so redesignated) by striking "retaining" and all that follows through the period and inserting "such training.";

(3) in section 4105--

(A) in subsection (a) by striking "(a)"; and

[**112] (B) by striking subsections (b) and (c);

(4) by repealing section 4106;

(5) in section 4107--

(A) by amending the catchline to read as follows:

"§ 4107. Restriction on degree training" ;

(B) by striking subsections (a) and (b) and redesignating subsections (c) and (d) as subsections (a) and (b), respectively;

(C) by amending subsection (a) (as so redesignated)--

(i) by striking "subsection (d)" and inserting "subsection (b)"; and

(ii) by striking "by, in, or through a non-Government facility"; and

(D) by amending paragraph (1) of subsection (b) (as so redesignated) by striking "subsection (c)" and inserting "subsection (a)";

(6) in section 4108(a) by striking "by, in, or through a non-Government facility under this chapter" and inserting "for more than a minimum period prescribed by the head of the agency";

(7) in section 4113(b)--

(A) in the first sentence by striking "annually to the Office," and inserting "to the Office, at least once every 3 years, and"; and

(B) by striking the matter following the first sentence and inserting the following: "The report shall set forth--

"(1) information needed to determine that training is being provided in a manner which is in compliance with applicable laws intended to protect or promote equal employment opportunity; and

"(2) information concerning the expenditures of the agency in connection with training and such other information as the Office considers appropriate.";

(8) by repealing section 4114; and

(9) in section 4118--

(A) in subsection (a)(7) by striking "by, in, and through non-Government facilities";

(B) by striking subsection (b); and

(C) by redesignating subsections (c) and (d) as subsections (b) and (c), respectively.

(b) Technical and Conforming Amendments.--Title 5, United States Code, is amended--

(1) in section 3381(e) by striking "4105(a)," and inserting "4105,"; and

(2) in the analysis for chapter 41--

(A) by repealing the items relating to sections 4106 and 4114; and

(B) by amending the item relating to section 4107 to read as follows:
"4107. Restriction on degree training."

(c) <5 USC 3381 note> Effective Date.--The amendments made by this section shall become effective on the date of enactment of this Act.

[*3] Sec. 3. <5 USC 5597 note> VOLUNTARY SEPARATION INCENTIVES.

(a) Definitions.--For the purpose of this section--

[**113] (1) the term "agency" means an Executive agency (as defined by section 105 of title 5, United States Code), but does not include the Department of Defense, the Central Intelligence Agency, or the General Accounting Office; and

(2) the term "employee" means an employee (as defined by section 2105 of title 5, United States Code) who is employed by an agency, is serving under an appointment without time limitation, and has been currently employed for a continuous period of at least 12 months; such term includes an individual employed by a county committee established under section 8(b) of the Soil Conservation and Domestic Allotment Act (16 U.S.C. 590h(b)), but does not include--

(A) a reemployed annuitant under subchapter III of chapter 83 or chapter 84 of title 5, United States Code, or another retirement system for employees of the Government; or

(B) an employee having a disability on the basis of which such employee is or would be eligible for disability retirement under the applicable retirement system referred to in subparagraph (A).

(b) Authority.--

(1) In general.-- In order to avoid or minimize the need for involuntary separations due to a reduction in force, reorganization, transfer of function, or other similar action, and subject to paragraph (2), the head of an agency may pay, or authorize the payment of, voluntary separation incentive payments to agency employees--

(A) in any component of the agency;

(B) in any occupation;

(C) in any geographic location; or

(D) on the basis of any combination of factors under subparagraphs (A) through (C).

(2) Condition.----

(A) In general.--In order to receive an incentive payment, an employee must separate from service with the agency (whether by retirement or resignation) before April 1, 1995.

(B) Exception.--An employee who does not separate from service before the date specified in subparagraph (A) shall be ineligible for an incentive payment under this section unless--

(i) the agency head determines that, in order to ensure the performance of the agency's mission, it is necessary to delay such employee's separation; and

(ii) the employee separates after completing any additional period of service required (but not later than March 31, 1997).

(c) Amount and Treatment of Payments.--A voluntary separation incentive payment--

(1) shall be paid in a lump sum after the employee's separation;

(2) shall be equal to the lesser of--

(A) an amount equal to the amount the employee would be entitled to receive under section 5595(c) of title 5, United States Code, if the employee were entitled to payment under such section; or

(B) \$25,000;

[**114] (3) shall not be a basis for payment, and shall not be included in the computation, of any other type of Government benefit;

(4) shall not be taken into account in determining the amount of any severance pay to which an employee may be entitled under section 5595 of title 5, United States Code, based on any other separation; and

(5) shall be paid from appropriations or funds available for the payment of the basic pay of the employee.

(d) Effect of Subsequent Employment With the Government.--

(1) In general.-- An employee who has received a voluntary separation incentive payment under this section and accepts employment with the Government of the United States within 5 years after the date of the separation on which the payment is based shall be required to repay the entire amount of the incentive payment to the agency that paid the incentive payment.

(2) Waiver authority.----

(A) Executive agency.--If the employment is with an Executive agency (as defined by section 105 of title 5, United States Code), the Director of the Office of Personnel Management may, at the request of the head of the agency, waive the repayment if the individual involved possesses unique abilities and is the only qualified applicant available for the position.

(B) Legislative branch.--If the employment is with an entity in the legislative branch, the head of the entity or the appointing official may waive the repayment if the individual involved possesses unique abilities and is the only qualified applicant available for the position.

(C) Judicial branch.--If the employment is with the judicial branch, the Director of the Administrative Office of the United States Courts may waive the repayment if the individual involved possesses unique abilities and is the only qualified applicant available for the position.

(3) Definition. --For purposes of paragraph (1) (but not paragraph (2)), the term "employment" includes employment under a personal services contract with the United States.

(e) Regulations.--The Director of the Office of Personnel Management may prescribe any regulations necessary for the administration of subsections (a) through (d).

(f) Employees of the Judicial Branch.--The Director of the Administrative Office of the United States Courts may, by regulation, establish a program consistent with the program established by subsections (a) through (d) for individuals serving in the judicial branch.

[*4] Sec. 4. <5 USC 8331 note> ADDITIONAL AGENCY CONTRIBUTIONS TO THE RETIREMENT FUND.

(a) Relating to Fiscal Years 1994 and 1995.--

(1) In general.-- In addition to any other payments which it is required to make under subchapter III of chapter 83 of title 5, United States Code, an agency shall remit to the Office of Personnel Management for deposit in the Treasury of the United States to the credit of the Civil Service Retirement [**115] and Disability Fund an amount equal to 9 percent of the final basic pay of each employee of the agency--

(A) who, on or after the date of the enactment of this Act and before October 1, 1995, retires under section 8336(d)(2) of such title; and

(B) to whom a voluntary separation incentive payment has been or is to be paid by such agency based on that retirement.

(2) Definitions.-- For the purpose of this subsection--

(A) the term "final basic pay", with respect to an employee, means the total amount of basic pay which would be payable for a year of service by such employee, computed using the employee's final rate of basic pay, and, if last serving on other than a full-time basis, with appropriate adjustment therefor; and

(B) the term "voluntary separation incentive payment" means--

(i) a voluntary separation incentive payment under section 3 (including under any program established under section 3(f)); and

(ii) any separation pay under section 5597 of title 5, *United States Code*, or section 2 of the Central Intelligence Agency Voluntary Separation Pay Act (Public Law 103-36; 107 Stat. 104).

(b) Relating to Fiscal Years 1995 Through 1998.--

(1) In general.-- In addition to any other payments which it is required to make under subchapter III of chapter 83 or chapter 84 of title 5, *United States Code*, in fiscal years 1995, 1996, 1997, and 1998 (and in addition to any amounts required under subsection (a)), each agency shall, before the end of each such fiscal year, remit to the Office of Personnel Management for deposit in the Treasury of the United States to the credit of the Civil Service Retirement and Disability Fund an amount equal to the product of--

(A) the number of employees of such agency who, as of March 31st of such fiscal year, are subject to subchapter III of chapter 83 or chapter 84 of such title; multiplied by

(B) \$80.

(2) Definition.-- For the purpose of this subsection, the term "agency" means an Executive agency (as defined by section 105 of title 5, *United States Code*), but does not include the General Accounting Office.

(c) Regulations.--The Director of the Office of Personnel Management may prescribe any regulations necessary to carry out this section.

[*5] Sec. 5. <5 USC 3101 note> REDUCTION OF FEDERAL FULL-TIME EQUIVALENT POSITIONS.

(a) Definition.--For the purpose of this section, the term "agency" means an Executive agency (as defined by section 105 of title 5, *United States Code*), but does not include the General Accounting Office.

(b) Limitations on Full-Time Equivalent Positions.--The President, through the Office of Management and Budget (in consultation with the Office of Personnel Management), shall ensure [**116] that the total number of full-time equivalent positions in all agencies shall not exceed--

- (1) 2,084,600 during fiscal year 1994;
- (2) 2,043,300 during fiscal year 1995;
- (3) 2,003,300 during fiscal year 1996;
- (4) 1,963,300 during fiscal year 1997;
- (5) 1,922,300 during fiscal year 1998; and
- (6) 1,882,300 during fiscal year 1999.

(c) Monitoring and Notification.--The Office of Management and Budget, after consultation with the Office of Personnel Management, shall--

(1) continuously monitor all agencies and make a determination on the first date of each quarter of each applicable fiscal year of whether the requirements under subsection (b) are met; and

(2) notify the President and the Congress on the first date of each quarter of each applicable fiscal year of any determination that any requirement of subsection (b) is not met.

(d) Compliance.--If, at any time during a fiscal year, the Office of Management and Budget notifies the President and the Congress that any requirement under subsection (b) is not met, no agency may hire any employee for any position in such agency until the Office of Management and Budget notifies the President and the Congress that the total number of full-time equivalent positions for all agencies equals or is less than the applicable number required under subsection (b).

(e) Waiver.--

(1) Emergencies.-- Any provision of this section may be waived upon a determination by the President that--

(A) the existence of a state of war or other national security concern so requires; or

(B) the existence of an extraordinary emergency threatening life, health, safety, property, or the environment so requires.

(2) Agency efficiency or critical mission.----

(A) Subsection (d) may be waived, in the case of a particular position or category of positions in an agency, upon a determination of the President that the efficiency of the agency or the performance of a critical agency mission so requires.

(B) Whenever the President grants a waiver pursuant to subparagraph (A), the President shall take all necessary actions to ensure that the overall limitations set forth in subsection (b) are not exceeded.

(f) Employment Backfill Prevention.--

(1) In general.-- The total number of funded employee positions in all agencies (excluding the Department of Defense and the Central Intelligence Agency) shall be reduced by one position for each vacancy created by the separation of any employee who has received, or is due to receive, a voluntary separation incentive payment under section 3 (a)-(e). For purposes of this subsection, positions and vacancies shall be counted on a full-time-equivalent basis.

(2) Related restriction.-- No funds budgeted for and appropriated by any Act for salaries or expenses of positions eliminated under this subsection may be used for any purpose other than authorized separation costs.

[**117] (g) Limitation on Procurement of Service Contracts.--The President shall take appropriate action to ensure that there is no increase in the procurement of service contracts by reason of the enactment of this Act, except in cases in which a cost comparison demonstrates such contracts would be to the financial advantage of the Federal Government.

[*6] Sec. 6. <USC 5597 note> MONITORING AND REPORT RELATING TO VOLUNTARY SEPARATION INCENTIVE PAYMENTS.

No later than December 31st of each fiscal year, the Office of Personnel Management shall submit to the Committee on Governmental Affairs of the Senate and the Committee on Post Office and Civil Service of the House of Representatives a report which, with respect to the preceding fiscal year, shall include--

(1) the number of employees who received a voluntary separation incentive payment under section 3 during such preceding fiscal year;

(2) the agency from which each such employee separated;

(3) at the time of separation from service by each such employee--

(A) such employee's grade or pay level; and

(B) the geographic location of such employee's official duty station, by region, State, and city (or foreign nation, if applicable); and

(4)(A) the number of waivers made (in the repayment upon subsequent employment) by each agency or other authority under section 3 or the amendments made by section 8; and

(B) the title and the grade or pay level of the position filled by the employee to whom such waiver applied.

[*7] Sec. 7. DISLOCATION PAYMENTS FOR CERTAIN CONTRACTOR PERSONNEL.

(a) Payment. --No later than October 31, 1994, the Director of the National Aeronautics and Space Administration shall pay \$5,000 to each full-time contractor employee who--

(1) was hired, under a contract relating to the Advanced Solid Rocket Motor Program, by--

(A) Lockheed Missiles and Space Company;

(B) Aerojet Corporation, Advanced Solid Rocket Motor Division; or

(C) Rust Corporation;

(2) was separated from employment in Yellow Creek, Mississippi, as a result of the termination of the Advanced Solid Rocket Motor Program; and

(3)(A) had been hired locally at Yellow Creek, Mississippi; or

(B) based on the separation referred to in paragraph (2), was eligible, but elected not, to be relocated.

(b) Offset. --No payment made under this section shall be offset against the severance costs of a contractor.

(c) Source of Payments. --Payments under this section shall be from funds appropriated under the subheading " space flight, control and data communications " under the heading " National Aeronautics and Space Administration " under title III of the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1994 (Public Law 103-124; 107 Stat. 1299).

[**118] (d) Limitation on Payments. --The amount of total payments made under this section may not exceed \$1,000,000.

[*8] Sec. 8. SUBSEQUENT EMPLOYMENT AND REPAYMENT OF SEPARATION PAYMENT.

(a) Defense Agency Separation Pay.--Section 5597 of title 5, United States Code, is amended by adding at the end the following:

"(g)(1) An employee who receives separation pay under this section on the basis of a separation occurring on or after the date of the enactment of the Federal Workforce Restructuring Act of 1994 and accepts employment with the Government of the United States within 5 years after the date of the separation on which payment of the separation pay is based shall be required to repay the entire amount of the separation pay to the defense agency that paid the separation pay.

"(2) If the employment is with an Executive agency, the Director of the Office of Personnel Management may, at the request of the head of the agency, waive the repayment if the individual involved possesses unique abilities and is the only qualified applicant available for the position.

"(3) If the employment is with an entity in the legislative branch, the head of the entity or the appointing official may waive the repayment if the individual involved possesses unique abilities and is the only qualified applicant available for the position.

"(4) If the employment is with the judicial branch, the Director of the Administrative Office of the United States Courts may waive the repayment if the individual involved possesses unique abilities and is the only qualified applicant available for the position."

(b) Central Intelligence Agency Separation Payment.--Section 2(b) of the Central Intelligence Agency Voluntary Separation Pay Act <50 USC 403-4 note> Law 103-36; 107 Stat. 104) is amended by adding at the end the following: "An employee who receives separation pay under this section on the basis of a separation occurring on or after the date of the enactment of the Federal Workforce Restructuring Act of 1994 and accepts employment with the Government of the United States within 5 years after the date of the separation on which payment of the separation pay is based shall be required to repay the entire amount of the separation pay to the Central Intelligence Agency. If the employment is with an Executive agency (as defined by section 105 of

title 5, United States Code), the Director of the Office of Personnel Management may, at the request of the head of the agency, waive the repayment if the individual involved possesses unique abilities and is the only qualified applicant available for the position. If the employment is with an entity in the legislative branch, the head of the entity or the appointing official may waive the repayment if the individual involved possesses unique abilities and is the only qualified applicant available for the position. If the employment is with the judicial branch, the Director of the Administrative Office of the United States Courts may waive the repayment if the individual involved possesses unique abilities and is the only qualified applicant available for the position."

[*9] Sec. 9. STANDARDIZATION OF WITHDRAWAL OPTIONS FOR THRIFT SAVINGS PLAN PARTICIPANTS.

(a) Participation in the Thrift Savings Plan.--Section 8351(b) of title 5, United States Code, is amended--

[*119] (1) by amending paragraph (4) to read as follows:

"(4) Section 8433(b) of this title applies to any employee or Member who elects to make contributions to the Thrift Savings Fund under subsection (a) of this section and separates from Government employment.";

(2) by striking paragraphs (5), (6), and (8);

(3) by redesignating paragraphs (7), (9), and (10) as paragraphs (5), (6), and (7), respectively;

(4) in paragraph (5)(C) (as so redesignated by paragraph (3) of this subsection) by striking "or former spouse" each place it appears;

(5) by amending paragraph (6) (as so redesignated by paragraph (3) of this subsection) to read as follows:

"(6) Notwithstanding paragraph (4), if an employee or Member separates from Government employment and such employee's or Member's nonforfeitable account balance is \$3,500 or less, the Executive Director shall pay the nonforfeitable account balance to the participant in a single payment unless the employee or Member elects, at such time and otherwise in such manner as the Executive Director prescribes, one of the options available under subsection (b)."; and

(6) in paragraph (7) (as so redesignated by paragraph (3) of this subsection) by striking "nonforfeiture" and inserting "nonforfeitable".

(b) Benefits and Election of Benefits.--Section 8433 of title 5, United States Code, is amended--

(1) in subsection (b) by striking the matter before paragraph (1) and inserting the following:

"(b) Subject to section 8435 of this title, any employee or Member who separates from Government employment is entitled and may elect--";

(2) by striking subsections (c) and (d) and redesignating subsections (e) through (i) as subsections (c) through (g), respectively;

(3) in subsection (c)(1) (as so redesignated by paragraph (2) of this subsection) by striking "or (c)(4) or required under subsection (d) directly to an eligible retirement plan or plans (as defined in section 402(a)(5)(E) of the Internal Revenue Code of 1954)" and inserting "directly to an eligible retirement plan or plans (as defined in section 402(c)(8) of the Internal Revenue Code of 1986)";

(4) in subsection (d)(2) (as so redesignated by paragraph (2) of this subsection) by striking "or (c)(2)"; and

(5) in subsection (f) (as so redesignated by paragraph (2) of this subsection)--

(A) by striking paragraph (1) and redesignating paragraphs (2) and (3) as paragraphs (1) and (2), respectively; and

(B) in paragraph (1) (as so redesignated by subparagraph (A) of this paragraph)--

(i) by striking "Notwithstanding subsections (b) and (c), if an employee or Member separates from Government employment under circumstances making such employee or Member eligible to make an election under either of those subsections, and such employee's or Member's" and inserting "Notwithstanding subsection (b), if an employee or Member separates from [**120] Government employment, and such employee's or Member's"; and

(ii) by striking "or (c), as applicable"; and

(C) in paragraph (2) (as so redesignated by subparagraph (A) of this paragraph) by striking "paragraphs (1) and (2)" and inserting "paragraph (1)".

(c) Annuities: Methods of Payment; Election; Purchase.--Section 8434(c) of title 5, United States Code, is amended to read as follows:

"(c) Notwithstanding the elimination of a method of payment by the Board, an employee, Member, former employee, or former Member may elect the eliminated method if the elimination of such method becomes effective less than 5 years before the date on which that individual's annuity commences."

(d) Protections for Spouses and Former Spouses.--Section 8435 of title 5, United States Code, is amended--

(1) in subsection (a)(1)(A) by striking "subsection (b)(3), (b)(4), (c)(3), or (c)(4) of section 8433 of this title or change an election previously made under subsection (b)(1), (b)(2), (c)(1), or (c)(2)" and inserting "subsection (b)(3) or (b)(4) of section 8433 of this title or change an election previously made under subsection (b)(1) or (b)(2)";

(2) by striking subsection (b);

(3) by redesignating subsections (c) through (i) as subsections (b) through (h), respectively;

(4) in subsection (b) (as so redesignated by paragraph (3) of this subsection) by amending paragraph (2) to read as follows:

"(2) Paragraph (1) shall not apply if--

"(A) a joint waiver of such method is made, in writing, by the employee or Member and the spouse; or

"(B) the employee or Member waives such method, in writing, after establishing to the satisfaction of the Executive Director that circumstances described under subsection (a)(2) (A) or (B) make the requirement of a joint waiver inappropriate."; and

(5) in subsection (c)(1) (as so redesignated by paragraph (3) of this subsection) by striking "and a transfer may not be made under section 8433(d) of this title".

(e) Justices and Judges.--Section 8440a(b) of title 5, United States Code, is amended--

(1) in paragraph (5) by striking "Section 8433(d)" and inserting "Section 8433(b)"; and

(2) by striking paragraphs (7) and (8) and inserting the following:

"(7) Notwithstanding paragraphs (4) and (5), if any justice or judge retires under subsection (a) or (b) of section 371 or section 372(a) of title 28, or resigns without having met the age and service requirements set forth under section 371(c) of title 28, and such justice's or judge's nonforfeitable account balance is \$3,500 or less, the Executive Director shall pay the nonforfeitable account balance to the participant in a single payment unless the justice or judge elects, at such time and

otherwise in such manner as the Executive Director prescribes, one of the options available under section 8433(b).".

(f) Bankruptcy Judges and Magistrates.--Section 8440b of title 5, United States Code, is amended--

[**121] (1) in subsection (b)(4) by amending subparagraph (B) to read as follows:

"(B) Section 8433(b) of this title applies to any bankruptcy judge or magistrate who elects to make contributions to the Thrift Savings Fund under subsection (a) of this section and who retires before attaining age 65 but is entitled, upon attaining age 65, to an annuity under section 377 of title 28 or section 2(c) of the Retirement and Survivors Annuities for Bankruptcy Judges and Magistrates Act of 1988.";

(2) in subsection (b)(4)(C) by striking "Section 8433(d)" and inserting "Section 8433(b)";

(3) in subsection (b)(5) by striking "retirement under section 377 of title 28 is" and inserting "any of the actions described under paragraph (4) (A), (B), or (C) shall be considered";

(4) in subsection (b) by striking paragraph (8) and redesignating paragraph (9) as paragraph (8); and

(5) in paragraph (8) of subsection (b) (as so redesignated by paragraph (4) of this subsection)--

(A) by striking "Notwithstanding subparagraphs (A) and (B) of paragraph (4), if any bankruptcy judge or magistrate retires under circumstances making such bankruptcy judge or magistrate eligible to make an election under subsection (b) or (c)" and inserting "Notwithstanding paragraph (4), if any bankruptcy judge or magistrate retires under circumstances making such bankruptcy judge or magistrate eligible to make an election under subsection (b)"; and

(B) by striking "and (c), as applicable".

(g) Claims Court Judges.--Section 8440c of title 5, United States Code, is amended--

(1) in subsection (b)(4)(B) by striking "Section 8433(d)" and inserting "Section 8433(b)";

(2) in subsection (b)(5) by striking "retirement under section 178 of title 28 is" and inserting "any of the actions described in paragraph (4) (A) or (B) shall be considered";

(3) in subsection (b) by striking paragraph (8) and redesignating paragraph (9) as paragraph (8); and

(4) in paragraph (8) (as so redesignated by paragraph (3) of this subsection) by striking "Notwithstanding paragraph (4)(A)" and inserting "Notwithstanding paragraph (4)".

(h) Judges of the United States Court of Veterans Appeals.--Section 8440d(b)(5) of title 5, United States Code, is amended by striking "A transfer shall be made as provided in section 8433(d) of this title" and inserting "Section 8433(b) of this title applies".

(i) Technical and Conforming Amendments.--Title 5, United States Code, is amended--

(1) in section 8351(b)(5)(B) (as so redesignated by subsection (a)(3) of this section) by striking "section 8433(i)" and inserting "section 8433(g)";

(2) in section 8351(b)(5)(D) (as so redesignated by subsection (a)(3) of this section) by striking "section 8433(i)" and inserting "section 8433(g)";

(3) in section 8433(b)(4) by striking "subsection (e)" and inserting "subsection (c)";

[**122] (4) in section 8433(d)(1) (as so redesignated by subsection (b)(2) of this section) by striking "(d) of section 8435" and inserting "(c) of section 8435";

(5) in section 8433(d)(2) (as so redesignated by subsection (b)(2) of this section) by striking "section 8435(d)" and inserting "section 8435(c)";

(6) in section 8433(e) (as so redesignated by subsection (b)(2) of this section) by striking "section 8435(d)(2)" and inserting "section 8435(c)(2)";

(7) in section 8433(g)(5) (as so redesignated by subsection (b)(2) of this section) by striking "section 8435(f)" and inserting "section 8435(e)";

(8) in section 8434(b) by striking "section 8435(c)" and inserting "section 8435(b)";

(9) in section 8435(a)(1)(B) by striking "subsection (c)" and inserting "subsection (b)";

(10) in section 8435(d)(1)(B) (as so redesignated by subsection (d)(3) of this section) by striking "subsection (d)(2)" and inserting "subsection (c)(2)";

(11) in section 8435(d)(3)(A) (as so redesignated by subsection (d)(3) of this section) by striking "subsection (c)(1)" and inserting "subsection (b)(1)";

(12) in section 8435(d)(6) (as so redesignated by subsection (d)(3) of this section) by striking "or (c)(2)" and inserting "or (b)(2)";

(13) in section 8435(e)(1)(A) (as so redesignated by subsection (d)(3) of this section) by striking "section 8433(i)" and inserting "section 8433(g)";

(14) in section 8435(e)(2) (as so redesignated by subsection (d)(3) of this section) by striking "section 8433(i) of this title shall not be approved if approval would have the result described in subsection (d)(1)" and inserting "section 8433(g) of this title shall not be approved if approval would have the result described under subsection (c)(1)";

(15) in section 8435(g) (as so redesignated by subsection (d)(3) of this section) by striking "section 8433(i)" and inserting "section 8433(g)";

(16) in section 8437(c)(5) by striking "section 8433(i)" and inserting "section 8433(g)"; and

(17) in section 8440a(b)(6) by striking "section 8351(b)(7)" and inserting "section 8351(b)(5)".

(j) <5 USC 8351 note> Effective Date.--This section shall take effect 1 year after the date of the enactment of this Act or on such earlier date as the Executive Director of the Federal Retirement Thrift Investment Board shall provide in regulation.

[*10] SEC. 10. AMENDMENTS TO ALASKA RAILROAD TRANSFER ACT OF 1982 REGARDING FORMER FEDERAL EMPLOYEES.

(a) Applicability of Voluntary Separation Incentives to Certain Former Federal Employees.--Section 607(a) of the Alaska Railroad Transfer Act of 1982 (45 U.S.C. 1206(a)) is amended by adding at the end the following:

"(4)(A) The State-owned railroad shall be included in the definition of 'agency' for purposes of section 3 (a), (b), (c), and (e) of the Federal Workforce Restructuring Act of 1994 and may elect to participate in the voluntary separation incentive program established under such Act. Any employee of [**123] the State-owned railroad who meets the qualifications as described under the first sentence of paragraph (1) shall be deemed an employee under such Act.

"(B) An employee who has received a voluntary separation incentive payment under this paragraph and accepts employment with the State-owned railroad within 5 years after the date of separation on which payment of the incentive is based shall be required to repay the entire amount of the incentive payment unless the head of the State-owned railroad determines that the individual involved possesses unique abilities and is the only qualified applicant available for the position."

(b) Life and Health Insurance Benefits.--Section 607 of the Alaska Railroad Transfer Act of 1982 (45 U.S.C. 1206) is amended by striking subsection (e) and inserting the following:

"(e)(1) Any person described under the provisions of paragraph (2) may elect life insurance coverage under chapter 87 of title 5, United States Code, and enroll in a health benefits plan under chapter 89 of title 5, United States Code, in accordance with the provisions of this subsection.

"(2) The provisions of paragraph (1) shall apply to any person who--

"(A) on the date of the enactment of the Federal Workforce Restructuring Act of 1994, is an employee of the State-owned railroad;

"(B) has 20 years or more of service (in the civil service as a Federal employee or as an employee of the State-owned railroad, combined) on the date of retirement from the State-owned railroad; and

"(C)(i) was covered under a life insurance policy pursuant to chapter 87 of title 5, United States Code, on January 4, 1985, for the purpose of electing life insurance coverage under the provisions of paragraph (1); or

"(ii) was enrolled in a health benefits plan pursuant to chapter 89 of title 5, United States Code, on January 4, 1985, for the purpose of enrolling in a health benefits plan under the provisions of paragraph (1).

"(3) For purposes of this section, any person described under the provisions of paragraph (2) shall be deemed to have been covered under a life insurance policy under chapter 87 of title 5, United States Code, and to have been enrolled in a health benefits plan under chapter 89 of title 5, United States Code, during the period beginning on January 5, 1985, through the date of retirement of any such person.

[**124] "(4) The provisions of paragraph (1) shall not apply to any person described under paragraph (2) until the date such person retires from the State-owned railroad."

10 USCS § 2470 (1998)

§ 2470. Depot-level activities of the Department of Defense: authority to compete for maintenance and repair workloads of other Federal agencies

A depot-level activity of the Department of Defense shall be eligible to compete for the performance of any depot-level maintenance and repair workload of a Federal agency for which competitive procedures are used to select the entity to perform the workload.

10 USCS § 2474 (1998)

§ 2474. Centers of Industrial and Technical Excellence: designation; public-private partnerships

(a) Designation.

(1) The Secretary of Defense shall designate each depot-level activity of the military departments and the Defense Agencies (other than facilities approved for closure or major realignment under the Defense Base Closure and Realignment Act of 1990 (part A of title XXIX of Public Law 101-510; 10 U.S.C. 2687 note)) as a Center of Industrial and Technical Excellence in the recognized core competencies of the activity.

(2) The Secretary shall establish a policy to encourage the Secretary of each military department and the head of each Defense Agency to reengineer industrial processes and adopt best-business practices at their depot-level activities in

connection with their core competency requirements, so as to serve as recognized leaders in their core competencies throughout the Department of Defense and in the national technology and industrial base (as defined in section 2500(1) of this title).

(3) The Secretary of a military department may conduct a pilot program, consistent with applicable requirements of law, to test any practices referred to in paragraph (2) that the Secretary determines could improve the efficiency and effectiveness of depot-level operations, improve the support provided by depot-level activities for the armed forces user of the services of such activities, and enhance readiness by reducing the time that it takes to repair equipment.

(b) Public-private partnerships. The Secretary of Defense shall enable Centers of Industrial and Technical Excellence to enter into public-private cooperative arrangements for the performance of depot-level maintenance and repair at such Centers and shall encourage the use of such arrangements to maximize the utilization of the capacity at such Centers. A public-private cooperative arrangement under this subsection shall be known as a "public-private partnership".

(c) Crediting of amounts for performance. Amounts received by a Center for work performed under a public-private partnership shall be credited to the appropriation or fund, including a working-capital fund, that incurs the cost of performing the work.

(d) Additional work. The policy required under subsection (a) shall include measures to enable a private sector entity that enters into a partnership arrangement under subsection (b) or leases excess equipment and facilities at a Center of Industrial and Technical Excellence pursuant to section 2471 of this title to perform additional work at the Center, subject to the limitations outlined in subsection (b) of such section, outside of the types of work normally assigned to the Center.

10 USCS § 2208 (1998)

STATUS: CONSULT PUBLIC LAWS CITED BELOW FOR RECENT CHANGES TO THIS DOCUMENT <=1>

LEXSEE 105 P.L. 262 -- See section 8143, Effective upon enactment.

<=2> LEXSEE 105 P.L. 261 -- See section 1007(e)(1), Effective upon enactment.

<=3> LEXSEE 105 P.L. 261 -- See section 1008(a), Effective upon enactment.

§ 2208. Working-capital funds

(a) To control and account more effectively for the cost of programs and work performed in the Department of Defense, the Secretary of Defense may require the establishment of working-capital funds in the Department of Defense to--

(1) finance inventories of such supplies as he may designate; and

(2) provide working capital for such industrial-type activities, and such commercial-type activities that provide common services within or among departments and agencies of the Department of Defense, as he may designate.

(b) Upon the request of the Secretary of Defense, the Secretary of the Treasury shall establish working-capital funds established under this section on the books of the Department of the Treasury.

(c) Working-capital funds shall be charged, when appropriate, with the cost of--

(1) supplies that are procured or otherwise acquired, manufactured, repaired, issued, or used; and

(2) services or work performed;

including applicable administrative expenses, and be reimbursed from available appropriations or otherwise credited for those costs, including applicable administrative expenses and costs of using equipment.

(d) The Secretary of Defense may provide capital for working-capital funds by capitalizing inventories. In addition, such amounts may be appropriated for the purpose of providing capital for working-capital funds as have been specifically authorized by law.

(e) Subject to the authority and direction of the Secretary of Defense, the Secretary of each military department shall allocate responsibility for its functions, powers, and duties to accomplish the most economical and efficient organization and operation

of the activities, and the most economical and efficient use of the inventories, for which working-capital funds are authorized by this section.

(f) The requisitioning agency may not incur a cost for supplies drawn from inventories, or services or work performed by industrial-type or commercial-type activities for which working-capital funds may be established under this section, that is more than the amount of appropriations or other funds available for those purposes.

(g) The appraised value of supplies returned to working-capital funds by a department, activity, or agency may be charged to that fund. The proceeds thereof shall be credited to current applicable appropriations and are available for expenditure for the same purposes that those appropriations are so available. Credits may not be made to appropriations under this subsection as the result of capitalization of inventories under subsection (d).

(h) The Secretary of Defense shall prescribe regulations governing the operation of activities and use of inventories authorized by this section. The regulations may, if the needs of the Department of Defense require it and it is otherwise authorized by law, authorize supplies to be sold to, or services to be rendered or work performed for, persons outside the Department of Defense. However, supplies available in inventories financed by working capital funds established under this section may be sold to contractors for use in performing contracts with the Department of Defense. Working-capital funds shall be reimbursed for supplies so sold, services so rendered, or work so performed by charges to applicable appropriations or payments received in cash.

(i) For provisions relating to sales outside the Department of Defense of manufactured articles and services by a working-capital funded Army industrial facility (including a Department of the Army arsenal) that manufactures large caliber cannons, gun mounts, recoil mechanisms, ammunition, munitions, or components thereof, see section 4543 of this title.

(j) The Secretary of a military department may authorize a working capital funded industrial facility of that department to manufacture or remanufacture articles and sell these articles, as well as manufacturing or remanufacturing services provided by such facilities, to persons outside the Department of Defense if--

(1) the person purchasing the article or service is fulfilling a Department of Defense contract; and

(2) the Department of Defense solicitation for such contract is open to competition between Department of Defense activities and private firms.

(k) (1) Subject to paragraph (2), a contract for the procurement of a capital asset financed by a working-capital fund may be awarded in advance of the availability of funds in the working-capital fund for the procurement.

(2) Paragraph (1) applies to any of the following capital assets that have a development or acquisition cost of not less than \$100,000:

(A) An unspecified minor military construction project under section 2805(c)(1) of this title.

(B) Automatic data processing equipment or software.

(C) Any other equipment.

(D) Any other capital improvement.

(l) (1) An advance billing of a customer of a working-capital fund may be made if the Secretary of the military department concerned submits to Congress written notification of the advance billing within 30 days after the end of the month in which the advanced billing was made. The notification shall include the following:

(A) The reasons for the advance billing.

(B) An analysis of the effects of the advance billing on military readiness.

(C) An analysis of the effects of the advance billing on the customer.

(2) The Secretary of Defense may waive the notification requirements of paragraph (1)--

(A) during a period war or national emergency; or

(B) to the extent that the Secretary determines necessary to support a contingency operation.

(3) In this subsection:

(A) The term "advance billing", with respect to a working-capital fund, means a billing of a customer by the fund, or a requirement for a customer to reimburse or otherwise credit the fund, for the cost of goods or services provided (or for other

expenses incurred) on behalf of the customer that is rendered or imposed before the customer receives the goods or before the services have been performed.

(B) The term "customer" means a requisitioning component or agency.

10 USCS § 4532 (1998)

§ 4532. Factories and arsenals: manufacture at; abolition of

(a) The Secretary of the Army shall have supplies needed for the Department of the Army made in factories or arsenals owned by the United States, so far as those factories or arsenals can make those supplies on an economical basis.

(b) The Secretary may abolish any United States arsenal that he considers unnecessary.

10 USCS § 4543 (1998)

§ 4543. Army industrial facilities: sales of manufactured articles or services outside Department of Defense

(a) **Authority to sell outside DOD.** Regulations under section 2208(h) of this title shall authorize a working-capital funded Army industrial facility (including a Department of the Army arsenal) that manufactures large caliber cannons, gun mounts, recoil mechanisms, ammunition, munitions, or components thereof to sell manufactured articles or services to a person outside the Department of Defense if--

(1) in the case of an article, the article is sold to a United States manufacturer, assembler, developer, or other concern--

(A) for use in developing new products;

(B) for incorporation into items to be sold to, or to be used in a contract with, an agency of the United States;

(C) for incorporation into items to be sold to, or to be used in a contract with, or to be used for purposes of soliciting a contract with, a friendly foreign government; or

(D) for use in commercial products;

(2) in the case of an article, the purchaser is determined by the Department of Defense to be qualified to carry out the proposed work involving the article to be purchased;

(3) the sale is to be made on a basis that does not interfere with performance of work by the facility for the Department of Defense or for a contractor of the Department of Defense;

(4) in the case of services, the services are related to an article authorized to be sold under this section and are to be performed in the United States for the purchaser;

(5) the Secretary of the Army determines that the articles or services are not available from a commercial source located in the United States;

(6) the purchaser of an article or service agrees to hold harmless and indemnify the United States, except in a case of willful misconduct or gross negligence, from any claim for damages or injury to any person or property arising out of the article or service;

(7) the article to be sold can be manufactured, or the service to be sold can be substantially performed, by the industrial facility with only incidental subcontracting;

(8) it is in the public interest to manufacture such article or perform such service; and

(9) the sale will not interfere with performance of the military mission of the industrial facility.

(b) **Additional requirements.** The regulations shall also--

(1) require that the authority to sell articles or services under the regulations be exercised at the level of the commander of the major subordinate command of the Army with responsibility over the facility concerned;

(2) authorize a purchaser of articles or services to use advance incremental funding to pay for the articles or services; and

(3) in the case of a sale of commercial articles or commercial services in accordance with subsection (a) by a facility that manufactures large caliber cannons, gun mounts, or recoil mechanisms, or components thereof, authorize such facility--

(A) to charge the buyer, at a minimum, the variable costs that are associated with the commercial articles or commercial services sold;

(B) to enter into a firm, fixed-price contract or, if agreed by the buyer, a cost reimbursement contract for the sale; and

(C) to develop and maintain (from sources other than appropriated funds) working capital to be available for paying design costs, planning costs, procurement costs, and other costs associated with the commercial articles or commercial services sold.

(c) Relationship to Arms Export Control Act. Nothing in this section shall be construed to affect the application of the export controls provided for in section 38 of the Arms Export Control Act (22 U.S.C. 2778) to items which incorporate or are produced through the use of an article sold under this section.

(d) Definitions. In this section:

(1) The term "commercial article" means an article that is usable for a nondefense purpose.

(2) The term "commercial service" means a service that is usable for a nondefense purpose.

(3) The term "advance incremental funding", with respect to a sale of articles or services, means a series of partial payments for the articles or services that includes--

(A) one or more partial payments before the commencement of work or the incurring of costs in connection with the production of the articles or the performance of the services, as the case may be; and

(B) subsequent progress payments that result in full payment being completed as the required work is being completed.

(4) The term "variable costs", with respect to sales of articles or services, means the costs that are expected to fluctuate directly with the volume of sales and--

(A) in the case of articles, the volume of production necessary to satisfy the sales orders; or

(B) in the case of services, the extent of the services sold.