

**NATIONAL DEFENSE AUTHORIZATION
ACT FOR FISCAL YEAR 2011**

R E P O R T

[TO ACCOMPANY S. 3454]

ON

AUTHORIZING APPROPRIATIONS FOR FISCAL YEAR 2011 FOR MILITARY ACTIVITIES OF THE DEPARTMENT OF DEFENSE AND FOR MILITARY CONSTRUCTION, TO PRESCRIBE MILITARY PERSONNEL STRENGTHS FOR SUCH FISCAL YEAR, AND FOR OTHER PURPOSES

TOGETHER WITH

ADDITIONAL VIEWS

**COMMITTEE ON ARMED SERVICES
UNITED STATES SENATE**



JUNE 4, 2010.—Ordered to be printed
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day, May 26), 2010

The exception provided by the proposed DFARS rule appears to be broader in scope than the exception authorized by the statute. Moreover, when this language is taken in conjunction with the rule's overall preference for mitigation over avoidance, the rule may be read to reverse the statutory presumption that SETA contractors may be permitted to participate in development and production only in exceptional cases. The committee directs the Secretary of Defense to review this issue and ensure that the final DFARS rule is consistent with the requirements of the statute.

In addition, the committee notes that several DOD components have already issued guidance that is tighter than, but not inconsistent with, the proposed DFARS rule. The committee believes that the final DFARS rule should make it clear that it is not intended to override tighter standards that have been issued by DOD components.

Planning and implementation for hiring civilian employees to replace contractor employees

In 2009, the Secretary of Defense announced plans to hire up to 30,000 new civilian employees of the Department of Defense (DOD) over a 5 year period, to replace contractor employees and restore needed expertise and authority to the DOD workforce. The committee endorses this initiative, which is needed to overcome past funding decisions that precluded trade-offs between civilian employees and contractor employees, and impeded the Department's efforts to achieve a rational balance between the two workforces.

The committee believes that the Department's hiring efforts should focus on individuals with critical skill sets that are most needed by the Department. At a time when DOD desperately needs to rebuild its intellectual capital in critical mission areas, the effort and expense required to hire new civilian employees to replace contractor employees should not be wasted on the conversion of routine commercial functions that can readily be performed by contractors.

In the acquisition workforce, the Department has a demonstrated need for more civilian employees to serve as contracting officials, system engineers, development planners, software engineers, cost estimators, and developmental testers. Outside the acquisition workforce, the Department has a demonstrated need for a wide range of highly skilled professionals, including accountants, auditors, financial management and business process experts, information technology experts, and human resources professionals.

Section 115b of title 10, United States Code, requires the Secretary to prepare an annual strategic workforce plan to shape and improve the Department's civilian employee workforce. In addition, section 2330a of title 10, United States Code, requires the secretaries of the military departments and the heads of the defense agencies to develop inventories of functions and missions performed by contractors and to review those inventories to identify functions that would more appropriately be performed by DOD employees. The committee urges the Department to take advantage of the rational planning processes developed in response to these requirements to focus the hiring effort undertaken pursuant to the Sec-

retary's plans on individuals with the skills and expertise most needed by the Department.

Profit or fee for undefinitized contract actions

Section 809 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110–181) required the Department of Defense (DOD) to issue guidance, with detailed implementation instructions, to ensure the enforcement of requirements applicable to undefinitized contract actions (UCAs), including regulatory limitations on profits or fees. The conference report explained the purpose of the new guidance as follows:

“[T]he Defense Federal Acquisition Regulation Supplement (DFARS) states that when the final price of a UCA is negotiated after a substantial portion of the required performance has been completed, the negotiated profit rate should reflect any reduced cost risk to the contractor for costs incurred during contract performance before negotiation of the final price. Section 215.404–71–3(d)(2) of the DFARS states: ‘When costs have been incurred prior to definitization, generally regard the contract type risk to be in the low end of the designated range. If a substantial portion of the costs have been incurred prior to definitization, the contracting officer may assign a value as low as 0 percent, regardless of contract type.’ However, [the Government Accountability Office (GAO)] found no evidence that DOD contracting officers have been observing these requirements in the negotiation of contract fees. The conferees expect the guidance issued pursuant to this section to include procedures for ensuring compliance with these and other requirements regarding UCAs.”

In January 2010, GAO reviewed DOD’s implementation of section 809. Although DOD has taken a number of steps to enhance its oversight of UCAs, GAO reported that even after the implementation of section 809, DOD officials failed to give the required consideration to reduced cost risk in determining contractor profits or fees. In those cases where DOD officials documented their profit determinations, GAO found that “the contract-type risk factors were skewed toward the middle and high end of the DFARS designated ranges, indicating higher risk for the contractors,” rather than the lower risk expected under the DFARS provision. As a result, it appears that DOD continues to pay excessive profits and fees on \$18.0 billion in potential obligations for UCAs.

The committee expects DOD to address this problem as recommended by GAO, by revising applicable regulations to provide specific guidance for how to develop, consider, and document assessments of cost risk for profit or fee determinations for all undefinitized contract actions. In addition, the committee directs the Department to revise the semi-annual reporting requirement under section 217.7405(a)(2) of the DFARS to include information on rates of profits and fees negotiated on all UCAs with an estimated value exceeding \$5.0 million. The semiannual reports should include a justification for any case in which contracting officials assign a level of contract type risk that is not in the low end of the