

**CONVERSION OF CERTAIN FUNCTIONS FROM CONTRACTOR PERFORMANCE
TO PERFORMANCE BY DEPARTMENT OF DEFENSE CIVILIAN EMPLOYEES
(SEC. 938)**

The House bill contained a provision (sec. 939) that would amend section 2463 of title 10, United States Code, to clarify the requirements for conversion of functions from contractor performance to performance by Department of Defense civilian employees

The Senate amendment contained no similar provision.

The Senate recedes with an amendment that would clarify the provision.

The conferees expect the use of insourcing to be focused, in accordance with the total force management policy developed in accordance with section 129a of title 10, United States Code, as amended, on ensuring appropriate government capacity to perform acquisition workforce and other critical government functions. The conferees note that section 7.503 of the Federal Acquisition Regulation states that contracts “shall not be used for the performance of inherently governmental functions.”

**SEC. 938. CONVERSION OF CERTAIN FUNCTIONS FROM CONTRACTOR
PERFORMANCE TO PERFORMANCE BY DEPARTMENT OF DEFENSE CIVILIAN
EMPLOYEES.**

Section 2463 of title 10, United States Code, is amended—

(1) in subsection (b)(1)—

(A) by redesignating subparagraphs (B), (C), and (D) as subparagraphs (C), (E), and (F), respectively;

(B) by striking subparagraph (A) and inserting the following new subparagraphs (A) and (B):

“(A) is a critical function that—

(i) is necessary to maintain sufficient Government expertise and technical capabilities; or

(ii) entails operational risk associated with contractor performance;

“(B) is an acquisition workforce function;” and

(C) by inserting after subparagraph (C), as redesignated by subparagraph (A), the following new subparagraph (D):

“(D) has been performed by Department of Defense civilian employees at any time during the previous 10-year period;”;

(2) by redesignating subsection (e) as subsection (g);

(3) by inserting after subsection (d) the following new subsections (e) and (f):

“(e) DETERMINATIONS RELATING TO THE CONVERSION OF CERTAIN FUNCTIONS.—

(1) Except as provided in paragraph (2), in determining whether a function should be converted to performance by Department of Defense civilian employees, the Secretary of Defense shall—

“(A) develop methodology for determining costs based on the guidance outlined in the Directive-Type Memorandum 09–007 entitled ‘Estimating and Comparing the Full Costs of Civilian and Military Manpower and Contractor Support’ or any successor guidance for the determination of costs when costs are the sole basis for the determination;

“(B) take into consideration any supplemental guidance issued by the Secretary of a military department for determinations affecting functions of that military department; and

“(C) ensure that the difference in the cost of performing the function by a contractor compared to the cost of performing the function by Department of Defense civilian employees would be equal to or exceed the lesser of—

(i) 10 percent of the personnel-related costs for performance of that function; or

(ii) \$10,000,000.

(2) Paragraph (1) shall not apply to any function that is inherently governmental or any function described in subparagraph (A), (B), or (C) of subsection (b)(1).

“(f) NOTIFICATION RELATING TO THE CONVERSION OF CERTAIN FUNCTIONS.—The Secretary of Defense shall establish procedures for the timely notification of any contractor who performs a function that the Secretary plans to convert to performance by Department of Defense civilian employees pursuant to subsection (a). The Secretary shall provide a copy of any such notification to the congressional defense committees.”; and

(4) in subsection (g), as redesignated by paragraph (2)—

(A) by striking “this section” and all that follows and inserting “this section:”; and

(B) by adding at the end the following new paragraphs:

“(1) The term ‘functions closely associated with inherently governmental functions’ has the meaning given that term in section 2383(b)(3) of this title.

“(2) The term ‘acquisition function’ has the meaning given that term under section 1721(a) of this title.

“(3) The term ‘inherently governmental function’ has the meaning given that term in the Federal Activities Inventory Reform Act of 1998 (Public 2 Law 105–270; 31 U. S.C. 501 note).”.

**TITLE 10 - ARMED FORCES
SUBTITLE A - GENERAL MILITARY LAW
PART IV - SERVICE, SUPPLY, AND PROCUREMENT
CHAPTER 146 - CONTRACTING FOR PERFORMANCE OF CIVILIAN COMMERCIAL
OR INDUSTRIAL TYPE FUNCTIONS**

§ 2463. GUIDELINES AND PROCEDURES FOR USE OF CIVILIAN EMPLOYEES TO PERFORM DEPARTMENT OF DEFENSE FUNCTIONS

(a) Guidelines Required.—

- (1) The Under Secretary of Defense for Personnel and Readiness shall devise and implement guidelines and procedures to ensure that consideration is given to using, on a regular basis, Department of Defense civilian employees to perform new functions and functions that are performed by contractors and could be performed by Department of Defense civilian employees. The Secretary of a military department may prescribe supplemental regulations, if the Secretary determines such regulations are necessary for implementing such guidelines within that military department.
- (2) The guidelines and procedures required under paragraph (1) may not include any specific limitation or restriction on the number of functions or activities that may be converted to performance by Department of Defense civilian employees.

(b) Special Consideration for Certain Functions.— The guidelines and procedures required under subsection (a) shall provide for special consideration to be given to using Department of Defense civilian employees to perform any function that—

(1) is performed by a contractor and—

~~(A) has been performed by Department of Defense civilian employees at any time during the previous 10 years;~~

~~(A) is a critical function that—~~

~~(i) is necessary to maintain sufficient Government expertise and technical capabilities; or~~

~~(ii) entails operational risk associated with contractor performance;~~

~~(B) is an acquisition workforce function;~~

~~(BC) is a function closely associated with the performance of an inherently governmental function;~~

~~(D) has been performed by Department of Defense civilian employees at any time during the previous 10-year period;~~

~~(EE) has been performed pursuant to a contract awarded on a non-competitive basis; or~~

~~(FF) has been performed poorly, as determined by a contracting officer during the 5-year period preceding the date of such determination, because of excessive costs or inferior quality; or~~

- (2) is a new requirement, with particular emphasis given to a new requirement that is similar to a function previously performed by Department of Defense civilian employees or is a function closely associated with the performance of an inherently governmental function.

- (c) Exclusion of Certain Functions From Competitions.— The Secretary of Defense may not conduct a public-private competition under this chapter, Office of Management and Budget Circular A–76, or any other provision of law or regulation before—
- (1) in the case of a new Department of Defense function, assigning the performance of the function to Department of Defense civilian employees;
 - (2) in the case of any Department of Defense function described in subsection (b), converting the function to performance by Department of Defense civilian employees; or
 - (3) in the case of a Department of Defense function performed by Department of Defense civilian employees, expanding the scope of the function.
- (d) Use of Flexible Hiring Authority.—
- (1) The Secretary of Defense may use the flexible hiring authority available to the Secretary pursuant to section 9902 of title 5, to facilitate the performance by Department of Defense civilian employees of functions described in subsection (b).
 - (2) The Secretary shall make use of the inventory required by section 2330a (c) of this title for the purpose of identifying functions that should be considered for performance by Department of Defense civilian employees pursuant to subsection (b).
- (e) Determinations Relating to the Conversion of Certain Functions.—
- (1) Except as provided in paragraph (2), in determining whether a function should be converted to performance by Department of Defense civilian employees, the Secretary of Defense shall—
 - (A) develop methodology for determining costs based on the guidance outlined in the Directive-Type Memorandum 09–007 entitled ‘Estimating and Comparing the Full Costs of Civilian and Military Manpower and Contractor Support’ or any successor guidance for the determination of costs when costs are the sole basis for the determination;
 - (B) take into consideration any supplemental guidance issued by the Secretary of a military department for determinations affecting functions of that military department; and
 - (C) ensure that the difference in the cost of performing the function by a contractor compared to the cost of performing the function by Department of Defense civilian employees would be equal to or exceed the lesser of—
 - (i) 10 percent of the personnel-related costs for performance of that function; or
 - (ii) \$10,000,000.
 - (2) Paragraph (1) shall not apply to any function that is inherently governmental or any function described in subparagraph (A), (B), or (C) of subsection (b)(1).
- (f) Notification Relating to the Conversion of Certain Functions.—The Secretary of Defense shall establish procedures for the timely notification of any contractor who performs a function that the Secretary plans to convert to performance by Department of Defense civilian employees pursuant to subsection (a). The Secretary shall provide a copy of any such notification to the congressional defense committees.
- (g) Definitions.— In this section the term “functions closely associated with inherently governmental functions” has the meaning given that term in section 2383 (b)(3) of this title. this section:

- (1) The term 'functions closely associated with inherently governmental functions' has the meaning given that term in section 2383(b)(3) of this title.
- (2) The term 'acquisition function' has the meaning given that term under section 1721(a) of this title.
- (3) The term 'inherently governmental function' has the meaning given that term in the Federal Activities Inventory Reform Act of 1998 (Public 2 Law 105-270; 31 U. S.C. 501 note).