

AMENDMENT NO. _____ Calendar No. _____

Purpose: To regulate management contracts, require an Analysis of Alternatives for major acquisitions of the Department of Defense and impose additional limitations on certain leases and charters.

IN THE SENATE OF THE UNITED STATES—109th Cong., 1st Sess.

S. 1042

To authorize appropriations for fiscal year 2006 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe personnel strengths for such fiscal year for the Armed Forces, and for other purposes.

Referred to the Committee on _____ and ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT intended to be proposed by Mr. MCCAIN

Viz:

- 1 At the end of subtitle A of title VIII, add the fol-
- 2 lowing:

1 **SEC. 807. MODIFICATION OF REQUIREMENTS APPLICABLE**
2 **TO CONTRACTS AUTHORIZED BY LAW FOR**
3 **CERTAIN MILITARY MATERIEL.**

4 (a) INCLUSION OF COMBAT VEHICLES UNDER RE-
5 QUIREMENTS.—Section 2401 of title 10, United States
6 Code, is amended—

7 (1) by striking “vessel or aircraft” each place it
8 appears and inserting “vessel, aircraft, or combat
9 vehicle”;

10 (2) in subsection (c), by striking “aircraft or
11 naval vessel” each place it appears and inserting
12 “aircraft, naval vessel, or combat vehicle”;

13 (3) in subsection (e), by striking “aircraft or
14 naval vessels” each place it appears and inserting
15 “aircraft, naval vessels, or combat vehicle”; and

16 (4) in subsection (f)—

17 (A) by striking “aircraft and naval vessels”
18 and inserting “aircraft, naval vessels, and com-
19 bat vehicle”; and

20 (B) by striking “such aircraft and vessels”
21 and inserting “such aircraft, vessels, and com-
22 bat vehicle”.

23 (b) ADDITIONAL INFORMATION FOR CONGRESS.—

24 Subsection (b) of such section is amended—

25 (1) in paragraph (1)—

1 (A) in subparagraph (B), by striking
2 “and” at the end;

3 (B) in subparagraph (C), by striking the
4 period at the end and inserting “; and”; and

5 (C) by adding at the end the following new
6 subparagraph:

7 “(D) the Secretary has certified to those com-
8 mittees—

9 “(i) that entering into the proposed con-
10 tract as a means of obtaining the vessel, air-
11 craft, or combat vehicle is the most cost-effec-
12 tive means of obtaining such vessel, aircraft, or
13 combat vehicle; and

14 “(ii) that the Secretary has determined
15 that the lease complies with all applicable laws,
16 Office of Management and Budget circulars,
17 and Department of Defense regulations.”; and

18 (2) by adding at the end the following new
19 paragraphs:

20 “(3) Upon receipt of a notice under paragraph
21 (1)(C), a committee identified in paragraph (1)(B)
22 may request the Inspector General of the Depart-
23 ment of Defense or the Comptroller General of the
24 United States to conduct a review of the proposed

1 contract to determine whether or not such contract
2 meets the requirements of this section.

3 “(4) If a review is requested under paragraph
4 (3), the Inspector General of the Department of De-
5 fense or the Comptroller General of the United
6 States, as the case may be, shall submit to the Sec-
7 retary and the congressional defense committees a
8 report on such review before the expiration of the
9 period specified in paragraph (1)(C).”.

10 (c) APPLICABILITY OF ACQUISITION REGULA-
11 TIONS.—Such section is further amended—

12 (1) by redesignating subsection (f) as sub-
13 section (g); and

14 (2) by inserting after subsection (e) the fol-
15 lowing new subsection (f):

16 “(f)(1) If a lease or charter covered by this section
17 is a capital lease or a lease-purchase—

18 “(A) the lease or charter shall be treated as an
19 acquisition and shall be subject to all applicable stat-
20 utory and regulatory requirements for the acquisi-
21 tion of aircraft, naval vessels, or combat vehicles;
22 and

23 “(B) funds appropriated to the Department of
24 Defense for operation and maintenance may not be
25 obligated or expended for the lease or charter.

1 “(2) In this subsection, the terms ‘capital lease’ and
2 ‘lease-purchase’ have the meanings given those terms in
3 Appendix B to Office of Management and Budget Circular
4 A–11, as in effect on the date of the enactment of the
5 National Defense Authorization Act for Fiscal Year
6 2006.”.

7 (d) CONFORMING AND CLERICAL AMENDMENTS.—

8 (1) The heading of such section is amended to
9 read as follows:

10 **“§ 2401. Requirement for authorization by law of cer-**
11 **tain contracts relating to vessels, aircraft,**
12 **and combat vehicles”.**

13 (2) The table of sections at the beginning of
14 chapter 141 of such title is amended by striking the
15 item relating to section 2401 and inserting the fol-
16 lowing new item:

“Sec. 2401. Requirement for authorization by law of certain contracts relating
to vessels, aircraft, and combat vehicles.”.

17 **SEC. 808. REQUIREMENT FOR ANALYSIS OF ALTERNATIVES**
18 **FOR MAJOR DEFENSE ACQUISITION PRO-**
19 **GRAMS.**

20 (a) REQUIREMENT.—

21 (1) IN GENERAL.—Chapter 144 of title 10,
22 United States Code, is amended by inserting after
23 section 2431 the following new section:

1 **“§ 2431a. Major defense acquisition programs: re-**
2 **quirement for analysis of alternatives**

3 “(a) No major defense acquisition program may be
4 commenced before the completion of an analysis of alter-
5 natives with respect to such program.

6 “(b) For the purposes of this section, a major defense
7 acquisition program is commenced when the milestone de-
8 cision authority approves entry of the program into the
9 first phase of the acquisition process applicable to the pro-
10 gram.”.

11 (2) CLERICAL AMENDMENT.—The table of sec-
12 tions at the beginning of chapter 144 of such title
13 is amended by inserting after the item relating to
14 section 2431 the following new item:

“2431a. Major defense acquisition programs: requirement for analysis of alter-
natives.”.

15 (b) EFFECTIVE DATE.—The amendments made by
16 subsection (a) shall take effect on the date of the enact-
17 ment of this Act, and shall apply with respect to major
18 defense acquisition programs commenced on or after that
19 date.

20 **SEC. 809. MANAGEMENT CONTRACTS FOR MAJOR SYSTEMS**
21 **ACQUISITIONS.**

22 (a) REGULATIONS REGARDING MANAGEMENT CON-
23 TRACTS.—

1 (1) REGULATIONS REQUIRED.—Not later than
2 90 days after the date of the enactment of this Act,
3 the Secretary of Defense shall prescribe regulations
4 on management contracts for the acquisition by the
5 Department of Defense of major systems.

6 (2) CONTENT.—The regulations prescribed
7 under paragraph (1) shall—

8 (A) define the respective rights of the De-
9 partment of Defense, management contractors,
10 and other contractors that participate in the de-
11 velopment or production of any individual ele-
12 ment of the major weapon system (including
13 subcontractors under management contracts) in
14 intellectual property that is developed by the
15 other participating contractors in a manner
16 that ensures that—

17 (i) the Department of Defense obtains
18 appropriate rights in technical data devel-
19 oped by the other participating contractors
20 in accordance with the requirements of sec-
21 tion 2320 of title 10, United States Code;
22 and

23 (ii) management contractors obtain
24 access to technical data developed by the
25 other participating contractors only to the

1 extent necessary for the management con-
2 tractors to execute their obligations under
3 such management contracts;

4 (B) include specific measures to prevent—

5 (i) organizational conflicts of interest
6 on the part of management contractors;

7 and

8 (ii) the performance of inherently gov-
9 ernmental functions by management con-
10 tractors;

11 (C) require that a management contractor
12 in a management contract with system respon-
13 sibility use competitive procedures for each sub-
14 contract in excess of the simplified acquisition
15 threshold, unless one of the circumstances de-
16 scribed in paragraphs (1) through (3) of section
17 2304c(b) of title 10, United States Code, ap-
18 plies to the award of such subcontract; and

19 (D) prohibit a management contractor in a
20 management contract without system responsi-
21 bility from having any financial interest in the
22 development or production of any individual ele-
23 ment of the major weapon system, unless the
24 Secretary of Defense determines in writing that
25 it is necessary in the interest of the national de-

1 fense for the management contractor to partici-
2 pate in the development or production of a par-
3 ticular element of the major weapon system.

4 (b) REGULATIONS PROHIBITING PASS-THROUGH
5 CHARGES.—

6 (1) REGULATIONS REQUIRED.—Not later than
7 90 days after the date of the enactment of this Act,
8 the Secretary of Defense shall prescribe regulations
9 prohibiting pass-through charges on contracts or
10 subcontracts (or task or delivery orders) that are en-
11 tered into for or on behalf of the Department of De-
12 fense that are in excess of the simplified acquisition
13 threshold.

14 (2) SCOPE OF REGULATIONS.—The regulations
15 prescribed under this paragraph shall not apply to
16 any firm, fixed-price contract or subcontract (or task
17 or delivery order) that is awarded on the basis of
18 adequate price competition.

19 (c) DEFINITIONS.—In this section:

20 (1) The term “management contract” includes
21 management contracts with system responsibility
22 and management contracts without system responsi-
23 bility.

24 (2) The term “management contract with sys-
25 tem responsibility” means a Federal agency contract

1 (or task or delivery order) for the development or
2 production of a major system under which the prime
3 contractor is not expected at the time of award to
4 perform work constituting at least 20 percent of the
5 cost of manufacturing the major system.

6 (3) The term “management contract without
7 system responsibility” means a Federal agency con-
8 tract (or task or delivery order) for the procurement
9 of services, the primary purpose of which is to per-
10 form acquisition functions closely associated with in-
11 herently governmental functions with regard to the
12 development or production of a major system.

13 (4) The term “management contractor” means
14 the prime contractor under a management contract.

15 (5) The term “major system” has the meaning
16 given such term in section 2302d of title 10, United
17 States Code.

18 (6) The term “pass-through charge” means a
19 charge by a covered contractor or subcontractor for
20 overhead or profit on work performed by a covered
21 lower-tier contractor (other than charges for the di-
22 rect costs of managing lower-tier contracts and over-
23 head and profit based on such direct costs).

24 (7) The term “covered contractor” means the
25 following:

1 (A) A contractor that assigns work ac-
2 counting for more than 90 percent of the cost
3 of contract performance (not including overhead
4 or profit) to subcontractors.

5 (B) In the case of a contract providing for
6 the development or production of more than one
7 weapon system, a contractor that assigns work
8 accounting for more than 90 percent of the cost
9 of contract performance (not including overhead
10 or profit) for any particular weapon system
11 under such contract to subcontractors.

12 (8) The term “covered lower-tier contractor”
13 means the following:

14 (A) With respect to a covered contractor
15 described by paragraph (7)(A) in a contract,
16 any lower-tier subcontractor under such con-
17 tract.

18 (B) With respect to a covered contractor
19 described by paragraph (7)(B) in a contract,
20 any lower-tier subcontractor on a weapon sys-
21 tem under such contract for which such covered
22 contractor has assigned work accounting for
23 more than 90 percent of the cost of contract
24 performance (not including overhead or profit).

1 (9) The term “functions closely associated with
2 inherently governmental functions” has the meaning
3 given such term in section 2383(b)(3) of title 10,
4 United States Code.

5 (d) **EFFECTIVE DATE.**—The regulations prescribed
6 under this section shall apply to contracts awarded for or
7 on behalf of the Department of Defense on or after the
8 date that is 90 days after the date of the enactment of
9 this Act.