



ACQUISITION,
TECHNOLOGY
AND LOGISTICS

THE UNDER SECRETARY OF DEFENSE

3010 DEFENSE PENTAGON
WASHINGTON, DC 20301-3010

FEB 24 2008

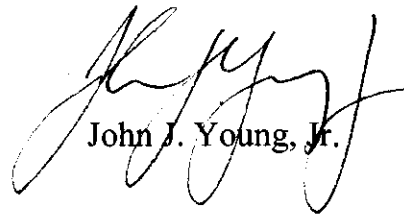
MEMORANDUM FOR DIRECTOR, OFFICE OF LEGISLATIVE COUNSEL

SUBJECT: Late Submission of Legislative Proposals for FY-09 (Gansler Commission)

Consistent with section 849(b) and (c) of Public Law 110-181, I am making a late submission of the attached six legislative proposals that need to be considered for the FY 2009 cycle, not delayed until FY 2010 or until submission of the report to Congress required by section 849. These proposals are part of a comprehensive approach being taken by the Office of the Secretary of Defense and the Department of the Army to resolve the serious issues recently revealed by the independent Commission on Army Acquisition and Program Management in Expeditionary Operations (the "Gansler Commission").

The Gansler Commission assessed many aspects of the Army's expeditionary operations, both foreign and domestic, and it explored legislative solutions among others. The Commission's findings highlight the urgent need for reforms to Army expeditionary contracting and to the Department as a whole.

Given the inherent urgency to improve the effectiveness and efficiency of the Department's acquisition and program management in expeditionary operations, the referenced legislative proposals should be processed without delay.



John J. Young, Jr.

Attachments:
As stated



SEC. ____ . AUTHORITY TO ACQUIRE PRODUCTS AND SERVICES PRODUCED IN A CONTINGENCY THEATER OF OPERATIONS OUTSIDE THE UNITED STATES.

1 (a) IN GENERAL.-- In the case of a product or service to be acquired in support of military
2 operations or stability operations (including security, transition, reconstruction, and humanitarian
3 relief activities) in a contingency theater of operations outside the United States for which the
4 Secretary of Defense makes a determination described in subsection (b), the Secretary may
5 conduct a procurement in which--

6 (1) competition is limited to products or services that are from a country within the
7 contingency theater of operations;

8 (2) procedures other than competitive procedures are used to award a contract to a particular
9 source or sources from a country within the contingency theater of operations; or

10 (3) a preference is provided for products or services that are from a country from within the
11 contingency theater of operations.

12 (b) DETERMINATION.-- A determination described in this subsection is a determination by the
13 Secretary that--

14 (1) the product or service concerned is to be used only in the contingency theater of
15 operations outside the United States; or

16 (2) it is in the national security interest of the United States to limit competition, use
17 procedures other than competitive procedures, or provide a preference as described in
18 subsection (a) because--

19 (A) such limitation, procedure, or preference is necessary to provide a stable source of
20 jobs in a country within the contingency theater of operations; and

21 (B) such limitation, procedure, or preference will not adversely affect--

1 (i) military operations or stability operations in the contingency theater of operations;

2 or

3 (ii) the United States industrial base.

4 (c) PRODUCTS, SERVICES, AND SOURCES FROM A CONTINGENCY THEATER OF OPERATIONS.-- For
5 the purposes of this section:

6 (1) A product is from a contingency theater of operations outside the United States if it is
7 mined, produced, or manufactured in a country within the contingency theater of operations;

8 (2) A service is from a contingency theater of operations outside the United States if it is
9 performed in a country within the contingency theater of operations by citizens or permanent
10 resident aliens of a country within the contingency theater of operations;

11 (3) A source is from a contingency theater of operations outside the United States if it--

12 (A) is located in a country within the contingency theater of operations; and

13 (B) offers products or services that are from a country within the contingency theater of
14 operations.

Section-by-Section Analysis

This proposal is wholly consistent with section 886, "Enhanced Authority to acquire products and services produced in Iraq and Afghanistan," under Public Law 110-181 (the National Defense Authorization Act for Fiscal Year 2008). Section 886 authorizes the Secretary of Defense to establish a preference for the acquisition of products and services in Iraq and Afghanistan for the purpose of providing a stable source of jobs and employment in Iraq and Afghanistan in cases where the preference will not have an adverse effect on U.S. military operations or stability operations in the contingency operation theater country or the U.S. industrial base. This proposal is a logical extension of the authority under section 886 that would be pre-positioned as a tool that could be used in our national interests and serve as a counterinsurgency initiative in the event the United States were to become engaged in military operations or stability operations (including security, transition, reconstruction, and humanitarian relief activities) in any foreign country other than Iraq or Afghanistan. This proposal is a result of lessons learned from such U.S. operations in Iraq and Afghanistan, consistent with the President's National Strategy for Victory in Iraq and the U.S. Operational Commander's campaign plan for creating a moderate, stable, and representative Afghanistan and Iraq capable of controlling and governing its respective territory. Specifically, this proposal would authorize

the Department of Defense to purchase products, construction materials, or services in support of military operations or stability operations in a contingency theater of operations outside the United States from a country within the contingency theater of operations.

Leading U.S. efforts in Iraq, General David H. Petraeus offered this noteworthy observation: "Empowering Iraqis to do the job themselves has, in fact, become the essence of our strategy -- and such an approach is particularly applicable in Iraq. Despite suffering for decades under Saddam, Iraq still has considerable human capital, with the remnants of an educated middle class, a number of budding entrepreneurs, and many talented leaders." Indeed, our military commanders in Iraq and Afghanistan identified unemployment (between 25 and 60 percent in Iraq, and 40 percent in Afghanistan) as a major concern that directly affects the security situation because the pool of unemployed locals is available for recruitment by either militias or insurgents. So as not to waste this lesson, the proposal seeks to secure authority for the Department of Defense to award contracts that provide meaningful opportunities for economic development and expansion for business concerns in a contingency theater of operations as well as entrepreneurship, employment, and skills training for the citizens of any country within the contingency theater of operations. These flexibilities will provide meaningful counterinsurgency options to U.S. warfighters.

This proposal is consistent with recommendations advocated by the Key Elements for Future Success as recently reported by the Commission on Army Acquisition and Program Management in Expeditionary Operations that was chaired by the Honorable Jacques Gansler, and it is consistent with the objectives of section 849(b) of Public Law 110-181 (the National Defense Authorization Act for Fiscal Year 2008).

Cost Implications: It would not increase costs to the government to establish a preference for the acquisition of products and services in a contingency theater of operations outside the United States for the purpose of providing a stable source of jobs and employment in any country within the contingency theater of operations in cases where the preference will not have an adverse effect on U.S. military operations or stability operations in the contingency theater of operations or on the U.S. industrial base.

Unified Legislative Budget (ULB) Proposal Number: N/A

Department of Defense Priority: This proposal relates to Priority #1 –Pursue the Global War on Terrorism.

Strategic Aim — Winning the Long War

- Reduce and defeat the threat of violent extremism

Strategic Approach

- Protect and defend our homeland interests
- Improve our ability to “Find, Fix, Finish”
- Help to build the capability of partner nations across the globe
- Support mainstream Muslim efforts to reject violent extremism

- Help to integrate all instruments of national power

Resubmission Justification: N/A (new proposal)

AT&L Appointee/Official: Shay D. Assad, Director, AT&L/DPAP, 703.695.7145

Reviewing Legal Counsel: Bo McBride, ODGC(A&L), 703.571.9462

AT&L Subject Matter Expert: Gary Blasser, DPAP, 703.693.0197

Changes to Existing Law: N/A; however, the proposed provision relates to sec. 886 of Public Law 110-181 (NDAA-08) and OLC 302 of FY08.

SEC. 886 ENHANCED AUTHORITY TO ACQUIRE PRODUCTS AND SERVICES PRODUCED IN IRAQ AND AFGHANISTAN A CONTINGENCY THEATER OF OPERATIONS OUTSIDE THE UNITED STATES.

(a) **IN GENERAL.**-- In the case of a product or service to be acquired in support of military operations or stability operations ~~in Iraq or Afghanistan~~ (including security, transition, reconstruction, and humanitarian relief activities) in a contingency theater of operations outside the United States for which the Secretary of Defense makes a determination described in subsection (b), the Secretary may conduct a procurement in which--

- (1) competition is limited to products or services that are from ~~Iraq or Afghanistan~~ a country within the contingency theater of operations;
- (2) procedures other than competitive procedures are used to award a contract to a particular source or sources from ~~Iraq or Afghanistan~~ a country within the contingency theater of operations; or
- (3) a preference is provided for products or services that are from ~~Iraq or Afghanistan~~ a country within the contingency theater of operations.

(b) **DETERMINATION.**-- A determination described in this subsection is a determination by the Secretary that--

- (1) the product or service concerned is to be used only ~~by the military forces, police, or other security personnel of Iraq or Afghanistan~~ in the contingency theater of operations outside the United States; or
- (2) it is in the national security interest of the United States to limit competition, use procedures other than competitive procedures, or provide a preference as described in subsection (a) because--
 - (A) such limitation, procedure, or preference is necessary to provide a stable source of jobs ~~in Iraq or Afghanistan~~ a country within the contingency theater of operations; and
 - (B) such limitation, procedure, or preference will not adversely affect--
 - (i) military operations or stability operations ~~in Iraq or Afghanistan~~ the contingency theater of operations; or
 - (ii) the United States industrial base.

(c) PRODUCTS, SERVICES, AND SOURCES FROM IRAQ OR AFGHANISTAN A CONTINGENCY THEATER OF OPERATIONS.-- For the purposes of this section:

(1) A product is from Iraq or Afghanistan a contingency theater of operations outside the United States if it is mined, produced, or manufactured in Iraq or Afghanistan a country within the contingency theater of operations;

(2) A service is from Iraq or Afghanistan a contingency theater of operations if it is performed in Iraq or Afghanistan a country from within the contingency theater of operations by citizens or permanent resident aliens of Iraq or Afghanistan a country within the contingency theater of operations;

(3) A source is from Iraq or Afghanistan a contingency theater of operations outside the United States if it--

(A) is located in Iraq or Afghanistan a country within the contingency theater of operations; and

(B) offers products or services that are from Iraq or Afghanistan a country within the contingency theater of operations.

SEC. ____ . EXCEPTIONS FOR NATIONAL SECURITY AND EMERGENCY OPERATIONS.

1 (a) EXCEPTION FOR NATIONAL SECURITY.--Section 2533a of title 10, United States Code, is
2 amended--

3 (1) by redesignating subsections (i), (j), and (k) as subsections (j), (k), and (l); and

4 (2) by inserting after subsection (h) the following new subsection:

5 " (i) EXCEPTION FOR NATIONAL SECURITY.—Subsection (a) does not apply to
6 procurements for which the Secretary of Defense or the Secretary of the military
7 department concerned determines in writing that an exception is in the national security
8 interest of the United States."

9 (3) CONFORMING AMENDMENT.—Subsection (a) of such section is amended by striking "(h)"
10 and inserting "(i)".

11 (b) EXCEPTION FOR CERTAIN PROCUREMENTS.—

12 (1) Subsection (d) of section 2533a of title 10, United States Code, is amended--

13 (A) by striking subparagraph (1); and

14 (B) by inserting the following new paragraph (1):

15 "(1) Procurements in support of emergency operations."; and

16 (2) DEFINITION.—In this section, the term "emergency operations" means:

17 (1) contingency operations as defined in section 101(a)(13) of this title;

18 (2) operations in defense against or recovery from nuclear, biological, chemical, or
19 radiological attack against the United States; or

20 (3) operations in response to an incident of national significance, emergency declaration,
21 national emergency, or major disaster declared by the President.

Section-by-Section Analysis

This proposal would retain the fundamental domestic preference requirements of the law; yet, it would provide the flexibility needed for the Department of Defense (DoD) and its suppliers to better respond to fulfill the needs that arise in cases of national security and defined cases of emergency operations using either competitive procedures or other than competitive procedures, as may be appropriate. The definition for “emergency operations” used in this proposal fully conforms to the definition prescribed in Part 18, “Emergency Acquisitions,” of the Federal Acquisition Regulation, and it is consistent with the special emergency procurement authority prescribed by section 1443 of Public Law 108-136 (the National Defense Authorization Act for Fiscal Year 2004), as amended. This proposal is also advocated by the Key Elements for Future Success as recently reported by the Commission on Army Acquisition and Program Management in Expeditionary Operations that was chaired by the Honorable Jacques Gansler, and it is consistent with the objectives of section 849(b) of Public Law 110-181 (the National Defense Authorization Act for Fiscal Year 2008).

Cost Implications: Increasing contracting flexibilities by the addition of a exception for cases in support of national security and by the amendment of the “Exception for Certain Procurements” to provide for support in cases of emergency operations, not just in support of combat operations and contingency operations, would not increase costs to the government.

Unified Legislative Budget (ULB) Proposal Number: N/A

Department of Defense Priority: This proposal relates to Priority #1 –Pursue the Global War on Terrorism. It will streamline the Department’s ability to support the needs of national security and emergency operations by providing prudent contracting flexibility to respond to both situations using either competitive procedures or other than competitive procedures.

Resubmission Justification: N/A (new proposal)

AT&L Appointee/Official: Shay D. Assad, Director, AT&L/DPAP, 703.695.7145

Reviewing Legal Counsel: Bo McBride, ODGC(A&L), 703.571.9462

AT&L Subject Matter Expert: Gary Blasser, DPAP, 703.693.0197

Changes to Existing Law: The proposed provision would amend 10 U.S.C. 2533a.

§ 2533a. Requirement to buy certain articles from American sources; exceptions

(a) **REQUIREMENT-** Except as provided in subsections (c) through ~~(h)~~(i), funds appropriated or otherwise available to the Department of Defense may not be used for the procurement of an item described in subsection (b) if the item is not grown, reprocessed, reused, or produced in the United States.

(b) **COVERED ITEMS-** An item referred to in subsection (a) is any of the following:

(1) An article or item of--

(A) food;

(B) clothing and the materials and components thereof, other than sensors, electronics, or other items added to, and not normally associated with, clothing (and the materials and components thereof);

(C) tents, tarpaulins, or covers;

(D) cotton and other natural fiber products, woven silk or woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric (including all textile fibers and yarns that are for use in such fabrics), canvas products, or wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles); or

(E) any item of individual equipment manufactured from or containing such fibers, yarns, fabrics, or materials.

(2) Hand or measuring tools.

(c) **AVAILABILITY EXCEPTION-** Subsection (a) does not apply to the extent that the Secretary of Defense or the Secretary of the military department concerned determines that satisfactory quality and sufficient quantity of any such article or item described in subsection (b)(1) grown, reprocessed, reused, or produced in the United States cannot be procured as and when needed at United States market prices.

(d) **EXCEPTION FOR CERTAIN PROCUREMENTS-** Subsection (a) does not apply to the following:

~~(1) Procurements outside the United States in support of combat operations or procurements of any item listed in subsection (b)(1)(A), (b)(2), or (b)(3) in support of contingency operations.~~ (1) Procurements in support of emergency operations.

(2) Procurements by vessels in foreign waters.

(3) Emergency procurements or procurements of perishable foods by, or for, an establishment located outside the United States for the personnel attached to such establishment.

(4) Procurements of any item listed in subsection (b)(1)(A), (b)(2), or (b)(3) for which the use of procedures other than competitive procedures has been approved on the basis of section 2304(c)(2) of this title, relating to unusual and compelling urgency of need.

(e) **EXCEPTION FOR CHEMICAL WARFARE PROTECTIVE CLOTHING-** Subsection (a) does not preclude the procurement of chemical warfare protective clothing produced outside the United States if--

(1) such procurement is necessary--

(A) to comply with agreements with foreign governments requiring the United States to purchase supplies from foreign sources for the purposes of offsetting sales made by the United States Government or United States firms under approved programs serving defense requirements; or

(B) in furtherance of agreements with foreign governments in which both such governments agree to remove barriers to purchases of supplies produced in the other country or services performed by sources of the other country; and

(2) any such agreement with a foreign government complies, where applicable, with the requirements of section 36 of the Arms Export Control Act (22 U.S.C. 2776) and with section 2457 of this title.

(f) EXCEPTIONS FOR CERTAIN OTHER COMMODITIES AND ITEMS- Subsection (a) does not preclude the procurement of the following:

(1) Foods manufactured or processed in the United States;

(2) Waste and byproducts of cotton and wool fiber for use in the production of propellants and explosives.

(g) EXCEPTION FOR COMMISSARIES, EXCHANGES, AND OTHER NONAPPROPRIATED FUND INSTRUMENTALITIES- Subsection (a) does not apply to items purchased for resale purposes in commissaries, exchanges, or nonappropriated fund instrumentalities operated by the Department of Defense.

(h) EXCEPTION FOR SMALL PURCHASES- Subsection (a) does not apply to purchases for amounts not greater than the simplified acquisition threshold referred to in section 2304(g) of this title.

(i) NATIONAL SECURITY EXCEPTION.—Subsection (a) does not apply to procurements for which the Secretary of Defense or the Secretary of the military department concerned determines in writing that an exception is in the national security interest of the United States.

~~(j)~~(j) APPLICABILITY TO CONTRACTS AND SUBCONTRACTS FOR PROCUREMENT OF COMMERCIAL ITEMS- This section is applicable to contracts and subcontracts for the procurement of commercial items notwithstanding section 34 of the Office of Federal Procurement Policy Act (41 U.S.C. 430).

~~(j)~~(k) GEOGRAPHIC COVERAGE- In this section, the term 'United States' includes the possessions of the United States.

~~(k)~~(l) NOTIFICATION REQUIRED WITHIN 7 DAYS AFTER CONTRACT AWARD IF CERTAIN EXCEPTIONS APPLIED.— In the case of any contract for the procurement of an item described in subparagraph (B), (C), (D), or (E) of subsection (b)(1), if the Secretary of Defense or of the military department concerned applies an exception set forth in subsection (c) or (e) with respect to that contract, the Secretary shall, not later than 7 days after the award of the contract, post a notification that the exception has been applied on the Internet site maintained by the General Services Administration known as FedBizOps.gov (or any successor site).”

Section-by-Section Analysis

Section 843 of Public Law 110-181 (the National Defense Authorization Act for Fiscal Year 2008) adds restrictions on the award of certain single source task or delivery order contracts, enhances the fair opportunity competition requirements, and for a period through September 30, 2010, provides protest rights for certain task or delivery orders. With increased reliance on multiple award contracts and competition, associated procurement lead times may increase. To preclude such a phenomenon on our ability to provide timely responses in anticipation, or in support, of emergency operations, it would be helpful if the record were made to reflect congressional support for use of the express option by the Comptroller General to adjudicate any protests registered in the case of such contract actions. This proposal is also advocated by the Key Elements for Future Success as recently reported by the Commission on Army Acquisition and Program Management in Expeditionary Operations that was chaired by the Honorable Jacques Gansler, and it consistent with the objectives of section 849(b) of Public Law 110-181 (the National Defense Authorization Act for Fiscal Year 2008).

Cost Implications: The costs to the government should not increase because of the Comptroller General's required use of the express option for deciding protests regarding the issuance or proposed issuance of a referenced contract, task order, or delivery order that is in anticipation, or in support, of emergency operations.

Unified Legislative Budget (ULB) Proposal Number: N/A

Department of Defense Priority: This proposal relates to Priority #1 –Pursue the Global War on Terrorism. It will enhance the Department's ability to support the needs of emergency operations if congressional support is given for use of the express option to decide protests regarding the issuance or proposed issuance of either a task or delivery order contract or a task or delivery order that is in anticipation, or support, of emergency operations.

Resubmission Justification: N/A (new proposal)

AT&L Appointee/Official: Shay D. Assad, Director, AT&L/DPAP, 703.695.7145

Reviewing Legal Counsel: Bo McBride, ODGC(A&L), 703.571.9462

AT&L Subject Matter Expert: Gary Blasser, DPAP, 703.693.0197

Changes to Existing Law: The proposed provision would amend 31 U.S.C. 3554.

§ 3554. Decisions on protests

(a)(1) To the maximum extent practicable, the Comptroller General shall provide for the inexpensive and expeditious resolution of protests under this subchapter. Except as provided under paragraph (2) of this subsection, the Comptroller General shall issue a final decision concerning a protest within 100 days after the date the protest is submitted to the Comptroller General.

~~(2) The Comptroller General~~ (2)(A) The Comptroller General shall, by regulation prescribed pursuant to section 3555 of this title, establish an express option for deciding those protests which the Comptroller General determines suitable for resolution within 65 days after the date the protest is submitted.

(B) With respect to a protest in connection with the issuance or proposed issuance of a contract that is in anticipation or in support of emergency operations or a protest under section 303J(e) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253j(e)) and section 2304c(e) of title 10, United States Code, in connection with the issuance or proposed issuance of a task order or a delivery order that is in anticipation or in support of emergency operations, the Comptroller General shall use the express option established pursuant to subparagraph (A) to decide protests, unless the Comptroller General determines that the protest is not suitable for resolution within 65 days after the date the protest is submitted.

(3) An amendment to a protest that adds a new ground of protest, if timely made, should be resolved, to the maximum extent practicable, within the time limit established under paragraph (1) of this subsection for final decision of the initial protest. If an amended protest cannot be resolved within such time limit, the Comptroller General may resolve the amended protest through the express option under paragraph (2) of this subsection.

(4) The Comptroller General may dismiss a protest that the Comptroller General determines is frivolous or which, on its face, does not state a valid basis for protest.

(b)(1) With respect to a solicitation for a contract, or a proposed award or the award of a contract, protested under this subchapter, the Comptroller General may determine whether the solicitation, proposed award, or award complies with statute and regulation. If the Comptroller General determines that the solicitation, proposed award, or award does not comply with a statute or regulation, the Comptroller General shall recommend that the Federal agency—

- (A) refrain from exercising any of its options under the contract;
- (B) recompetete the contract immediately;
- (C) issue a new solicitation;
- (D) terminate the contract;
- (E) award a contract consistent with the requirements of such statute and regulation;
- (F) implement any combination of recommendations under clauses (A), (B), (C), (D), and (E); or

(G) implement such other recommendations as the Comptroller General determines to be necessary in order to promote compliance with procurement statutes and regulations.

(2) If the head of the procuring activity responsible for a contract makes a finding under section 3553(d)(3)(C)(i)(I) of this title, the Comptroller General shall make recommendations under this subsection without regard to any cost or disruption from terminating, recompeting, or reawarding the contract.

(3) If the Federal agency fails to implement fully the recommendations of the Comptroller General under this subsection with respect to a solicitation for a contract or an award or proposed award of a contract within 60 days after receiving the recommendations, the head of the procuring activity responsible for that contract shall report such failure to the Comptroller General not later than 5 days after the end of such 60-day period.

(c)(1) If the Comptroller General determines that a solicitation for a contract or a proposed award or the award of a contract does not comply with a statute or regulation, the Comptroller General may recommend that the Federal agency conducting the procurement pay to an appropriate interested party the costs of—

(A) filing and pursuing the protest, including reasonable attorneys' fees and consultant and expert witness fees; and

(B) bid and proposal preparation.

(2) No party (other than a small business concern (within the meaning of section 3(a) of the Small Business Act)) may be paid, pursuant to a recommendation made under the authority of paragraph (1)—

(A) costs for consultant and expert witness fees that exceed the highest rate of compensation for expert witnesses paid by the Federal Government; or

(B) costs for attorneys' fees that exceed \$150 per hour unless the agency determines, based on the recommendation of the Comptroller General on a case by case basis, that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.

(3) If the Comptroller General recommends under paragraph (1) that a Federal agency pay costs to an interested party, the Federal agency shall—

(A) pay the costs promptly; or

(B) if the Federal agency does not make such payment, promptly report to the Comptroller General the reasons for the failure to follow the Comptroller General's recommendation.

(4) If the Comptroller General recommends under paragraph (1) that a Federal agency pay costs to an interested party, the Federal agency and the interested party shall attempt to reach an agreement on the amount of the costs to be paid. If the Federal agency and the interested party are unable to agree on the amount to be paid, the Comptroller General may, upon the request of the interested party, recommend to the Federal agency the amount of the costs that the Federal agency should pay.

(d) Each decision of the Comptroller General under this subchapter shall be signed by the Comptroller General or a designee for that purpose. A copy of the decision shall be made

available to the interested parties, the head of the procuring activity responsible for the solicitation, proposed award, or award of the contract, and the senior procurement executive of the Federal agency involved.

(e)(1) The Comptroller General shall report promptly to the Committee on Governmental Affairs and the Committee on Appropriations of the Senate and to the Committee on Government Reform and Oversight and the Committee on Appropriations of the House of Representatives any case in which a Federal agency fails to implement fully a recommendation of the Comptroller General under subsection (b) or (c). The report shall include—

(A) a comprehensive review of the pertinent procurement, including the circumstances of the failure of the Federal agency to implement a recommendation of the Comptroller General; and

(B) a recommendation regarding whether, in order to correct an inequity or to preserve the integrity of the procurement process, the Congress should consider—

(i) private relief legislation;

(ii) legislative rescission or cancellation of funds;

(iii) further investigation by Congress; or

(iv) other action.

(2) Not later than January 31 of each year, the Comptroller General shall transmit to the Congress a report containing a summary of each instance in which a Federal agency did not fully implement a recommendation of the Comptroller General under subsection (b) or (c) during the preceding year. The report shall also describe each instance in which a final decision in a protest was not rendered within 100 days after the date the protest is submitted to the Comptroller General.

SEC. ____. **AUTHORITY TO WAIVE ANNUAL LIMITATION ON PREMIUM PAY AND AGGREGATE LIMITATION ON PAY FOR FEDERAL CIVILIAN EMPLOYEES**

1 (a) **WAIVER AUTHORITY.**—Notwithstanding sections 5547 and 5307 of title 5, United States
2 Code, the head of an Executive agency may waive the limitations on the aggregate of basic pay
3 and premium pay payable in a calendar year, and limitations on payment of allowances,
4 differentials, bonuses, awards, or similar cash payments, when added to the total basic pay paid
5 or payable to an employee for service performed in a calendar year, up to the total annual
6 compensation payable to the Vice President under section 104 of title 3, United States Code, for
7 an employee who performs work while in an overseas location that is in the area of responsibility
8 of the Commander of the United States Central Command, in direct support of, or directly
9 related to—

10 (1) a military operation, including a contingency operation; or

11 (2) an operation in response to a declared emergency.

12 (b) **ROLLOVER OF EARNED PAY TO SUBSEQUENT YEAR.** — Any amount which is not paid to an
13 employee in a calendar year because of the limitation under subsection (a) shall be paid to such
14 employee in a lump sum at the beginning of the following calendar year. Any amount paid
15 under this subsection in a calendar year shall be taken into account for purposes of applying the
16 limitations under subsection (a) with respect to such calendar year.

17 (c) **ADDITIONAL PAY NOT CONSIDERED BASIC PAY.**—To the extent that a waiver under
18 subsection (a) results in payment of additional premium pay of a type that is normally creditable
19 as basic pay for retirement or any other purpose, such additional pay shall not be considered to
20 be basic pay for any purpose, nor shall it be used in computing a lump-sum payment for
21 accumulated and accrued annual leave under section 5551 of title 5, United States Code.

Section-by-Section Analysis

This proposed legislation would allow an individual who has volunteered to deploy to the United States Central Command, Area of Operations (CENTCOM AOR) in support of the mission of reconstruction and security stability to be paid what they had earned in the tax year that they earned it.

Current law puts limitations on the aggregate of basic pay and premium pay payable in a calendar year, and limitations on payment of allowances, differentials, bonuses, awards, or similar cash payments, when added to the total basic pay paid or payable to an employee for service performed in a calendar year. Under section 5547 of title 5, U.S.C., premium pay can be earned only to the extent that the aggregate of premium pay and basic pay do not exceed the greater of the GS-15 maximum rate (including applicability locality pay) or level V of the Executive Schedule in any single pay period or, by exception, in a calendar year. The National Defense Authorization Act for Fiscal Year 2007 granted heads of agencies the authority to allow employees assigned to the CENTCOM AOR during calendar year 2007 to earn an aggregate of basic pay and premium pay up to \$212K. Employees who reach the annual premium pay cap cannot be paid for any additional overtime or other premium hours worked. Section 5307 of title 5, U.S.C. limits cash payments (such as basic pay, premium pay, allowances, differential, bonuses, and awards) that an employee can receive in any calendar year to level I of the Executive Schedule. Earnings in excess of this limit are paid to the employee as a lump sum at the beginning of the following calendar year (or as appropriate, in the next calendar year(s)). - For example, using the annual earnings cap for calendar year 2007 of \$186.6K (equivalent to the rate for level I of the Executive Schedule) for government civilians, if a civilian deploys to the CENTCOM AOR and earns \$202K, \$15.4K of their pay would be deferred until the next calendar year. Raising the aggregate earnings cap for government civilians who volunteer to serve in the CENTCOM AOR would allow the employees to receive the money in the calendar year it was earned, invest or earn interest on that income as it is earned, and file taxes on the income without having to defer to the following calendar year. Making permanent the higher CENTCOM premium pay limit equivalent to the salary of the Vice President would ensure that Federal employees who work extended premium hours for extended tours in the CENTCOM AOR are compensated for the important work they perform in support of one of the nation's highest priorities – prevailing in the Global War on Terror, as well as the critical continuation of the reconstruction and stabilization efforts in the CENTCOM AOR.

Cost Implications: This waiver to the aggregate limitation on pay (section 5307 of title 5, U.S.C.) will not require the allocation of additional funds. There are not cost impacts to this proposed legislation, just the time of when the employee would be paid. The waiver to the limitation of premium pay (section 5547 of title 5, U.S.C.) is estimated to cost the Department approximately \$4.7 million per year, and would be funded from the Component and Defense Activity Operation and Maintenance Fund accounts.

- **Number of Personnel Affected:** 4000 DoD-Wide
- **Resource Requirements (\$Millions):** \$4.7 Per Year
- **Cost Methodology:** The cost will be determined by the number of employees affected, the basic pay of each employee (which varies by grade, step, and location), and the number of premium hours (overtime, nights, holidays, Sundays, etc.) authorized and worked by each employee. Based on available payroll data for eligible employees in 2006, the additional cost for overtime in excess of the annual premium pay limitation was approximately \$4.3M and covered approximately 3,500 DoD employees. Extrapolating mission requirements to reflect deployment requirements for 4,000 employees results in an estimate of \$4.7M per year.

Unified Legislative Budget (ULB) Proposal Number: N/A

Department of Defense Priority: Priority 1: Pursuing the Global War on Terrorism by helping to integrate all instruments of national power.

Resubmission Justification (if applicable): N/A. The Department has been granted similar authority to waive the annual limitation on premium pay on an annual basis since 2005. This occurred most recently in sec. 1011 of Pub. L. 110-181 (NDAA-08). (Reference DoD's FY 2008 Omnibus proposal OLC 045.) This is a *critical* proposal for our deployed civilians. A similar proposal is contained in DoD's FY 2009 Omnibus proposal OLC 082.

P&R Subject Matter Expert: Katherine Greenlaw, OUSD(P&R)CPP, 703.571.9289

P&R Appointee/Official: Patricia Bradshaw, DUSD(CPP), 703.614.9487

Reviewing Legal Counsel: Helen Sullivan, ODGC(P&HP), 703.695.1078

Changes to Existing Law: The proposed provision would change no existing law; however, it would authorize a waiver to two existing laws: 5 U.S.C. 5547 and 5 U.S.C. 5307.

§ 5547. Limitation on premium pay

(a) An employee may be paid premium pay under sections 5542, 5545 (a), (b), and (c), 5545a, and 5546 (a) and (b) only to the extent that the payment does not cause the aggregate of basic pay and such premium pay for any pay period for such employee to exceed the greater of—

(1) the maximum rate of basic pay payable for GS–15 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law); or

(2) the rate payable for level V of the Executive Schedule.

(b)(1) Subject to regulations prescribed by the Office of Personnel Management, subsection (a) shall not apply to an employee who is paid premium pay by reason of work in connection with an emergency (including a wildfire emergency) that involves a direct threat to life or property, including work performed in the aftermath of such an emergency.

(2) Notwithstanding paragraph (1), no employee referred to in such paragraph may be paid premium pay under the provisions of law cited in subsection (a) if, or to the extent that, the aggregate of the basic pay and premium pay under those provisions for such employee would, in any calendar year, exceed the greater of—

(A) the maximum rate of basic pay payable for GS–15 in effect at the end of such calendar year (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law); or

(B) the rate payable for level V of the Executive Schedule in effect at the end of such calendar year.

(3) Subject to regulations prescribed by the Office of Personnel Management, the head of an agency may determine that subsection (a) shall not apply to an employee who is paid premium pay to perform work that is critical to the mission of the agency. Such employees may be paid premium pay under the provisions of law cited in subsection (a) if, or to the extent that, the aggregate of the basic pay and premium pay under those provisions for such employee would not, in any calendar year, exceed the greater of—

(A) the maximum rate of basic pay payable for GS–15 in effect at the end of such calendar year (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law); or

(B) the rate payable for level V of the Executive Schedule in effect at the end of such calendar year.

(c) The Office of Personnel Management shall prescribe regulations governing the methods of applying subsection (b)(2) and (b)(3) to employees who receive premium pay under section 5545 (c) or 5545a, or to firefighters covered by section 5545b who receive overtime pay for hours in their regular tour of duty, and the method of payment to such employees. Such regulations may limit the payment of such premium pay on a biweekly basis.

(d) This section shall not apply to any employee of the Federal Aviation Administration or the Department of Defense who is paid premium pay under section 5546a.

§ 5307. Limitation on certain payments

(a)(1) Except as otherwise permitted by or under law, or as otherwise provided under subsection (d), no allowance, differential, bonus, award, or other similar cash payment under this title may be paid to an employee in a calendar year if, or to the extent that, when added to the total basic pay paid or payable to such employee for service performed in such calendar year as an employee in the executive branch (or as an employee outside the executive branch to whom chapter 51 applies), such payment would cause the total to exceed the annual rate of basic pay payable for level I of the Executive Schedule, as of the end of such calendar year.

(2) This section shall not apply to any payment under—

(A) subchapter III or VII of chapter 55 or section 5596;

(B) chapter 57 (other than section 5753, 5754, 5755, or 5757);^[1] or

(C) chapter 59 (other than section 5925, 5928, 5941 (a)(2), or 5948).

(b)(1) Any amount which is not paid to an employee in a calendar year because of the limitation under subsection (a) shall be paid to such employee in a lump sum at the beginning of the following calendar year.

(2) Any amount paid under this subsection in a calendar year shall be taken into account for purposes of applying^[2] the limitations under subsection (a) with respect to such calendar year.

(c) The Office of Personnel Management shall prescribe such regulations as may be necessary to carry out this section (subject to subsection (d)), including regulations (consistent with section 5582) concerning how a lump-sum payment under subsection (b) shall be made with respect to any employee who dies before an amount payable to such employee under subsection (b) is made.

(d)(1) Notwithstanding any other provision of this section, subsection (a)(1) shall be applied by substituting “the total annual compensation payable to the Vice President under section 104 of title 3” for “the annual rate of basic pay payable for level I of the Executive Schedule” in the case of any employee who—

(A) is paid under section 5376 or 5383 of this title or section 332 (f), 603, or 604 of title 28; and

(B) holds a position in or under an agency which is described in paragraph (2).

(2) An agency described in this paragraph is any agency which, for purposes of the calendar year involved, has been certified under this subsection as having a performance appraisal system which (as designed and applied) makes meaningful distinctions based on relative performance.

(3)(A) The Office of Personnel Management and the Office of Management and Budget jointly shall promulgate such regulations as may be necessary to carry out this subsection,

including the criteria and procedures in accordance with which any determinations under this subsection shall be made.

(B) An agency's certification under this subsection shall be for a period of 2 calendar years, except that such certification may be terminated at any time, for purposes of either or both of those years, upon a finding that the actions of such agency have not remained in conformance with applicable requirements.

(C) Any certification or decertification under this subsection shall be made by the Office of Personnel Management, with the concurrence of the Office of Management and Budget.

(4) Notwithstanding any provision of paragraph (3), any regulations, certifications, or other measures necessary to carry out this subsection with respect to employees within the judicial branch shall be the responsibility of the Director of the Administrative Office of the United States Courts. However, the regulations under this paragraph shall be consistent with those promulgated under paragraph (3).

SEC ____ . EXPEDITED HIRING AUTHORITY FOR DEFENSE ACQUISITION POSITIONS

- 1 (1) GENERAL.-- The Secretary of Defense may exercise the authority of the Director of the Office
2 of Personnel Management under sections 3304, 5333, and 5753 of title 5, United States Code, to-
- 3 (A) designate any category of acquisition positions within the Department of Defense as
4 shortage category positions; and
- 5 (B) recruit, appoint, and establish criteria to pay bonuses and allowances to highly qualified
6 persons directly to positions so designated.
- 7 (2) SUNSET.-- The Secretary may not appoint a person to a position of employment under this
8 subsection after September 30, 2012.

Section-by-Section Analysis

This proposed legislation will allow the Department of Defense (DoD) to address the requirements of section 854 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Public Law 109-364): Joint Policies on Requirements Definition, Contingency Program Management, and Contingency Contracting.

In addition, the DoD has established policy to enhance efforts to integrate, synchronize, and become more effective and responsive to the warfighter. For example, the contingency contracting mission of the Joint Contracting Command – Iraq/Afghanistan (JCC-I/A) has been significantly expanded. This increase requires the JCC-I/A to have contract management and oversight of all DoD contracts in Iraq and Afghanistan. The increased mission requirements of the JCC-I/A and the Defense Contract Management Agency will require an immediate infusion of approximately 250 additional acquisition personnel into theater with a corresponding increase of acquisition personnel in the United States. This population of acquisition specialists will serve as a future rotational force, as required, to sustain an appropriate level of acquisition oversight during contingency operations.

Responding to shortfalls identified by the Report of the “Commission on Army Acquisition and Program Management in Expeditionary Operations” (the “Gansler Report”) of October 31 2007, the Army estimates the need for an immediate increase of one thousand civilian contracting professionals.

Cost Implications: Positions and dollars associated with the salary have been budgeted.

Unified Legislative Budget (ULB) Proposal Number: N/A

Department of Defense Priority: This proposed legislation supports the priority of improving effectiveness and efficiency across the board by improving our ability to create a culture of efficiency and to make the best use of tax payer dollars.

Resubmission Justification (if applicable): N/A; however, similar language to this proposal was included in Senate version of the NDAA-08 (S. 1547, section 844(g)). Conference Committee Report 110-477 shows that the Conferees mistakenly interpreted that H.R. 1585 (section 853) and S.1547 (section 844(g)) were the same and erroneously deleted the latter reference from the final enrolled bill (H.R. 4986). S.1547, section 844(g), was worded similarly as this proposal.

P&R Subject Matter Expert: Michael Sena, OUSD(P&R)CPP, 703.614.9487

P&R Appointee/Official: Patricia Bradshaw, DUSD(CPP), 703.614.9487

Reviewing Legal Counsel: Helen Sullivan, ODGC(P&HP), 703.695.1078

Changes to Existing Law: The proposed provision would change no existing law; however, it would authorize an exception, with a sunset clause, to three laws: sections 3304, 5333, and 5753 of title 5, United States Code.

§ 3304. Competitive service; examinations

(a) The President may prescribe rules which shall provide, as nearly as conditions of good administration warrant, for—

(1) open, competitive examinations for testing applicants for appointment in the competitive service which are practical in character and as far as possible relate to matters that fairly test the relative capacity and fitness of the applicants for the appointment sought;

(2) noncompetitive examinations when competent applicants do not compete after notice has been given of the existence of the vacancy; and

(3) authority for agencies to appoint, without regard to the provision of sections 3309 through 3318, candidates directly to positions for which—

(A) public notice has been given; and

(B)

(i) the Office of Personnel Management has determined that there exists a severe shortage of candidates or there is a critical hiring need; or

(ii) the candidate is a participant in the Science, Mathematics, and Research for Transformation (SMART) Defense Education Program under section 2192a of title 10, United States Code.

The Office shall prescribe, by regulation, criteria for identifying such positions and may delegate authority to make determinations under such criteria.

(b) An individual may be appointed in the competitive service only if he has passed an examination or is specifically excepted from examination under section 3302 of this title. This subsection does not take from the President any authority conferred by section 3301 of this title that is consistent with the provisions of this title governing the competitive service.

(c)(1) For the purpose of this subsection, the term “technician” has the meaning given such term by section 8337 (h)(1) of this title.

(2) Notwithstanding a contrary provision of this title or of the rules and regulations prescribed under this title for the administration of the competitive service, an individual who served for at least 3 years as a technician acquires a competitive status for transfer to the competitive service if such individual—

(A) is involuntarily separated from service as a technician other than by removal for cause on charges of misconduct or delinquency;

(B) passes a suitable noncompetitive examination; and

(C) transfers to the competitive service within 1 year after separating from service as a technician.

(d) The Office of Personnel Management shall promulgate regulations on the manner and extent that experience of an individual in a position other than the competitive service, such as the excepted service (as defined under section 2103) in the legislative or judicial branch, or in any private or nonprofit enterprise, may be considered in making appointments to a position in the competitive service (as defined under section 2102). In promulgating such regulations OPM shall not grant any preference based on the fact of service in the legislative or judicial branch. The regulations shall be consistent with the principles of equitable competition and merit based appointments.

(e) Employees at any place outside the District of Columbia where the President or the Office of Personnel Management directs that examinations be held shall allow the reasonable use of public buildings for, and in all proper ways facilitate, holding the examinations.

(f)(1) Preference eligibles or veterans who have been separated from the armed forces under honorable conditions after 3 years or more of active service may not be denied the opportunity to compete for vacant positions for which the agency making the announcement will accept applications from individuals outside its own workforce under merit promotion procedures.

(2) If selected, a preference eligible or veteran described in paragraph (1) shall receive a career or career-conditional appointment, as appropriate.

(3) This subsection shall not be construed to confer an entitlement to veterans’ preference that is not otherwise required by law.

(4) The area of consideration for all merit promotion announcements which include consideration of individuals of the Federal workforce shall indicate that preference eligibles and veterans who have been separated from the armed forces under honorable conditions after 3 years or more of active service are eligible to apply. The announcements shall be publicized in accordance with section 3327.

(5) The Office of Personnel Management shall prescribe regulations necessary for the administration of this subsection. The regulations shall ensure that an individual who has completed an initial tour of active duty is not excluded from the application of this subsection

because of having been released from such tour of duty shortly before completing 3 years of active service, having been honorably released from such duty.

§ 5333. Minimum rate for new appointments

New appointments shall be made at the minimum rate of the appropriate grade. However, under regulations prescribed by the Office of Personnel Management which provide for such considerations as the existing pay or unusually high or unique qualifications of the candidate, or a special need of the Government for his services, the head of an agency may appoint, with the approval of the Office in each specific case, an individual to a position at such a rate above the minimum rate of the appropriate grade as the Office may authorize for this purpose. The approval of the Office in each specific case is not required with respect to an appointment made by the Librarian of Congress.

§ 5753. Recruitment and relocation bonuses

(a)(1) This section may be applied to—

(A) employees covered by the General Schedule pay system established under subchapter III of chapter 53; and

(B) employees in a category approved by the Office of Personnel Management at the request of the head of an Executive agency.

(2) A bonus may not be paid under this section to an individual who is appointed to or who holds—

(A) a position to which an individual is appointed by the President, by and with the advice and consent of the Senate;

(B) a position in the Senior Executive Service as a noncareer appointee (as such term is defined under section 3132 (a)); or

(C) a position which has been excepted from the competitive service by reason of its confidential, policy-determining, policy-making, or policy-advocating character.

(3) In this section, the term “employee” has the meaning given that term in section 2105, except that such term also includes an employee described in subsection (c) of that section.

(b) The Office of Personnel Management may authorize the head of an agency to pay a bonus under this section to an individual only if—

(1) the position to which such individual is appointed (as described in paragraph (2)(A)) or to which such individual moves or must relocate (as described in paragraph (2)(B)) is likely to be difficult to fill in the absence of such a bonus; and

(2) the individual—

(A) is newly appointed as an employee of the Federal Government; or

(B)

(i) is currently employed by the Federal Government; and

(ii)(I) moves to a new position in the same geographic area under circumstances described in regulations of the Office; or

(II) must relocate to accept a position in a different geographic area.

(c)(1) Payment of a bonus under this section shall be contingent upon the employee entering into a written service agreement to complete a period of employment with the agency, not longer than 4 years. The Office may, by regulation, prescribe a minimum service period for purposes of this section.

(2)(A) The agreement shall include—

(i) the commencement and termination dates of the required service period (or provisions for the determination thereof);

(ii) the amount of the bonus;

(iii) the method of payment; and

(iv) other terms and conditions under which the bonus is payable, subject to the requirements of this section and regulations of the Office.

(B) The terms and conditions for paying a bonus, as specified in the service agreement, shall include—

(i) the conditions under which the agreement may be terminated before the agreed-upon service period has been completed; and

(ii) the effect of the termination.

(C) The required service period shall commence upon the commencement of service with the agency or movement to a new position or geographic area, as applicable, unless the service agreement provides for a later commencement date in circumstances and to the extent allowable under regulations of the Office, such as when there is an initial period of formal basic training.

(d)(1) Except as provided in subsection (e), a bonus under this section shall not exceed 25 percent of the annual rate of basic pay of the employee at the beginning of the service period multiplied by the number of years (including a fractional part of a year, as determined under regulations of the Office) in the required service period of the employee involved.

(2) A bonus under this section may be paid as an initial lump sum, in installments, as a final lump sum upon the completion of the full period of service required by the agreement, or in a combination of these forms of payment.

(3) A bonus under this section is not part of the basic pay of an employee for any purpose.

(4) Under regulations of the Office, a recruitment bonus under this section may be paid to an eligible individual before that individual enters on duty.

(e) The Office may authorize the head of an agency to waive the limitation under subsection (d)(1) based on a critical agency need, subject to regulations prescribed by the Office. Under such a waiver, the maximum bonus allowable shall—

(1) be equal to the maximum that would be determined if subsection (d)(1) were applied by substituting “50” for “25”; but

(2) in no event exceed 100 percent of the annual rate of basic pay of the employee at the beginning of the service period.

Nothing in this subsection shall be considered to permit the waiver of any requirement under subsection (c).

(f) The Office shall require that an agency establish a plan for the payment of recruitment bonuses before paying any such bonuses, and a plan for the payment of relocation bonuses before paying any such bonuses, subject to regulations prescribed by the Office.

(g) The Office may prescribe regulations to carry out this section, including regulations relating to the repayment of a bonus under this section in appropriate circumstances when the agreed-upon service period has not been completed.

SEC. —. OPTIONAL LIFE INSURANCE ELECTION OPPORTUNITY FOR CERTAIN FEDERAL CIVILIAN EMPLOYEES

1 (a) AUTOMATIC COVERAGE—Section 8702(c) of title 5, United States Code, is amended—

2 (1) by inserting “any employee who is deployed in support of a military contingency
3 operation as defined in section 101(a)(13) of title 10, or” after “subsection (b)”; and

4 (2) by inserting “notification of deployment or” after “the date of the”.

5 (b) OPTIONAL INSURANCE.—Section 8714a(b) of such title is amended—

6 (1) by inserting “(2)” after “(b)”; and

7 (2) by inserting before paragraph (2) the following new paragraph (1):

8 “(1) Any employee who is deployed in support of a military contingency operation as
9 defined in section 101(a)(13) of title 10, or an employee of the Department of Defense
10 who is designated as emergency essential under section 1580 of title 10, shall be insured
11 if the employee, within 60 days after the date of notification of deployment or
12 designation, elects to be insured under a policy of insurance under this chapter. An
13 election under the preceding sentence shall be effective when provided to the Office in
14 writing, in the form prescribed by the Office, within such 60-day period.”.

15 (c) ADDITIONAL OPTIONAL LIFE INSURANCE.—Section 8714b(b) of such title is amended—

16 (1) by inserting “(2)” after “(b)” and

17 (2) by inserting before paragraph (2) the following new paragraph (1):

18 “(1) Any employee who is deployed in support of a military contingency operation as
19 defined in section 101(a)(13) of title 10, or an employee of the Department of Defense
20 who is designated as emergency essential under section 1580 of title 10, or, shall be
21 insured if the employee, within 60 days after the date of notification of deployment or
22 designation, elects to be insured under a policy of insurance under this chapter. An

1 election under the preceding sentence shall be effective when provided to the Office in
2 writing, in the form prescribed by the Office, within such 60-day period.”.

Section-by-Section Analysis

This section would allow Federal employees serving in support of military contingency operations to elect basic Federal Employees' Group Life Insurance (FEGLI) coverage. It also would allow newly-designated emergency essential employees of the Department of Defense and any Federal employees who are being deployed the right to obtain Option A (standard option) coverage, or obtain or increase Option B (additional) coverage, within 60 days of deployment. During the Global War on Terror, the Department of Defense's (DoD's) civilian workforce will become more involved in contingency and emergency operations and, thus, placed in harm's way. These operations are increasingly relying on the interagency partnerships for their success, as evidenced by interagency participation in reconstruction and stabilization efforts in Iraq and Afghanistan. Allowing Federal employees deployed in support of contingency operations to obtain additional life insurance would provide an incentive to recruit and retain these employees. These changes also would create greater equity between military and civilian benefits.

Active duty members and members of the Ready Reserve may elect Servicemembers' Group Life Insurance (SGLI) coverage of up to \$400,000. By comparison, FEGLI basic coverage is limited to the employee's salary rounded up to the next \$1,000, plus an additional \$2,000. To obtain life insurance coverage on par with that of servicemembers, civilian employees must elect optional FEGLI coverage. Servicemembers who have previously declined SGLI may enroll at any time by completing a "Request for Insurance" form that is certified by their commanding officer. Using the same process, servicemembers may increase their SGLI coverage at any time. In contrast, Federal civilian employees can only request FEGLI enrollment or increase existing coverage if they experience a qualifying "life event" (e.g., marriage, divorce, death of spouse, or acquiring an eligible child), or during an open season. Enrolling or increasing coverage due to a life event or during an open season does not require the employee to first obtain a physical. Deployment is not considered a qualifying "life event", and open seasons are extremely rare (unlike the annual Federal Employees Health Benefits open season periods). Absent a qualifying "life event" or an open season, Federal employees who have waived FEGLI coverage may request coverage when at least one year has passed since the effective date of their most recent waiver. They must also obtain a physical examination, and submit the documentation to the Office of Federal Employees' Group Life Insurance (OFEGLI) for determination and await a decision. Obtaining a physical, submitting the required forms, and receiving a determination from OFEGLI realistically takes months.

Roughly 35 percent of DoD emergency essential employees have only basic FEGLI coverage. These employees constitute only a small proportion of DoD's 700,000 civilian employees. Only about 5 percent of DoD emergency essential employees have no FEGLI coverage at all. Employees with basic FEGLI coverage typically have only about 20 percent of the life insurance coverage of their uniformed servicemember counterparts.

DoD is concerned about its emergency essential employees, as well as other DoD and Federal employees who deploy in support of contingency operations. These employees will have to rely on FEGLI since private-sector life insurance typically precludes the payment of life insurance policies when the insured is killed or dismembered in a combat zone. By contrast, FEGLI will typically provide coverage to deployed civilians in the event of dismemberment or death in a combat zone as long as the insured is not directly engaged in combat.

Currently, section 8702(c) of title 5, United States Code, permits a DoD emergency essential employee to elect basic coverage under FEGLI within 60 days of the designation, even if the employee previously waived coverage. This proposed section would allow any employee who receives notification of deployment in support of a military contingency operation to elect basic coverage. This change would make basic FEGLI coverage available to any deploying civilian who desires it, regardless of whether the employee was designated emergency essential. The proposal would effectively treat deployment as a qualifying "life event" for the purpose of electing basic FEGLI coverage.

This proposed section also would amend sections 8714a and 8714b of title 5, United States Code, to permit newly-designated DoD emergency essential employees and any other DoD or Federal employees who are being deployed eligibility to obtain Option A (standard option) coverage, or obtain or increase Option B (additional) coverage, within 60 days of deployment or, if deployed on or before the effective date of this section, within 60 days of its effective date. Currently, neither an employee who is designated as emergency essential nor an employee who is deploying in a contingency operation has the ability to elect Option A (standard option) coverage or Option B (additional) coverage. The proposal would effectively treat deployment as a qualifying "life event" for the purpose of electing additional FEGLI coverage.

Cost Implications: The DoD estimates that the cost of this section would be minimal. Most employees already have basic life insurance (the employee pays 2/3 of the cost and the agency pays 1/3 of the cost). The cost for basic insurance is currently \$0.15 biweekly per \$1,000 and based on the employee's basic salary. Although 35 percent of emergency essential employees could obtain additional insurance under this section, the employees would pay the full cost of any additional insurance (Options A and B coverage) and such elections are of no cost to the Department. The benefits to the Federal government and the DoD of enacting this section, however, would far out-weigh any minimal costs associated with it. Using the 5 percent of emergency essential employees typically not covered by basic FEGLI and an average salary of \$75,000, the cost of the employer portion of the basic FEGLI premiums would be about \$150 per year per employee. If 4,000 employees were deployed and 5 percent did not have basic life insurance, the cost to the DoD would be about \$30,000 per year.

Unified Legislative Budget (ULB) Proposal Number: N/A

Department of Defense Priority: Priority 1: Pursuing the Global War on Terrorism by helping to integrate all instruments of national power.

Resubmission Justification (if applicable): OMB disapproved a related proposal, OLC 025(5), on November 1, 2006, saying: "This proposal would exempt employees from seeking medical

evaluations to determine insurability, which would increase FEGLI premiums for all employees as it allows people with significant risk to purchase insurance only when needed. Moreover, it does not recognize that other agencies also have employees in high-risk areas. If the waiting period presents a problem for some employees, DoD can work with OMB and OPM to possibly amend regulations to waive the normal waiting period for employees deployed in support of contingency operations.”

The present proposal is a modified version that answers OMB’s concerns as follows:

OMB objected to the previous proposal's limited applicability to DoD civilian employees. This new proposal is expanded to cover all Federal employees, as defined by 5 U.S.C. 8701(a). OMB also raised concern that allowing this group of employees to obtain or increase FEGLI coverage without first obtaining a physical examination would increase FEGLI premiums. Far more Federal employees experience qualifying life events (e.g., marriage, divorce, death of spouse, or acquiring an eligible child) than become designated as emergency essential, or volunteer to serve in support of military contingency operations. Physicals are not required for election or increased coverage due to a life event. Deploying civilians must first obtain medical clearance to identify any existing medical conditions that would disqualify them from eligibility for deployment to a contingency operation, thus minimizing the risk of insuring an employee with a serious pre-existing medical condition. Thus, the overall actuarial impact on FEGLI premiums by allowing this additional group of employees eligibility to elect or increase FEGLI coverage without first obtaining a physical, would be negligible.

P&R Subject Matter Expert: Katherine Greenlaw, OUSD(P&R)CPP, 703.571.9289

P&R Appointee/Official: Patricia Bradshaw, DUSD(CPP), 703.614.9487

Reviewing Legal Counsel: Helen Sullivan, ODGC(P&HP), 703.695.1078

Changes to Existing Law: The proposed provision amends three existing laws: 5 U.S.C. 8702, 5 U.S.C. 8714a, and 5 U.S.C. 8714b.

§ 8702. Automatic coverage

(a) An employee is automatically insured on the date he becomes eligible for insurance and each policy of insurance purchased by the Office of Personnel Management under this chapter shall provide for that automatic coverage.

(b) An employee desiring not to be insured shall give written notice to his employing office on a form prescribed by the Office. If the notice is received before he has become insured, he shall not be insured. If the notice is received after he has become insured, his insurance stops at the end of the pay period in which the notice is received.

(c) Notwithstanding a notice previously given under subsection (b), any employee who is deployed in support of a military contingency operation as defined in section 101(a)(13) of title 10, or an employee of the Department of Defense who is designated as an emergency essential employee under section 1580 of title 10 shall be insured if the employee, within 60 days after the date of the notification of deployment or designation, elects to be insured under a policy of

insurance under this chapter. An election under the preceding sentence shall be effective when provided to the Office in writing, in the form prescribed by the Office, within such 60-day period.

§ 8714a. Optional insurance

(a) Under the conditions, directives, and terms specified in sections 8709–8712 of this title, the Office of Personnel Management, without regard to section 5 of title 41, may purchase a policy which shall make available to each insured employee equal amounts of optional life insurance and accidental death and dismemberment insurance in addition to the amounts provided in section 8704 (a) of this title.

(b) (1) Any employee who is deployed in support of a military contingency operation as defined in section 101(a)(13) of title 10, or an employee of the Department of Defense who is designated as emergency essential under section 1580 of title 10, shall be insured if the employee, within 60 days after the date of notification of deployment or designation, elects to be insured under a policy of insurance under this chapter. An election under the preceding sentence shall be effective when provided to the Office in writing, in the form prescribed by the Office, within such 60-day period.

(2) The optional life insurance and accidental death and dismemberment insurance shall be made available to each insured employee under such conditions as the Office shall prescribe and in amounts approved by the Office but not more than the greater of \$10,000 or an amount which, when added to the amount provided in section 8704 (a) of this title, makes the sum of his insurance equal to his annual pay.

(c)(1) Except as otherwise provided in this subsection, the optional insurance on an employee stops on his separation from service or 12 months after discontinuance of his pay, whichever is earlier, subject to a provision for temporary extension of life insurance coverage and for conversion to an individual policy of life insurance under conditions approved by the Office.

(2)(A) In the case of any employee who retires on an immediate annuity and has been insured under this section throughout—

- (i) the 5 years of service immediately preceding the date of such retirement, or
- (ii) the full period or periods of service during which the employee was entitled to be insured, if less than 5 years,

the amount of optional life insurance only which has been in force throughout such period may be continued, under conditions determined by the Office.

(B) In the case of any employee who becomes entitled to receive compensation under subchapter I of chapter 81 of this title because of disease or injury to the employee and has been insured under this section throughout—

- (i) the 5 years of service immediately preceding the date such employee becomes entitled to such compensation, or
- (ii) the full period or periods of service during which the employee was entitled to be insured, if less than 5 years,

the amount of optional life insurance only which has been in force throughout such period may be continued, under conditions determined by the Office, during the period the employee is receiving such compensation for disease or injury and is held by the Secretary of Labor or his delegate to be unable to return to duty.

(C) The amount of optional life insurance continued under subparagraph (A) or subparagraph (B) of this paragraph shall be reduced by 2 percent at the end of each full calendar month after the date the employee becomes 65 years of age and is retired or is receiving compensation for disease or injury. The Office shall prescribe minimum amounts, not less than 25 percent of the amount of life insurance in force before the first reduction, to which the insurance may be reduced.

(3) Notwithstanding paragraph (c)(1) of this section,^[1] a justice or judge of the United States as defined by section 8701 (a)(5) of this title who resigns his office without meeting the requirements of section 371 (a) of title 28, United States Code, for continuation of the judicial salary shall have the right to convert regular optional life insurance coverage issued under this section during his judicial service to an individual policy of life insurance under the same conditions approved by the Office governing conversion of basic life insurance coverage for employees eligible as provided in section 8706 (a) of this title.

(d)(1) During each period in which an employee has the optional insurance the full cost thereof shall be withheld from his pay. During each period in which an employee continues optional life insurance after retirement or while in receipt of compensation for work injuries, as provided in section 8706 (b) of this title, the full cost thereof shall be withheld from his annuity or compensation, except that, at the end of the calendar month in which he becomes 65 years of age, the optional life insurance shall be without cost to him. Amounts so withheld shall be deposited, used, and invested as provided in section 8714 of this title and shall be reported and accounted for separately from amounts withheld and contributed under sections 8707 and 8708 of this title.

(2) If an agency fails to withhold the proper cost of optional insurance from an individual's salary, compensation, or retirement annuity, the collection of amounts properly due may be waived by the agency if, in the judgment of the agency, the individual is without fault and recovery would be against equity and good conscience. However, if the agency so waives the collection of any unpaid amount, the agency shall submit an amount equal to the uncollected amount to the Office for deposit to the Employees' Life Insurance Fund.

(3) Notwithstanding paragraph (1), an employee who is subject to withholdings under this subsection and whose pay, annuity, or compensation is insufficient to cover such withholdings may nevertheless continue optional insurance if the employee arranges to pay currently into the Employees' Life Insurance Fund, through the agency or retirement system which administers pay, annuity, or compensation, an amount equal to the withholdings that would otherwise be required under this subsection.

(e) The cost of the optional insurance shall be determined from time to time by the Office on the basis of such age groups as it considers appropriate.

(f) The amount of optional life, or life and accidental death, insurance in force on an employee at the date of his death shall be paid as provided in section 8705 of this title.

[1] So in original. Probably should be “paragraph (1) of this subsection.”.

§ 8714b. Additional optional life insurance

(a) Under the conditions, directives, and terms specified in sections 8709 through 8712 of this title, the Office of Personnel Management, without regard to section 5 of title 41, may purchase a policy which shall make available to each employee insured under section 8702 of this title amounts of additional optional life insurance (without accidental death and dismemberment insurance). An employee may elect coverage under this section without regard to whether the employee has elected coverage under optional insurance available under section 8714a of this title.

(b)(1) Any employee who is deployed in support of a military contingency operation as defined in section 101(a)(13) of title 10, or an employee of the Department of Defense who is designated as emergency essential under section 1580 of title 10, shall be insured if the employee, within 60 days after the date of notification or deployment or designation, elects to be insured under a policy of insurance under this chapter. An election under the preceding sentence shall be effective when provided to the Office in writing, in the form prescribed by the Office, within such 60-day period.

(2) The additional optional insurance provided under this section shall be made available to each eligible employee who has elected coverage under this section, under conditions the Office shall prescribe, in multiples, at the employee’s election, of 1, 2, 3, 4, or 5 times the annual rate of basic pay payable to the employee (rounded to the next higher multiple of \$1,000). An employee may reduce or stop coverage elected pursuant to this section at any time.

(c)(1) Except as otherwise provided in this subsection, the additional optional insurance elected by an employee pursuant to this section shall stop on separation from service or 12 months after discontinuance of his pay, whichever is earlier, subject to a provision for temporary extension of life insurance coverage and for conversion to an individual policy of life insurance under conditions approved by the Office. Justices and judges of the United States described in section 8701 (a)(5)(ii) and (iii) of this chapter are deemed to continue in active employment for purposes of this chapter. A justice or judge of the United States as defined by section 8701 (a)(5) of this title who resigns his office without meeting the requirements of section 371 (a) of title 28, United States Code, for continuation of the judicial salary shall have the right to convert additional optional life insurance coverage issued under this section during his judicial service to an individual policy of life insurance under the same conditions approved by the Office governing conversion of basic life insurance coverage for employees eligible as provided in section 8706 (a) of this title.

(2) In the case of any employee who retires on an immediate annuity or who becomes entitled to receive compensation under subchapter I of chapter 81 of this title because of disease or injury to the employee, so much of the additional optional insurance as has been in force for not less than—

(A) the 5 years of service immediately preceding the date of retirement or entitlement to compensation, or

(B) the full period or periods of service during which the insurance was available to the employee, if fewer than 5 years,

may be continued under conditions determined by the Office after retirement or while the employee is receiving compensation under subchapter I of chapter 81 of this title and is held by the Secretary of Labor (or the Secretary's delegate) to be unable to return to duty.

(3) The amount of additional optional insurance continued under paragraph (2) shall be continued, with or without reduction, in accordance with the employee's written election at the time eligibility to continue insurance during retirement or receipt of compensation arises, as follows:

(A) The employee may elect to have withholdings cease in accordance with subsection (d), in which case—

(i) the amount of additional optional insurance continued under paragraph (2) shall be reduced each month by 2 percent effective at the beginning of the second calendar month after the date the employee becomes 65 years of age and is retired or is in receipt of compensation; and

(ii) the reduction under clause (i) shall continue for 50 months at which time the insurance shall stop.

(B) The employee may, instead of the option under subparagraph (A), elect to have the full cost of additional optional insurance continue to be withheld from such employee's annuity or compensation on and after the date such withholdings would otherwise cease pursuant to an election under subparagraph (A), in which case the amount of additional optional insurance continued under paragraph (2) shall not be reduced, subject to paragraph (4).

(C) An employee who does not make any election under the preceding provisions of this paragraph shall be treated as if such employee had made an election under subparagraph (A).

(4) If an employee makes an election under paragraph (3)(B), that individual may subsequently cancel such election, in which case additional optional insurance shall be determined as if the individual had originally made an election under paragraph (3)(A).

(5)(A) An employee whose additional optional insurance under this section would otherwise stop in accordance with paragraph (1) and who is not eligible to continue insurance under paragraph (2) may elect, under conditions prescribed by the Office of Personnel Management, to continue all or a portion of so much of the additional optional insurance as has been in force for not less than—

(i) the 5 years of service immediately preceding the date of the event which would cause insurance to stop under paragraph (1); or

(ii) the full period or periods of service during which the insurance was available to the employee, if fewer than 5 years,

at group rates established for purposes of this section, in lieu of conversion to an individual policy. The amount of insurance continued under this paragraph shall be reduced by 50 percent effective at the beginning of the second calendar month after the

date the employee or former employee attains age 70 and shall stop at the beginning of the second calendar month after attainment of age 80, subject to a provision for temporary extension of life insurance coverage and for conversion to an individual policy of life insurance under conditions approved by the Office. Alternatively, insurance continued under this paragraph may be reduced or stopped at any time the employee or former employee elects.

(B) When an employee or former employee elects to continue additional optional insurance under this paragraph following separation from service or 12 months without pay, the insured individual shall submit timely payment of the full cost thereof, plus any amount the Office determines necessary to cover associated administrative expenses, in such manner as the Office shall prescribe by regulation. Amounts required under this subparagraph shall be deposited, used, and invested as provided under section 8714 and shall be reported and accounted for together with amounts withheld under section 8714a (d).

(C)(i) Subject to clause (ii), no election to continue additional optional insurance may be made under this paragraph 3 years after the effective date of this paragraph.

(ii) On and after the date on which an election may not be made under clause (i), all additional optional insurance under this paragraph for former employees shall terminate, subject to a provision for temporary extension of life insurance coverage and for conversion to an individual policy of life insurance under conditions approved by the Office.

(d)(1) During each period in which the additional optional insurance is in force on an employee the full cost thereof shall be withheld from the employee's pay. During each period in which an employee continues additional optional insurance after retirement or while in receipt of compensation under subchapter I of chapter 81 of this title because of disease or injury to the employee, as provided in subsection (c) of this section, the full cost thereof shall be withheld from the former employee's annuity or compensation, except that, if insurance is continued as provided under subsection (c)(3)(A), beginning at the end of the calendar month in which the former employee becomes 65 years of age, the additional optional life insurance shall be without cost to the former employee. Amounts so withheld (and any amounts withheld as provided in subsection (c)(3)(B)) shall be deposited, used, and invested as provided in section 8714 of this title and shall be reported and accounted for together with amounts withheld under section 8714a (d) of this title.

(2) If an agency fails to withhold the proper cost of additional optional insurance from an individual's salary, compensation, or retirement annuity, the collection of amounts properly due may be waived by the agency if, in the judgment of the agency, the individual is without fault and recovery would be against equity and good conscience. However, if the agency so waives the collection of any unpaid amount, the agency shall submit an amount equal to the uncollected amount to the Office for deposit to the Employees' Life Insurance Fund.

(3) Notwithstanding paragraph (1), an employee who is subject to withholdings under this subsection and whose pay, annuity, or compensation is insufficient to cover such withholdings may nevertheless continue additional optional insurance if the employee arranges to pay currently into the Employees' Life Insurance Fund, through the agency or retirement system which administers pay, annuity, or compensation, an amount equal to the

withholdings that would otherwise be required under this subsection.

(e) The cost of the additional optional insurance shall be determined from time to time by the Office on the basis of the employee's age relative to such age groups as the Office establishes under section 8714a (e) of this title.

(f) The amount of additional optional life insurance in force on an employee at the date of his death shall be paid as provided in section 8705 of this title.