

Calendar No. 234

115TH CONGRESS
1ST SESSION

S. 906

[Report No. 115–165]

To amend the Homeland Security Act of 2002 to provide for congressional notification regarding major acquisition program breaches, and for other purposes.

IN THE SENATE OF THE UNITED STATES

APRIL 7, 2017

Mrs. McCASKILL (for herself and Mr. DAINES) introduced the following bill; which was read twice and referred to the Committee on Homeland Security and Governmental Affairs

OCTOBER 5, 2017

Reported by Mr. JOHNSON, with an amendment

[Insert the part printed in italic]

A BILL

To amend the Homeland Security Act of 2002 to provide for congressional notification regarding major acquisition program breaches, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Reducing DHS Acqui-
3 sition Cost Growth Act”.

4 **SEC. 2. CONGRESSIONAL NOTIFICATION FOR MAJOR AC-**
5 **QUISITION PROGRAMS.**

6 (a) IN GENERAL.—Subtitle D of title VIII of the
7 Homeland Security Act of 2002 (6 U.S.C. 391 et seq.)
8 is amended by adding at the end the following:

9 **“SEC. 836. CONGRESSIONAL NOTIFICATION AND OTHER RE-**
10 **QUIREMENTS FOR MAJOR ACQUISITION PRO-**
11 **GRAM BREACH.**

12 “(a) DEFINITIONS.—In this section:

13 “(1) ACQUISITION.—The term ‘acquisition’ has
14 the meaning given the term in section 131 of title
15 41, United States Code.

16 “(2) ACQUISITION PROGRAM.—The term ‘acqui-
17 sition program’ means the process by which the De-
18 partment acquires, with any appropriated amounts,
19 by contract for purchase or lease, property or serv-
20 ices (including construction) that support the mis-
21 sions and goals of the Department.

22 “(3) ACQUISITION PROGRAM BASELINE.—The
23 term ‘acquisition program baseline’, with respect to
24 an acquisition program, means a summary of the
25 cost, schedule, and performance parameters, ex-
26 pressed in standard, measurable, quantitative terms,

1 which shall be met in order to accomplish the goals
2 of the program.

3 “(4) APPROPRIATE COMMITTEES OF CON-
4 GRESS.—The term ‘appropriate committees of Con-
5 gress’ has the meaning given the term in section
6 226(a).

7 “(5) BEST PRACTICES.—The term ‘best prac-
8 tices’, with respect to acquisition, means a knowl-
9 edge-based approach to capability development that
10 includes—

11 “(A) identifying and validating needs;

12 “(B) assessing alternatives to select the
13 most appropriate solution;

14 “(C) clearly establishing well-defined re-
15 quirements;

16 “(D) developing realistic cost assessments
17 and schedules;

18 “(E) securing stable funding that matches
19 resources to requirements;

20 “(F) demonstrating technology, design,
21 and manufacturing maturity;

22 “(G) using milestones and exit criteria or
23 specific accomplishments that demonstrate
24 progress;

1 “(H) adopting and executing standardized
2 processes with known success across programs;

3 “(I) establishing an adequate workforce
4 that is qualified and sufficient to perform nec-
5 essary functions; and

6 “(J) integrating the capabilities described
7 in subparagraphs (A) through (I) into the mis-
8 sion and business operations of the Depart-
9 ment.

10 “(6) BREACH.—The term ‘breach’, with respect
11 to a major acquisition program, means a failure to
12 meet any cost, schedule, or performance threshold
13 specified in the most recently approved acquisition
14 program baseline.

15 “(7) COMPONENT ACQUISITION EXECUTIVE.—
16 The term ‘Component Acquisition Executive’ means
17 the senior acquisition official within a component
18 who is designated in writing by the Under Secretary
19 for Management, in consultation with the component
20 head, with authority and responsibility for leading a
21 process and staff to provide acquisition and program
22 management oversight, policy, and guidance to en-
23 sure that statutory, regulatory, and higher level pol-
24 icy requirements are fulfilled, including compliance
25 with Federal law, the Federal Acquisition Regula-

1 tion, and Department acquisition management direc-
2 tives established by the Under Secretary for Man-
3 agement.

4 “(8) MAJOR ACQUISITION PROGRAM.—The term
5 ‘major acquisition program’ means an acquisition
6 program of the Department that is estimated by the
7 Secretary to require an eventual total expenditure of
8 at least \$300,000,000 (based on fiscal year 2017
9 constant dollars) over the life cycle cost of the pro-
10 gram.

11 “(b) REQUIREMENTS WITHIN DEPARTMENT IN
12 EVENT OF BREACH.—

13 “(1) NOTIFICATIONS.—

14 “(A) NOTIFICATION OF BREACH.—If a
15 breach occurs in a major acquisition program,
16 the program manager for the program shall no-
17 tify the Component Acquisition Executive for
18 the program, the head of the component con-
19 cerned, the Executive Director of the Program
20 Accountability and Risk Management division,
21 the Under Secretary for Management, and the
22 Deputy Secretary not later than 30 calendar
23 days after the date on which the breach is iden-
24 tified.

“(B) NOTIFICATION TO SECRETARY.—If a breach occurs in a major acquisition program and the breach results in a cost overrun greater than 15 percent, a schedule delay greater than 180 days, or a failure to meet any of the performance thresholds from the cost, schedule, or performance parameters specified in the most recently approved acquisition program baseline for the program, the Component Acquisition Executive for the program shall notify the Secretary and the Inspector General of the Department not later than 5 business days after the date on which the Component Acquisition Executive for the program, the head of the component concerned, the Executive Director of the Program Accountability and Risk Management Division, the Under Secretary for Management, and the Deputy Secretary are notified of the breach under subparagraph (A).

“(2) REMEDIATION PLAN AND ROOT CAUSE ANALYSIS.—

“(A) IN GENERAL.—If a breach occurs in a major acquisition program, the program manager for the program shall submit in writing to the head of the component concerned, the Exec-

1 utive Director of the Program Accountability
2 and Risk Management division, and the Under
3 Secretary for Management, at a date estab-
4 lished by the Under Secretary for Management,
5 a remediation plan and root cause analysis re-
6 lating to the breach and program.

7 “(B) REMEDIATION PLAN.—The remedi-
8 ation plan required under subparagraph (A)
9 shall—

10 “(i) explain the circumstances of the
11 breach at issue;

12 “(ii) provide prior cost estimating in-
13 formation;

14 “(iii) include a root cause analysis
15 that determines the underlying cause or
16 causes of shortcomings in cost, schedule,
17 or performance of the major acquisition
18 program with respect to which the breach
19 has occurred, including the role, if any,
20 of—

21 “(I) unrealistic performance ex-
22 pectations;

23 “(II) unrealistic baseline esti-
24 mates for cost or schedule or changes
25 in program requirements;

1 “(III) immature technologies or
2 excessive manufacturing or integra-
3 tion risk;

4 “(IV) unanticipated design, engi-
5 neering, manufacturing, or technology
6 integration issues arising during pro-
7 gram performance;

8 “(V) changes to the scope of the
9 program;

10 “(VI) inadequate program fund-
11 ing or changes in planned out-year
12 funding from one 5-year funding plan
13 to the next 5-year funding plan as
14 outlined in the Future Years Home-
15 land Security Program required under
16 section 874;

17 “(VII) legislative, legal, or regu-
18 latory changes; or

19 “(VIII) inadequate program
20 management personnel, including lack
21 of sufficient number of staff, training,
22 credentials, certifications, or use of
23 best practices;

1 “(iv) propose corrective action to ad-
 2 dress cost growth, schedule delays, or per-
 3 formance issues;

4 “(v) explain the rationale for why a
 5 proposed corrective action is recommended;
 6 and

7 “(vi) in coordination with the Compo-
 8 nent Acquisition Executive for the pro-
 9 gram, discuss all options considered, in-
 10 cluding—

11 “(I) the estimated impact on
 12 cost, schedule, or performance of the
 13 program if no changes are made to
 14 current requirements;

15 “(II) the estimated cost of the
 16 program if requirements are modified;
 17 and

18 “(III) the extent to which fund-
 19 ing from other programs will need to
 20 be reduced to cover the cost growth of
 21 the program.

22 “(3) REVIEW OF CORRECTIVE ACTIONS.—

23 “(A) IN GENERAL.—The Under Secretary
 24 for Management—

1 “(i) shall review each remediation
2 plan required under paragraph (2); and

3 “(ii) not later than 30 days after sub-
4 mission of a remediation plan under para-
5 graph (2), may approve the plan or provide
6 an alternative proposed corrective action.

7 “(B) SUBMISSION TO CONGRESS.—Not
8 later than 30 days after the date on which the
9 Under Secretary for Management completes a
10 review of a remediation plan under subpara-
11 graph (A), the Under Secretary for Manage-
12 ment shall submit to the appropriate commit-
13 tees of Congress—

14 “(i) a copy of the remediation plan;
15 and

16 “(ii) a statement describing the cor-
17 rective action or actions that have occurred
18 pursuant to paragraph (2)(B)(iv) for the
19 major acquisition program at issue, with a
20 justification for each action.

21 “(c) REQUIREMENTS RELATING TO CONGRESSIONAL
22 NOTIFICATION IF BREACH OCCURS.—

23 “(1) NOTIFICATION TO CONGRESS.—If a notifi-
24 cation to the Secretary is made under subsection
25 (b)(1)(B) relating to a breach in a major acquisition

1 program, the Under Secretary for Management shall
2 notify the appropriate committees of Congress of the
3 breach in the next quarterly Comprehensive Acquisition
4 Status Report, as required in the matter under
5 the heading ‘OFFICE OF THE UNDER SECRETARY
6 FOR MANAGEMENT’ in title I of division F of the
7 Consolidated Appropriations Act of 2016 (Public
8 Law 114–113; 129 Stat. 2493), after receipt by the
9 Under Secretary for Management of notification
10 under that subsection.

11 “(2) SIGNIFICANT VARIANCES IN COSTS OR
12 SCHEDULE.—If a likely cost overrun is greater than
13 20 percent or a likely delay is greater than 12
14 months from the costs and schedule specified in the
15 acquisition program baseline for a major acquisition
16 program, the Under Secretary for Management shall
17 include in the notification required in paragraph (1)
18 a written certification, with supporting explanation,
19 that—

20 “(A) the program is essential to the ac-
21 complishment of the mission of the Depart-
22 ment;

23 “(B) there are no alternatives to the capa-
24 bility or asset provided by the program that will

1 provide equal or greater capability in a more
 2 cost-effective and timely manner;

3 “(C) the new acquisition schedule and esti-
 4 mates for total acquisition cost are reasonable;
 5 and

6 “(D) the management structure for the
 7 program is adequate to manage and control
 8 cost, schedule, and performance.”.

9 (b) CLERICAL AMENDMENT.—The table of contents
 10 in section 1(b) of the Homeland Security Act of 2002
 11 (Public Law 107–296; 116 Stat. 2135) is amended by in-
 12 serting after the item relating to section 835 the following:

“Sec. 836. Congressional notification and other requirements for major acqui-
 sition program breach.”.

13 **SEC. 3. REPORT ON BID PROTESTS.**

14 (a) *DEFINITION.*—In this section, the term “Depart-
 15 ment” means the Department of Homeland Security.

16 (b) *STUDY AND REPORT.*—Not later than 1 year after
 17 the date of enactment of this Act, the Inspector General of
 18 the Department shall conduct a study and submit to the
 19 Committee on Homeland Security and Governmental Af-
 20 fairs of the Senate and the Committee on Homeland Secu-
 21 rity of the House of Representatives a report on the preva-
 22 lence and impact of bid protests on the acquisition process
 23 of the Department, in particular bid protests filed with the

1 *Government Accountability Office and the United States*
 2 *Court of Federal Claims.*

3 (c) *CONTENTS.*—*The report required under subsection*
 4 *(b) shall include—*

5 (1) *with respect to contracts with the Depart-*
 6 *ment—*

7 (A) *trends in the number of bid protests*
 8 *filed with Federal agencies, the Government Ac-*
 9 *countability Office, and Federal courts, the effec-*
 10 *tiveness of each forum for contracts and task or*
 11 *delivery orders, and the rate of those bid protests*
 12 *compared to contract obligations and the number*
 13 *of contracts;*

14 (B) *an analysis of bid protests filed by in-*
 15 *cumbent contractors, including the rate at which*
 16 *those contractors are awarded bridge contracts or*
 17 *contract extensions over the period during which*
 18 *the bid protest remains unresolved;*

19 (C) *a comparison of the number of bid pro-*
 20 *tests and the outcome of bid protests for—*

21 (i) *awards of contracts compared to*
 22 *awards of task or delivery orders;*

23 (ii) *contracts or orders primarily for*
 24 *products compared to contracts or orders*
 25 *primarily for services;*

1 (iii) protests filed pre-award to chal-
 2 lenge the solicitation compared to those filed
 3 post-award;

4 (iv) contracts or awards with single
 5 protestors compared to multiple protestors;
 6 and

7 (v) contracts with single awards com-
 8 pared to multiple award contracts;

9 (D) a description of trends in the number
 10 of bid protests filed as a percentage of contracts
 11 and as a percentage of task or delivery orders by
 12 the value of the contract or order with respect
 13 to—

14 (i) contracts valued at more than
 15 \$300,000,000;

16 (ii) contracts valued at not less than
 17 \$50,000,000 and not more than
 18 \$300,000,000;

19 (iii) contracts valued at not less than
 20 \$10,000,000 and not more than
 21 \$50,000,000; and

22 (iv) contracts valued at less than
 23 \$10,000,000;

24 (E) an assessment of the cost and schedule
 25 impact of successful and unsuccessful bid pro-

1 *tests, as well as delineation of litigation costs,*
2 *filed on major acquisitions with more than*
3 *\$100,000,000 in annual expenditures or*
4 *\$300,000,000 in lifecycle costs;*

5 *(F) an analysis of how often bid protestors*
6 *are awarded the contract that was the subject of*
7 *the bid protest;*

8 *(G) a summary of the results of bid protests*
9 *in which the contracting Federal agencies took*
10 *unilateral corrective action, including the aver-*
11 *age time for remedial action to be completed;*

12 *(H) the time it takes Federal agencies to*
13 *implement corrective actions after a ruling or*
14 *decision with respect to a bid protest, and the*
15 *percentage of those corrective actions that are*
16 *subsequently protested, including the outcome of*
17 *any subsequent bid protest;*

18 *(I) an analysis of those contracts with re-*
19 *spect to which a company files a bid protest and*
20 *later files a subsequent bid protest;*

21 *(J) an analysis of the time spent at each*
22 *phase of the procurement process attempting to*
23 *prevent a bid protest, addressing a bid protest,*
24 *or taking corrective action in response to a bid*
25 *protest, including the efficacy of any actions at-*

1 *tempted to prevent the occurrence of a protest;*
2 *and*

3 *(K) with respect to a company bidding on*
4 *contracts or task or delivery orders, the extent to*
5 *and manner in which the bid protest process af-*
6 *fects or may affect the decision to offer a bid or*
7 *proposal on single award or multiple award con-*
8 *tracts when the company is the incumbent or*
9 *non-incumbent contractor; and*
10 *(2) any recommendations by the Inspector Gen-*
11 *eral of the Department relating to the study con-*
12 *ducted under this section.*

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