SEC. ___. AUTHORITY FOR WORKING-CAPITAL FUNDED ARMY INDUSTRIAL FACILITIES AND ARSENALS TO SELL ARTICLES AND SERVICES OUTSIDE THE DEPARTMENT OF DEFENSE.

(a) REVISION OF AUTHORITY TO SELL ARTICLES AND SERVICES.—Paragraph (2) of section 2563(a) of title 10, United States Code, is amended to read as follows:

"(2) Articles and services referred to in paragraph (1) are articles and services that are manufactured or performed by any working-capital funded industrial facility of the armed forces.".

(b) CONFORMING REPEAL OF LIMITATIONS ON SALE OF MANUFACTURED ARTICLES OR SERVICES BY ARMY INDUSTRIAL FACILITIES.—(1) Section 4543 of such title is repealed.

(2) The table of sections at the beginning of chapter 433 of such title is amended by striking the item relating to section 4543.

Section-by-Section Analysis

This proposal would amend section 2563 of title 10, United States Code, to enable all working capital-funded (WCF) industrial facilities and arsenals to sell their products and services outside the Department of Defense (DoD). The current statute allows for the sales of articles or services outside the Department of Defense, but does not apply to WCF Army industrial facilities (including a Department of the Army arsenal) that manufacture large caliber cannons, gun mounts, recoil mechanisms, ammunition, munitions, or components thereof, which are governed by regulations required by section 4543 of title 10. These latter Army industrial facilities do not have access to equivalent authority under any other statutes that govern public-private partnering to sell articles or services outside DoD and therefore have limited ability to achieve the same level of benefits. As a result, a significant portion of the Army's industrial base remains limited in its ability to engage in public-private partnering.

Subject to section 38 of the Arms Export Control Act (22 U.S.C. 2778), the proposed legislation would eliminate the specific restrictions on ammunition plants, depots and arsenals in section 2563, and allow all WCF industrial facilities to sell services and articles outside DoD. The public-private partnering that results from the sale of services and articles under section 2563 has been widely recognized by Congress and the DoD for the value it brings to the industrial base. Both have actively encouraged public-private partnering. Those facilities that have made effective use of section 2563 authority and built substantial partnerships have reduced

the cost of products; obtained private sector investment in government facilities; and enhanced readiness by improving quality and timeliness of industrial facilities.

Finally, this legislative proposal would repeal section 4543 of title 10, United States Code. If the authority to sell services and articles under section 2563 is extended to include Army industrial facilities that manufacture large caliber cannons, gun mounts, recoil mechanisms, ammunition, munitions, or components thereof, the regulations required by section 4543 are no longer necessary. All WCF industrial facilities would remain bound by the existing conditions and methods of sale contained in section 2563, including application of export controls provided for in section 38 of the Arms Export Control Act (22 U.S.C. 2778).

Changes to Existing Law: This proposal would make the following changes to section 2563 of title 10, United States Code:

§ 2563. Articles and services of industrial facilities: sale to persons outside the Department of Defense

(a) AUTHORITY TO SELL OUTSIDE DOD.—(1) The Secretary of Defense may sell in accordance with this section to a person outside the Department of Defense articles and services referred to in paragraph (2) that are not available from any United States commercial source.

(2)~~(A) Except as provided in subparagraph (B), articles~~ Articles and services referred to in paragraph (1) are articles and services that are manufactured or performed by any working-capital funded industrial facility of the armed forces.

~~(B) The authority in this section does not apply to sales of articles and services by a working-capital funded Army industrial facility (including a Department of the Army arsenal) that manufactures large caliber cannons, gun mounts, recoil mechanisms, ammunition, munitions, or components thereof, which are governed by regulations required by section 4543 of this title.~~

(b) DESIGNATION OF PARTICIPATING INDUSTRIAL FACILITIES.—The Secretary may designate facilities referred to in subsection (a) as the facilities from which articles and services manufactured or performed by such facilities may be sold under this section.

(c) CONDITIONS FOR SALES.—(1) A sale of articles or services may be made under this section only if—

(A) the Secretary of Defense determines that the articles or services are not available from a commercial source in the United States;

(B) the purchaser agrees to hold harmless and indemnify the United States, except as provided in paragraph (3), from any claim for damages or injury to any person or property arising out of the articles or services;

(C) the articles or services can be substantially manufactured or performed by the industrial facility concerned with only incidental subcontracting;

(D) it is in the public interest to manufacture the articles or perform the services;

(E) the Secretary determines that the sale of the articles or services will not interfere with the military mission of the industrial facility concerned; and

(F) the sale of the goods and services is made on the basis that it will not interfere with performance of work by the industrial facility concerned for the Department of Defense.

(2) The Secretary of Defense may waive the condition in paragraph (1)(A) and subsection (a)(1) that an article or service must be not available from a United States commercial source in the case of a particular sale if the Secretary determines that the waiver is necessary for reasons of national security and notifies Congress regarding the reasons for the waiver.

(3) Paragraph (1)(B) does not apply in any case of willful misconduct or gross negligence or in the case of a claim by a purchaser of articles or services under this section that damages or injury arose from the failure of the Government to comply with quality, schedule, or cost performance requirements in the contract to provide the articles or services.

(d) METHODS OF SALE.—(1) The Secretary shall permit a purchaser of articles or services under this section to use advance incremental funding to pay for the articles or services.

(2) In the sale of articles and services under this section, the Secretary shall—

(A) charge the purchaser, at a minimum, the variable costs, capital improvement costs, and equipment depreciation costs that are associated with the articles or services sold;

(B) enter into a firm, fixed-price contract or, if agreed by the purchaser, a cost reimbursement contract for the sale; and

(C) develop and maintain (from sources other than appropriated funds) working capital to be available for paying design costs, planning costs, procurement costs, and other costs associated with the articles or services sold.

(e) DEPOSIT OF PROCEEDS.—Proceeds from sales of articles and services under this section shall be credited to the funds, including working capital funds and operation and maintenance funds, incurring the costs of manufacture or performance.

(f) RELATIONSHIP TO ARMS EXPORT CONTROL ACT.—Nothing in this section shall be construed to affect the application of the export controls provided for in section 38 of the Arms Export Control Act (22 U.S.C. 2778) to items which incorporate or are produced through the use of an article sold under this section.

(g) DEFINITIONS.—In this section:

(1) The term “advance incremental funding”, with respect to a sale of articles or services, means a series of partial payments for the articles or services that includes—

(A) one or more partial payments before the commencement of work or the incurring of costs in connection with the manufacture of the articles or the performance of the services, as the case may be; and

(B) subsequent progress payments that result in full payment being completed as the required work is being completed.

(2) The term “not available”, with respect to an article or service proposed to be sold under this section, means that the article or service is unavailable from a commercial source in the required quantity and quality or within the time required.

(3) The term “variable costs”, with respect to sales of articles or services, means the costs that are expected to fluctuate directly with the volume of sales and—

(A) in the case of articles, the volume of production necessary to satisfy the sales orders; or

(B) in the case of services, the extent of the services sold.

This proposal would repeal section 4543 of title 10, United States Code:

~~§ 4543. Army industrial facilities: sales of manufactured articles or services outside Department of Defense~~

~~(a) AUTHORITY TO SELL OUTSIDE DOD.—Regulations under section 2208(h) of this title shall authorize a working-capital funded Army industrial facility (including a Department of the Army arsenal) that manufactures large caliber cannons, gun mounts, recoil mechanisms, ammunition, munitions, or components thereof to sell manufactured articles or services to a person outside the Department of Defense if—~~

~~(1) in the case of an article, the article is sold to a United States manufacturer, assembler, developer, or other concern—~~

~~(A) for use in developing new products;~~

~~(B) for incorporation into items to be sold to, or to be used in a contract with, an agency of the United States;~~

~~(C) for incorporation into items to be sold to, or to be used in a contract with, or to be used for purposes of soliciting a contract with, a friendly foreign government; or~~

~~(D) for use in commercial products;~~

~~(2) in the case of an article, the purchaser is determined by the Department of Defense to be qualified to carry out the proposed work involving the article to be purchased;~~

~~(3) the sale is to be made on a basis that does not interfere with performance of work by the facility for the Department of Defense or for a contractor of the Department of Defense;~~

~~(4) in the case of services, the services are related to an article authorized to be sold under this section and are to be performed in the United States for the purchaser;~~

~~(5) the Secretary of the Army determines that the articles or services are not available from a commercial source located in the United States;~~

~~(6) the purchaser of an article or service agrees to hold harmless and indemnify the United States, except in a case of willful misconduct or gross negligence, from any claim for damages or injury to any person or property arising out of the article or service;~~

~~(7) the article to be sold can be manufactured, or the service to be sold can be substantially performed, by the industrial facility with only incidental subcontracting;~~

~~(8) it is in the public interest to manufacture such article or perform such service; and~~

~~(9) the sale will not interfere with performance of the military mission of the industrial facility.~~

~~(b) ADDITIONAL REQUIREMENTS.—The regulations shall also—~~

~~(1) require that the authority to sell articles or services under the regulations be exercised at the level of the commander of the major subordinate command of the Army with responsibility over the facility concerned;~~

~~(2) authorize a purchaser of articles or services to use advance incremental funding to pay for the articles or services; and~~

~~(3) in the case of a sale of commercial articles or commercial services in accordance with subsection (a) by a facility that manufactures large caliber cannons, gun mounts, or recoil mechanisms, or components thereof, authorize such facility—~~

~~(A) to charge the buyer, at a minimum, the variable costs that are associated with the commercial articles or commercial services sold;~~

~~(B) to enter into a firm, fixed-price contract or, if agreed by the buyer, a cost reimbursement contract for the sale; and~~

~~(C) to develop and maintain (from sources other than appropriated funds) working capital to be available for paying design costs, planning costs, procurement costs, and other costs associated with the commercial articles or commercial services sold.~~

~~(c) RELATIONSHIP TO ARMS EXPORT CONTROL ACT.—Nothing in this section shall be construed to affect the application of the export controls provided for in section 38 of the Arms Export Control Act (22 U.S.C. 2778) to items which incorporate or are produced through the use of an article sold under this section.~~

~~(d) DEFINITIONS.—In this section:~~

~~(1) The term "commercial article" means an article that is usable for a nondefense purpose.~~

~~(2) The term "commercial service" means a service that is usable for a nondefense purpose.~~

~~(3) The term "advance incremental funding", with respect to a sale of articles or services, means a series of partial payments for the articles or services that includes—~~

~~(A) one or more partial payments before the commencement of work or the incurring of costs in connection with the production of the articles or the performance of the services, as the case may be; and~~

~~(B) subsequent progress payments that result in full payment being completed as the required work is being completed.~~

~~(4) The term "variable costs", with respect to sales of articles or services, means the costs that are expected to fluctuate directly with the volume of sales and—~~

~~(A) in the case of articles, the volume of production necessary to satisfy the sales orders; or~~

~~(B) in the case of services, the extent of the services sold.~~

CHAPTER 433—PROCUREMENT

Section

[4531. Repealed]

4532. Factories and arsenals: manufacture at; abolition of.

[4533-4535. Repealed]

4536. Equipment: Post bakeries, schools, kitchens, and mess halls.

[4537-4539. Repealed]

4540. Architectural and engineering services.

4541. Army arsenals: treatment of unutilized or underutilized plant-capacity costs.

4542. Technical data packages for large-caliber cannon: prohibition on transfers to foreign countries; exception.

~~4543. Army industrial facilities: sales of manufactured articles or services outside Department of Defense~~

4544. Army industrial facilities: cooperative activities with non-Army entities.