



DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

SEP 25 2001

The Honorable J. Dennis Hastert
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

The Department of Defense proposes the enclosed draft bill, "Contracts for Performance of Firefighting and Security-Guard Functions at Department of Defense Facilities," as part of its legislative program for the First Session of the 107th Congress and we urge its enactment.

This provision would authorize the Secretary of Defense to contract for firefighters and security guards for our military installations. Because of the heightened security concerns due to the recent terrorist attack, our military installations have substantially increased security. The current civil service workforce is insufficient to meet the new demands. Accordingly, the installation commanders are using military personnel to meet this requirement. This decreases time for training, thereby undercutting military readiness. In some instances, students have been withdrawn from their military classes to perform security functions. This has affected all the military departments and our defense agencies.

Current law (10 U.S.C. 2465) prohibits, with certain exceptions, an obligation of funds that have been appropriated to the Department of Defense for the purpose of entering into a contract for the performance of firefighting or security-guard functions at any military installation or facility. A review of the legislative history indicates the prohibition derives from a concern that increased contracting could lead to an adverse impact on national security and a loss of government jobs. In the ensuing fourteen years, however, such has not been the case and the current situation specifically contradicts such concerns. The military departments have not experienced any significant degradation of readiness at the sites at which functions have been outsourced under the grandfather provisions of the prohibition.

A simple repeal of section 2465 is insufficient to permit entering into security guard or firefighting contracts because it will not overcome the general prohibition against using appropriations to contract for police, or similar mandatory governmental services where the local entity is required by state law to provide such services at no cost to all property owners in its jurisdiction. The general prohibition is rooted in the Constitutional immunity of the Federal Government from State and local taxation, and from payments in lieu of taxes. See *Novato Fire Protection District V. United States*, 181 F.3d 1135 (9th Cir. 1999), cert. denied, 529 U.S. 1115 (2000). In order to overcome that prohibition, the legislation is clearly required to indicate its intent to do so. The proposed revision to section 2465 authorizes contracting with private entities. It constitutes a clear waiver of the immunity of the United States from state and local



taxes, and from payments in lieu of taxes, to the extent the Secretary contracts to compensate a government unit for fire protection, security services, and other municipal services.

The Office of Management and Budget advises that there is no objection from the standpoint of the Administration's program to the presentation of the enclosed legislation for the consideration of the Congress.

Sincerely,

A handwritten signature in cursive script that reads "Daniel J. Dell'Orto".

Daniel J. Dell'Orto
Principal Deputy General Counsel

Enclosure
As Stated



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1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

SEP 25 2001

The Honorable Richard B. Cheney
President of the Senate
Washington, D.C. 20510

Dear Mr. President:

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Principal Deputy General Counsel

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**SEC. ____ . CONTRACTS FOR PERFORMANCE OF FIREFIGHTING AND SECURITY
GUARD FUNCTIONS AT DEPARTMENT OF DEFENSE
INSTALLATIONS.**

1 (a) **REPEAL OF PROHIBITION.**--Section 2465, title 10, United States Code, is amended to
2 read as follows:

3 **"2465. Contracting for firefighting and security-guard functions**

4 "The Secretaries of the Military Departments are authorized to contract to obtain fire
5 protection and security-guard services on a military installations and facilities. The Secretary
6 concerned may obtain such services from private contractors, or the Secretary may obtain such
7 services and other municipal services, such as police, public works, and sanitation services, from
8 nearby local government or governments in which the installation or facility lies,
9 notwithstanding whether any such local government is obligated to provide such services to the
10 general public without compensation."

11 (b) **CLERICAL AMENDMENT.**—The table of sections for chapter 146 is amended by
12 amending the item relating to section 2465 to read as follows:

"2465. Contracting for Firefighting and Security-Guard Functions."