

Calendar No. 506

114TH CONGRESS }
2d Session }

SENATE

{ REPORT
114-270 }

TO ENHANCE WHISTLEBLOWER
PROTECTION FOR CONTRACTOR AND
GRANTEE EMPLOYEES

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

S. 795



JUNE 7, 2016.—Ordered to be printed

U.S. GOVERNMENT PUBLISHING OFFICE

59-010

WASHINGTON : 2016

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Mr. JOHNSON, from the Committee on Homeland Security and
Governmental Affairs, submitted the following

R E P O R T

[To accompany S. 795]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 795) to enhance the whistleblower protection for contractor and grantee employees, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill, as amended, do pass.

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I. PURPOSE AND SUMMARY

The purpose of S. 795 is to improve the whistleblower rights of Federal contractors working on Federal contracts, grants and other programs. The bill would put whistleblowing protections related to individuals working on Federal civilian contracts and grants on par with those already existing related to individuals working on Federal defense contracts and grants by making the temporary civilian whistleblowing program permanent and extending these protections to subgrantees. It would also extend these protections to personal services contractors working on both defense and civilian grant programs.

II. BACKGROUND AND THE NEED FOR LEGISLATION

This Committee has made it a priority to examine the root and contributing causes of whistleblower retaliation through investigations, hearings, and other oversight, and to identify ways in which gaps or weaknesses in current law can be addressed through legislation.¹

S. 795 addresses current gaps in whistleblower protections for the individuals that work on projects funded by the over \$1 trillion in contract and grant funding provided by the Federal Government each year.² Much of this contract and grant funding flows through the prime contractors and grantees to subcontractors and subgrantees, but employees of these subcontractors and subgrantees do not enjoy the same whistleblower protections that those working for the prime contractors do.

Section 1553 of The American Recovery and Reinvestment Act of 2009 (ARRA) established whistleblower protections for all recipients of stimulus funds, including all state and local government employees and all contractors, including within the intelligence community (IC).³ During a December 6, 2011, hearing before the Senate Committee on Homeland Security and Governmental Affairs Subcommittee on Contracting Oversight, the Chair of the Legislation Committee of the Council of Inspectors General on Integrity and Efficiency (CIGIE) testified that:

. . . investigations and reviews of the whistleblower complaints had resulted in recovery of approximately \$1.85 million as of April [2011]. One of the key provisions of ARRA is Section 1553 that gives the authority of [Offices of Inspectors General (OIGs)] to investigate reprisal complaints from non-Federal employee whistleblowers. Of the surveyed [Inspectors General (IGs)], 8 of the OIGs had received a total of 18 reprisal complaints, and 11 of those had been accepted for investigation. The majority of IGs that had received these complaints had not experienced any problems or concerns with implementing Section 1553 or in responding to the complainants' request to access the completed investigation file.⁴

The ARRA whistleblower provision, while significant, only extended to contracts funded by stimulus funds, which make up only a small portion of Federal Government contracts. During the 2011

¹ See, e.g., *Blowing the Whistle on Retaliation: Accounts of Current and Former Federal Agency Whistleblowers: Hearing Before the Comm. on Homeland Security & Governmental Affairs*, 114th Cong. (2015), available at <http://www.hsgac.senate.gov/hearings/blowing-the-whistle-on-retaliation-accounts-of-current-and-former-federal-agency-whistleblowers>; *Improving VA Accountability: Examining First-Hand Accounts of Department of Veterans Affairs Whistleblowers: Hearing Before the Comm. on Homeland Security & Governmental Affairs*, 114th Cong. (2015), available at <http://www.hsgac.senate.gov/hearings/improving-va-accountability-examining-first-hand-accounts-of-department-of-veterans-affairs-whistleblowers>; Pub. L. No. 112-199 (112th Cong.) (2012); S. 2127, the Dr. Chris Kirkpatrick Whistleblower Protection Act of 2015 (114th Cong.).

² *Overview of Awards by FY 2008-2015* (last visited Mar. 7, 2016) (online at: <https://www.usaspending.gov/Pages/TextView.aspx?data=OverviewOfAwardsByFiscalYearTextView>). the \$438 billion in contracts and \$614 billion in grants provided by the Federal Government in fiscal year (FY) 2015 alone.

³ Pub. L. No. 111-5 (111th Cong.) (2009).

⁴ *Whistleblower Protections for Government Contractors, Hearing Before the S. Homeland Sec. & Governmental Affairs Subcomm. On Contracting Oversight* 6, 112th Cong. (2011) [hereinafter *Whistleblower Protections*] (testimony of the Honorable Peggy Gustafson, Inspector General, U.S. Small Business Administration/Chair of the Legislation Committee of CIGIE), available at <https://www.gpo.gov/fdsys/pkg/CHRG-112shrg72560/pdf/CHRG-112shrg72560.pdf>.

subcommittee hearing, the Director of Public Policy at the Project On Government Oversight (POGO) testified on the need for extending whistleblower coverage to all Federal contractors:

According to USAspending.gov, out of nearly \$3.8 trillion in the federal budget in fiscal year 2011, roughly half was spent on prime awards to contractors, grantees, states and localities, and others. A recent POGO report illustrates the imperative of protecting whistleblowers in this growing workforce of federal contractors. In fact, in some federal offices contractor employees outnumber federal employees. Since 1999, the size of the federal employee workforce has remained relatively constant at about 2 million, while the contractor workforce has increased radically—from an estimated 4.4 million to 7.6 million 2005. In other words, the federal contractor workforce dwarfs the federal employee workforce nearly four-fold.⁵

Senator Rob Portman added that “whistleblower protections for non-Federal employees are nowhere more necessary and appropriate than in Federal contracting. We now spend over half a trillion dollars a year in contracts annually.”⁶ Similarly, Senator Claire McCaskill discussed the need for extending coverage to all Federal contractors noting that, “if we are not including contractors in the protection of the whistleblower legislation, then we have a huge problem here. If the whistleblowers that work for contractors do not have the same protections as Federal employees, we are saying to contractors we do not think wrongdoing by you is that important.”⁷

Dr. Walter Tamosaitis, a former Department of Energy (DOE) government contractor manager in the \$13 billion Waste Treatment Plant (WTP) project in Hanford, Washington, testified before the subcommittee based on his own experience having been terminated as a result of disclosing extensive government contractor waste. Dr. Tamosaitis described the risks of failing to cover Federal contractors, stating:

With no whistleblower protection, the contractors do what they want. They actually make more money in DOE by not doing it right the first time. They get paid to build it, and then they get paid more to fix it, if it will run at all. And this cost [sic] the taxpayers billions at a time when our country’s budget cannot afford it. The original WTP cost was about \$4.6 billion, and now it is at over \$13 billion in 10 years.⁸

To address this gap in law, Senators Claire McCaskill (D–MO), Jon Tester (D–MT) and Jim Webb (D–MT) introduced legislation in the 112th Congress that would have created permanent whistleblower rights for all Federal Government contractors, subcontractors, and grantees, including those within the IC.⁹ Although the bill was not signed into law, the concept was included in the Na-

⁵ *Whistleblower Protections* 68–69 (statement of Angela Cantebury, Director of Public Policy, Project on Government Oversight).

⁶ *Id.* at 3 (opening statement of Senator Rob Portman).

⁷ *Id.* at 2 (opening statement of Senator Claire McCaskill).

⁸ *Id.* at 19 (testimony of Dr. Walter Tamosaitis).

⁹ S. 241, the Non-Federal Employee Whistleblower Protection Act of 2012 (112th Cong.).

tional Defense Authorization Act for Fiscal Year 2013, but as a four-year pilot program that excluded IC contractors.¹⁰ In sum, the pilot program prohibits employees of a “contractor, subcontractor, or grantee” from being retaliated against for blowing the whistle on waste, mismanagement, and abuse occurring in relation to a Federal contract or grant, and provides employees with a mechanism for submitting complaints of such conduct to the inspector general of the relevant agency.¹¹ The pilot program is set to expire in 2017.¹²

Importantly, Congress extended the whistleblower protections only to the extent the private individual is making a disclosure that is related to “gross mismanagement” “an abuse of authority,” “a substantial and specific danger to public health or safety,” “or a violation of law, rule, or regulation” that is “related to a *Federal* contract or grant” or “a gross waste of *Federal* funds.”¹³ A private individual blowing the whistle on conduct occurring in relation to a private company that is not related to a Federal project must seek the protection of other laws that apply to private citizens.

Similar rights have existed for Department of Defense (DoD) contractors working on DoD Federal grants for decades.¹⁴ In the years since the protections were first added, Congress expanded the DoD whistleblower protections to also cover grants,¹⁵ subcontractors,¹⁶ and finally, in 2014, grantees and subgrantees.¹⁷

Unlike the temporary, four-year program for civilian contracts, the rights of whistleblowers working on Federal defense contracts are not time-limited. S. 795 would remedy this unbalanced treatment by ensuring that contractors, subcontractors, grantees, and subgrantees of civilian Federal contracts and grants have the same rights as those working on defense contracts and grants.

Additionally, S. 795 would add another category of contract employees who would be protected from retaliation against whistleblowing: personal services contractors. Personal services contractors are contractors that contract their services directly with the Government, instead of as an employee of a private contracting company, but they are not currently covered under defense protections or the civilian pilot program.

One notable example of the need to include personal services contractors is the story of Mr. Leonard Cooper, a mechanical engineering expert who worked as a personal services contractor on embassy security for the State Department.¹⁸ Mr. Cooper alleged to the Office of Special Counsel that he believes he was retaliated against after he disclosed to superiors that the Environmental Safety Protection Systems (ESPS) for embassies worldwide lack the instruments necessary to sense and account for the impact of constantly-changing wind conditions or wind that leaks into the building.¹⁹ This creates global vulnerability to exposure by chemical, bi-

¹⁰ Pub. L. No. 112-239, 828 (112th Cong.) (2013), codified at 41 U.S.C. § 4712.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* (emphasis supplied).

¹⁴ Pub. L. No. 99-500 (99th Cong.) (1986).

¹⁵ Pub. L. No. 110-181 (110th Cong.) (2008).

¹⁶ Pub. L. No. 112-239 (113th Cong.) (2013).

¹⁷ Pub. L. No. 113-291 (113th Cong.) (2014), codified at 10 USC § 2409.

¹⁸ Briefing by Government Accountability Project to Comm. staff (March 2016).

¹⁹ Letter from the U.S. Office of Special Counsel to Mr. Leonard Y. Cooper (Mar. 21, 2014) (on file with Comm. staff).

ological, and radiological (CBR) attacks.²⁰ Mr. Cooper also disclosed that the design of new stand-alone safe haven facilities, called Compound Emergency Sanctuaries (CES), in the United States Embassy Compound in Tripoli, Libya does not protect occupants against arson or fire as a weapon, leading to their guaranteed death against that type of attack.²¹ Although the United States Office of Special Counsel found a substantial likelihood that Mr. Cooper is correct and ordered a State Department investigation, his contract was not renewed.²² As a personal services contractor, he arguably has no recourse under current law.

S. 795 would extend to subcontractors the existing laws prohibiting the Federal Government from reimbursing certain litigation or defense costs for contractors, including in their defense against retaliation claims by whistleblowers.²³ Federal taxpayers should not foot the legal bills for contractors who retaliate against employees that report waste, fraud and abuse of taxpayer dollars.

Current law does not require contracts signed before the effective date of the National Defense Authorization Act for Fiscal Year 2013 to be revised so as to include the new whistleblower protections.²⁴ This bill, however, would require companies to use best efforts to include these protections if there is a major modification to any contract that is currently grand-fathered in.

S. 795 would make the rights of civilian contractors permanent and make responsible corrections to existing protections for civilian and defense contractors to ensure that Federal Government contractors can safely report government waste, fraud, abuse and public health and safety threats.

III. LEGISLATIVE HISTORY

Senator Claire McCaskill (D–MO.) introduced S. 795 on March 18, 2015. The bill was referred to the Committee on Homeland Security and Governmental Affairs. Senator Ron Johnson (R–WI.) joined as a cosponsor on February 9, 2016.

The Committee considered S. 795 at a business meeting on February 10, 2016. During the business meeting, a substitute amendment was offered by Senator McCaskill. The bill, as amended by the McCaskill substitute amendment, was ordered reported favorably by voice vote *en bloc*. Senators Johnson, McCain, Portman, Paul, Lankford, Ayotte, Ernst, Sasse, Carper, McCaskill, Tester, Baldwin, Heitkamp, Booker, and Peters were present for the vote.

Consistent with the Committee's order on technical and conforming changes at the meeting, the Committee reports the bill with a technical amendment by mutual agreement of the full Committee majority and minority staff.

²⁰ Briefing by Government Accountability Project to Comm. staff (March 2016).

²¹ *Id.*

²² Letter from the U.S. Office of Special Counsel to Mr. Leonard Y. Cooper (Mar. 21, 2014) (on file with Comm. staff).

²³ 10 U.S.C. § 2324(k), 41 U.S.C. § 4310.

²⁴ See 10 U.S.C. § 2324 (note); 41 U.S.C. § 4712 (note).

IV. SECTION-BY-SECTION ANALYSIS OF THE BILL, AS REPORTED

Section 1. Enhancement of whistleblower protection for contractor and grantee employees

Subsection (a) adds “personal services contractor” to the list of protected individuals working on defense contracts or grants for the Federal Government. It also makes permanent the four-year pilot program that provides whistleblower protections to certain individuals working on civilian contracts, and adds “personal services contractor” and “subgrantee” to the list of those protected individuals.

Subsection (b) prohibits reimbursement of legal fees accrued by a contractor, subcontractor, or personal services contractor in defense of reprisal claims brought by the Federal Government, a state, or by a contractor or grantee employee arising under the authority of the Federal whistleblower protections established for civilian and defense contracts.

Subsection (c) requires the head of each contracting agency to, at the time of any major contract modification, make best efforts to include the protections established under this bill and the National Defense Authorization Act for Fiscal Year 2013 in any contract awarded prior to the date of enactment of this bill.

V. EVALUATION OF REGULATORY IMPACT

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of this bill and determined that the bill will have no regulatory impact within the meaning of the rules. The Committee agrees with the Congressional Budget Office’s statement that the bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

VI. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

MAY 27, 2016.

Hon. RON JOHNSON, *Chairman,*
Committee on Homeland Security and Governmental Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 795, a bill to enhance whistleblower protection for contractor and grantee employees.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford.

Sincerely,

KEITH HALL.

Enclosure.

S. 795—A bill to enhance whistleblower protection for contractor and grantee employees

S. 795 would amend federal law to permanently extend legal protections to certain nonfederal employees (contractors, subcontractors, grantees, and others employed by entities that receive federal funds) who report waste, fraud, or abuse involving federal funds. Specifically, under the bill, anyone who reports the misuse of fed-

eral funds could not be demoted, discharged, or discriminated against because of the disclosure. The current four-year pilot program that extends those same protections ends in December 2016.

The cost to implement S. 795 would depend on the number of whistleblower claims made by those nonfederal employees. Evidence from the pilot program that currently protects certain nonfederal employees from such discrimination suggests that the number of such claims brought by nonfederal employees has totaled less than 20 for each of the 26 major federal agencies. CBO estimates that implementing S. 795 would cost about \$3,000 to investigate each claim, or about \$5 million over the 2017–2021 period. Any such spending would be subject to the availability of appropriated funds. Enacting the bill could affect direct spending by agencies not funded through annual appropriations; therefore, pay-as-you-go procedures apply. CBO estimates, however, that any net increase in spending by those agencies would be negligible. Enacting S. 795 would not affect revenues.

CBO estimates that enacting S. 795 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2027.

S. 795 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is Matthew Pickford. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

VI. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows: (existing law proposed to be omitted is enclosed in brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

UNITED STATES CODE

* * * * *

TITLE 10—ARMED FORCES

* * * * *

PART IV—SERVICE, SUPPLY, AND PROCUREMENT

* * * * *

CHAPTER 137—PROCUREMENT GENERALLY

* * * * *

SEC. 2324. ALLOWABLE COSTS UNDER DEFENSE CONTRACTS

(a) * * *

* * * * *

(k) PROCEEDING COSTS NOT ALLOWABLE.

(1) Except as otherwise provided in this subsection, costs incurred by a contractor, *subcontractor*, or *personal services contractor* in connection with any criminal, civil, or administrative proceeding commenced by the United States, by a State, or by a contractor, *subcontractor*, or *personal services contractor* employee submitting a complaint under section 2409 of this title are not allowable as reimbursable costs under a covered contract, subcontract, or personal services contract if the proceeding

(A) relates to a violation of, or failure to comply with, a Federal or State statute or regulation or to any other activity described in subparagraphs (A) through (C) of section 2409(a)(1) of this title, and

(B) results in a disposition described in paragraph (2).

(2) A disposition referred to in paragraph (1)(B) is any of the following:

(A) In the case of a criminal proceeding, a conviction (including a conviction pursuant to a plea of nolo contendere) by reason of the violation or failure referred to in paragraph (1).

(B) In the case of a civil or administrative proceeding involving an allegation of fraud or similar misconduct, a determination of contractor, *subcontractor*, or *personal services contractor* liability on the basis of the violation or failure referred to in paragraph (1).

(C) In the case of any civil or administrative proceeding, the imposition of a monetary penalty or an order to take corrective action under section 2409 of this title by reason of the violation or failure referred to in paragraph (1).

(D) A final decision—

(i) to debar or suspend the contractor, *subcontractor*, or *personal services contractor*;

(ii) to rescind or void the contract, *subcontract*, or *personal services contract*; or

(iii) to terminate the contract, *subcontract*, or *personal services contract* for default;

* * * * *

CHAPTER 141—MISCELLANEOUS PROCUREMENT PROVISIONS

* * * * *

SEC. 2409. CONTRACTOR EMPLOYEES: PROTECTION FROM REPRISAL FOR DISCLOSURE OF CERTAIN INFORMATION

(a) PROHIBITION OF REPRISALS.

(1) An employee of a contractor, subcontractor, grantee, or subgrantee or *personal services contractor* may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a person or body described in paragraph (2) information that the employee reasonably believes is evidence of the following:

* * * * *

TITLE 41—PUBLIC CONTRACTS

* * * * *

Subtitle I—Federal Procurement Policy

* * * * *

DIVISION C—PROCUREMENT

* * * * *

TITLE 41—PUBLIC CONTRACTS

* * * * *

Subtitle I—Federal Procurement Policy

* * * * *

DIVISION C—PROCUREMENT

* * * * *

CHAPTER 43—ALLOWABLE COSTS

* * * * *

SEC. 4304. SPECIFIC COSTS NOT ALLOWABLE

(a) **SPECIFIC COSTS.**—The following costs are not allowable under a covered contract:

(1) * * *

* * * * *

(15) Costs incurred by a contractor, *subcontractor*, or *personal services contractor* in connection with any criminal, civil, or administrative proceeding commenced by the Federal Government or a State, to the extent provided in section 4310 of this title.

* * * * *

SEC. 4310. PROCEEDING COSTS NOT ALLOWABLE

(a) **DEFINITIONS.**—

(1) **COSTS.**—The term “costs”, with respect to a proceeding, means all costs incurred by a contractor, *subcontractor*, or *personal services contractor*, whether before or after the commencement of the proceeding, including—

(A) administrative and clerical expenses;

(B) the cost of legal services, including legal services performed by an employee of the contractor, *subcontractor*, or *personal services contractor*;

(C) the cost of the services of accountants and consultants retained by the contractor, *subcontractor*, or *personal services contractor*; and

(D) the pay of directors, officers, and employees of the contractor, *subcontractor*, or *personal services contractor*

for time devoted by those directors, officers, and employees to the proceeding.

(2) PENALTY.—The term “penalty” does not include restitution, reimbursement, or compensatory damages.

(3) PROCEEDING.—The term “proceeding” includes an investigation.

(b) IN GENERAL.—Except as otherwise provided in this section, costs incurred by a contractor, *subcontractor*, or *personal services contractor* in connection with a criminal, civil, or administrative proceeding commenced by the Federal Government, by a State, or by a contractor, *subcontractor*, or *personal services contractor* or grantee employee submitting a complaint under section 4712 of this title are not allowable as reimbursable costs under a covered contract, *subcontract*, or *personal services contract* if the proceeding—

(1) relates to a violation of, or failure to comply with, a Federal or State statute or regulation or to any other activity described in section 4712(a)(1) of this title; and

(2) results in a disposition described in subsection (c).

(c) COVERED DISPOSITIONS.—A disposition referred to in subsection (b)(2) is any of the following:

(1) In a criminal proceeding, a conviction (including a conviction pursuant to a plea of *nolo contendere*) by reason of the violation or failure referred to in subsection (b).

(2) In a civil or administrative proceeding involving an allegation of fraud or similar misconduct, a determination of contractor, *subcontractor*, or *personal services contractor* liability on the basis of the violation or failure referred to in subsection (b).

(3) In any civil or administrative proceeding, the imposition of a monetary penalty or an order to take corrective action under section 4712 of this title by reason of the violation or failure referred to in subsection (b).

(4) A final decision to do any of the following, by reason of the violation or failure referred to in subsection (b):

(A) Debar or suspend the contractor, *subcontractor*, or *personal services contractor*.

(B) Rescind or void the contract, *subcontract*, or *personal services contract*.

(C) Terminate the contract, *subcontract*, or *personal services contract* for default.

(5) A disposition of the proceeding by consent or compromise if the disposition could have resulted in a disposition described in paragraph (1), (2), (3), or (4).

(d) COSTS ALLOWED BY SETTLEMENT AGREEMENT IN PROCEEDING COMMENCED BY FEDERAL GOVERNMENT.—In the case of a proceeding referred to in subsection (b) that is commenced by the Federal Government and is resolved by consent or compromise pursuant to an agreement entered into by a contractor, *subcontractor*, or *personal services contractor* and the Federal Government, the costs incurred by the contractor, *subcontractor*, or *personal services contractor* in connection with the proceeding that are otherwise not allowable as reimbursable costs under subsection (b) may be allowed to the extent specifically provided in that agreement.

(e) COSTS SPECIFICALLY AUTHORIZED BY EXECUTIVE AGENCY IN PROCEEDING COMMENCED BY STATE.—In the case of a proceeding referred to in subsection (b) that is commenced by a State, the executive agency that awarded the covered contract, *subcontract*, or *personal services contract* involved in the proceeding may allow the costs incurred by the contractor, *subcontractor*, or *personal services contractor* in connection with the proceeding as reimbursable costs if the executive agency determines, in accordance with the Federal Acquisition Regulation, that the costs were incurred as a result of—

- (1) a specific term or condition of the contract, *subcontract*, or *personal services contract*; or
- (2) specific written instructions of the executive agency.

(f) OTHER ALLOWABLE COSTS.—

(1) IN GENERAL.—Except as provided in paragraph (3), costs incurred by a contractor, *subcontractor*, or *personal services contractor* in connection with a criminal, civil, or administrative proceeding commenced by the Federal Government or a State in connection with a covered contract, *subcontract*, or *personal services contract* may be allowed as reimbursable costs under the contract, *subcontract*, or *personal services contract* if the costs are not disallowable under subsection (b), but only to the extent provided in paragraph (2).

(2) AMOUNT OF ALLOWABLE COSTS.—

(A) MAXIMUM AMOUNT ALLOWED.—The amount of the costs allowable under paragraph (1) in any case may not exceed the amount equal to 80 percent of the amount of the costs incurred, to the extent that the costs are determined to be otherwise allowable and allocable under the Federal Acquisition Regulation.

(B) CONTENT OF REGULATIONS.—Regulations issued for the purpose of subparagraph (A) shall provide for appropriate consideration of the complexity of procurement litigation, generally accepted principles governing the award of legal fees in civil actions involving the Federal Government as a party, and other factors as may be appropriate.

(3) WHEN OTHERWISE ALLOWABLE COSTS ARE NOT ALLOWABLE.—In the case of a proceeding referred to in paragraph (1), contractor, *subcontractor*, or *personal services contractor* costs otherwise allowable as reimbursable costs under this subsection are not allowable if—

(A) the proceeding involves the same contractor, *subcontractor*, or *personal services contractor* misconduct alleged as the basis of another criminal, civil, or administrative proceeding; and

(B) the costs of the other proceeding are not allowable under subsection (b).

* * * * *

CHAPTER 47—MISCELLANEOUS

* * * * *

Table of sections

Sec.

4701. Determinations and decisions.

* * * * *

[4712. Pilot program for enhancement of contractor protection from reprisal for disclosure of certain information.]

4712. *Enhancement of contractor protection from reprisal for disclosure of certain information.*

* * * * *

SEC. 4712. ~~PILOT PROGRAM FOR ENHANCEMENT~~ ENHANCEMENT OF CONTRACTOR PROTECTION FROM REPRISAL FOR DISCLOSURE OF CERTAIN INFORMATION

(a) PROHIBITION OF REPRISALS.—

(1) IN GENERAL.—An employee of a contractor, subcontractor, [or grantee] *grantee, or subgrantee or personal services contractor*, may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a person or body described in paragraph (2) information that the employee reasonably believes is evidence of gross mismanagement of a Federal contract or grant, a gross waste of Federal funds, an abuse of authority relating to a Federal contract or grant, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a Federal contract (including the competition for or negotiation of a contract) or grant.

* * * * *

[(i) DURATION OF SECTION.—This section shall be in effect for the four-year period beginning on the date of that is 180 days after the date the enactment of this section.]