

CHAPTER II—OTHER ALLOWABLE COST PROVISIONS”.

Statutory Notes and Related Subsidiaries**REPORT AND REGULATIONS ON EXCESSIVE PASS-THROUGH CHARGES**

Pub. L. 109-364, div. A, title VIII, § 852, Oct. 17, 2006, 120 Stat. 2340, as amended by Pub. L. 113-291, div. A, title X, § 1071(b)(3)(B), Dec. 19, 2014, 128 Stat. 3506; Pub. L. 115-232, div. A, title VIII, § 836(f)(5), Aug. 13, 2018, 132 Stat. 1871, provided that:

“(a) **COMPTROLLER GENERAL REPORT ON EXCESSIVE PASS-THROUGH CHARGES.**—

“(1) **IN GENERAL.**—Not later than 180 days after the date of the enactment of this Act [Oct. 17, 2006], the Comptroller General shall issue a report on pass-through charges on contracts or subcontracts (or task or delivery orders) that are entered into for or on behalf of the Department of Defense.

“(2) **MATTERS COVERED.**—The report issued under this subsection—

“(A) shall assess the extent to which the Department of Defense has paid excessive pass-through charges to contractors who provided little or no value to the performance of the contract;

“(B) shall assess the extent to which the Department has been particularly vulnerable to excessive pass-through charges on any specific category of contracts or by any specific category of contractors (including any category of small business); and

“(C) shall determine the extent to which any prohibition on excessive pass-through charges would be inconsistent with existing commercial practices for any specific category of contracts or have an unjustified adverse effect on any specific category of contractors (including any category of small business).

“(b) **REGULATIONS REQUIRED.**—

“(1) **IN GENERAL.**—Not later than May 1, 2007, the Secretary of Defense shall prescribe regulations to ensure that pass-through charges on contracts or subcontracts (or task or delivery orders) that are entered into for or on behalf of the Department of Defense are not excessive in relation to the cost of work performed by the relevant contractor or subcontractor.

“(2) **SCOPE OF REGULATIONS.**—The regulations prescribed under this subsection—

“(A) shall not apply to any firm, fixed-price contract or subcontract (or task or delivery order) that is—

“(i) awarded on the basis of adequate price competition; or

“(ii) for the acquisition of a commercial product or a commercial service, as defined in sections 103 and 103a, respectively, of title 41, United States Code; and

“(B) may include such additional exceptions as the Secretary determines to be necessary in the interest of the national defense.

“(3) **DEFINITION.**—In this section, the term ‘excessive pass-through charge’, with respect to a contractor or subcontractor that adds no, or negligible, value to a contract or subcontract, means a charge to the Government by the contractor or subcontractor that is for overhead or profit on work performed by a lower-tier contractor or subcontractor (other than charges for the direct costs of managing lower-tier contracts and subcontracts and overhead and profit based on such direct costs).

“(4) **REPORT.**—Not later than one year after the date of the enactment of this Act [Oct. 17, 2006], the Secretary of Defense shall submit to the congressional defense committees [Committees on Armed Services and Appropriations of the Senate and the House of Representatives] a report on the steps taken to implement the requirements of this subsection, including—

“(A) any standards for determining when no, or negligible, value has been added to a contract by a contractor or subcontractor;

“(B) any procedures established for preventing excessive pass-through charges; and

“(C) any exceptions determined by the Secretary to be necessary in the interest of the national defense.

“(5) **EFFECTIVE DATE.**—The regulations prescribed under this subsection shall apply to contracts awarded for or on behalf of the Department of Defense on or after May 1, 2007.”

REIMBURSEMENT OF INDIRECT COSTS OF INSTITUTIONS OF HIGHER EDUCATION UNDER DEPARTMENT OF DEFENSE CONTRACTS

Pub. L. 103-160, div. A, title VIII, § 841, Nov. 30, 1993, 107 Stat. 1719, as amended by Pub. L. 105-244, title I, § 102(a)(2)(C), Oct. 7, 1998, 112 Stat. 1617, provided that:

“(a) **PROHIBITION.**—The Secretary of Defense may not by regulation place a limitation on the amount that the Department of Defense may reimburse an institution of higher education for allowable indirect costs incurred by the institution for work performed for the Department of Defense under a Department of Defense contract unless that same limitation is applied uniformly to all other organizations performing similar work for the Department of Defense under Department of Defense contracts.

“(b) **WAIVER.**—The Secretary of Defense may waive the application of the prohibition in subsection (a) in the case of a particular institution of higher education if the governing body of the institution requests the waiver in order to simplify the overall management by that institution of cost reimbursements by the Department of Defense for contracts awarded by the Department to the institution.

“(c) **DEFINITIONS.**—In this section:

“(1) The term ‘allowable indirect costs’ means costs that are generally considered allowable as indirect costs under regulations that establish the cost reimbursement principles applicable to an institution of higher education for purposes of Department of Defense contracts.

“(2) The term ‘institution of higher education’ has the meaning given such term in section 101 of the Higher Education Act of 1965 [20 U.S.C. 1001].”

§ 3761. Restructuring costs

(a) **LIMITATION ON PAYMENT OF RESTRUCTURING COSTS.**—The Secretary of Defense may not pay, under subchapter I, a defense contractor for restructuring costs associated with a business combination of the contractor that occurs after November 18, 1997, unless the Secretary determines in writing either—

(1) that the amount of projected savings for the Department of Defense associated with the restructuring will be at least twice the amount of the costs allowed; or

(2) that the amount of projected savings for the Department of Defense associated with the restructuring will exceed the amount of the costs allowed and that the business combination will result in the preservation of a critical capability that otherwise might be lost to the Department.

(b) **LIMITATION ON DELEGATION.**—The Secretary may not delegate the authority to make a determination under subsection (a), with respect to a business combination, to an official of the Department of Defense—

(1) below the level of an Assistant Secretary of Defense for cases in which the amount of restructuring costs is expected to exceed \$25,000,000 over a 5-year period; or

(2) below the level of the Director of the Defense Contract Management Agency for all other cases.

(c) DEFINITION.—In this section, the term “business combination” includes a merger or acquisition.

(Added Pub. L. 105–85, div. A, title VIII, §804(a)(1), Nov. 18, 1997, 111 Stat. 1832, §2325; amended Pub. L. 106–65, div. A, title X, §1066(a)(19), Oct. 5, 1999, 113 Stat. 771; Pub. L. 108–375, div. A, title VIII, §819, Oct. 28, 2004, 118 Stat. 2016; Pub. L. 112–239, div. A, title X, §1076(g)(2), Jan. 2, 2013, 126 Stat. 1955; renumbered §3761 and amended Pub. L. 116–283, div. A, title XVIII, §1832(j)(2), (3), Jan. 1, 2021, 134 Stat. 4225.)

Editorial Notes

AMENDMENTS

2021—Pub. L. 116–283, §1832(j)(2), renumbered section 2325 of this title as this section.

Subsec. (a). Pub. L. 116–283, §1832(j)(3)(B), (E), in introductory provisions, struck out par. (1) designation before “The Secretary” and substituted “subchapter I” for “section 2324 of this title” and redesignated subpars. (A) and (B) as pars. (1) and (2), respectively. Former par. (2) of subsec. (a) redesignated subsec. (b).

Subsec. (b). Pub. L. 116–283, §1832(j)(3)(C)–(E), redesignated par. (2) of subsec. (a) as subsec. (b), inserted heading, substituted “subsection (a)” for “paragraph (1)” in introductory provisions, and redesignated subpars. (A) and (B) as pars. (1) and (2), respectively. Former subsec. (b) redesignated (c).

Subsec. (c). Pub. L. 116–283, §1832(j)(3)(A), redesignated subsec. (b) as (c).

2013—Subsec. (b). Pub. L. 112–239 redesignated subsec. (c) as (b) and struck out former subsec. (b) which required reports relating to business combinations occurring on or after August 15, 1994.

2004—Subsec. (a)(2). Pub. L. 108–375 substituted “paragraph (1), with respect to a business combination, to an official of the Department of Defense—” for “paragraph (1) to an official of the Department of Defense below the level of an Assistant Secretary of Defense.” and added subpars. (A) and (B).

1999—Subsec. (a)(1). Pub. L. 106–65 inserted “that occurs after November 18, 1997,” after “of the contractor” in introductory provisions.

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 2021 AMENDMENT

Amendment by Pub. L. 116–283 effective Jan. 1, 2021, with additional provisions for delayed implementation and applicability of existing law, see section 1801(d) of Pub. L. 116–283, set out as a note preceding section 3001 of this title.

EFFECTIVE DATE

Pub. L. 105–85, div. A, title VIII, §804(c), Nov. 18, 1997, 111 Stat. 1834, provided that: “Section 2325(a) of title 10, United States Code [now 10 U.S.C. 3761(a)], as added by subsection (a), shall apply with respect to business combinations that occur after the date of the enactment of this Act [Nov. 18, 1997].”

§ 3762. Independent research and development costs: allowable costs

(a) REGULATIONS.—The Secretary of Defense shall prescribe regulations governing the payment by the Department of Defense of expenses incurred by contractors for independent research and development costs. Such regulations shall provide that expenses incurred for independent research and development shall be reported independently from other allowable indirect costs.

(b) COSTS TREATED AS FAIR AND REASONABLE, AND ALLOWABLE, EXPENSES.—The regulations prescribed under subsection (a) shall provide that independent research and development costs shall be considered a fair and reasonable, and allowable, indirect expense on Department of Defense contracts.

(c) ADDITIONAL CONTROLS.—Subject to subsection (d), the regulations prescribed under subsection (a) may include the following provisions:

(1) Controls on the reimbursement of costs to the contractor for expenses incurred for independent research and development to ensure that such costs were incurred for independent research and development.

(2) Implementation of regular methods for transmission—

(A) from the Department of Defense to contractors, in a reasonable manner, of timely and comprehensive information regarding planned or expected needs of the Department of Defense for future technology and advanced capability; and

(B) from contractors to the Department of Defense, in a reasonable manner, of information regarding progress by the contractor on the independent research and development programs of the contractor.

(d) LIMITATIONS ON REGULATIONS.—Regulations prescribed under subsection (a) may not include provisions that would infringe on the independence of a contractor to choose which technologies to pursue in its independent research and development program if the chief executive officer of the contractor determines that expenditures will advance the needs of the Department of Defense for future technology and advanced capability as transmitted pursuant to subsection (c)(2)(A).

(e) EFFECTIVE DATE.—The regulations prescribed under subsection (a) shall apply to indirect costs incurred on or after October 1, 2017.

(Added Pub. L. 101–510, div. A, title VIII, §824(a)(1), Nov. 5, 1990, 104 Stat. 1603, §2372; amended Pub. L. 102–25, title VII, §701(c), Apr. 6, 1991, 105 Stat. 113; Pub. L. 102–190, div. A, title VIII, §802(a)(1), Dec. 5, 1991, 105 Stat. 1412; Pub. L. 102–484, div. A, title X, §1052(27), Oct. 23, 1992, 106 Stat. 2500; Pub. L. 103–35, title II, §201(c)(5), May 31, 1993, 107 Stat. 98; Pub. L. 104–106, div. D, title XLIII, §4321(b)(11), Feb. 10, 1996, 110 Stat. 672; Pub. L. 114–328, div. A, title VIII, §824(a)(1), Dec. 23, 2016, 130 Stat. 2277; Pub. L. 115–91, div. A, title X, §1081(a)(35), Dec. 12, 2017, 131 Stat. 1596; renumbered §3762, Pub. L. 116–283, div. A, title XVIII, §1832(j)(2), Jan. 1, 2021, 134 Stat. 4225.)

Editorial Notes

AMENDMENTS

2021—Pub. L. 116–283 renumbered section 2372 of this title as this section.

2017—Subsec. (d). Pub. L. 115–91 substituted “subsection (c)(2)(A)” for “subsection (c)(3)(A)”.

2016—Pub. L. 114–328 amended section generally. Prior to amendment, section related to payments to contractors for independent research and development and bid and proposal costs.

1996—Subsec. (i)(1). Pub. L. 104–106 substituted “2324(l)” for “2324(m)”.