(b) **Penalty for Violation of Cost Principle.**

(1) If the head of the agency determines that a cost submitted by a contractor in its proposal for settlement is expressly unallowable under a cost principle referred to in subsection (a) that defines the allowability of specific selected costs, the head of the agency shall assess a penalty against the contractor in an amount equal to—

(A) the amount of the disallowed cost allocated to covered contracts for which a proposal for settlement of indirect costs has been submitted; plus

(B) interest (to be computed based on provisions in the Federal Acquisition Regulation) to compensate the United States for the use of any funds which a contractor has been paid in excess of the amount to which the contractor was entitled.

(2) **Cost Determined to Be Unallowable Before Proposal Submitted.**—If the head of the agency determines that a proposal for settlement of indirect costs submitted by a contractor includes a cost determined to be unallowable in the case of such contractor before the submission of such proposal, the head of the agency shall assess a penalty against the contractor in an amount equal to two times the amount of the disallowed cost allocated to covered contracts for which a proposal for settlement of indirect costs has been submitted.

(c) **Waiver of Penalty.**—The Federal Acquisition Regulation shall provide for a penalty for settlement of indirect costs when—

(1) the contractor withdraws the proposal before the formal initiation of an audit of the proposal by the Federal Government and resubmits a revised proposal;

(2) the amount of unallowable costs subject to the penalty is insignificant; or

(3) the contractor demonstrates, to the contracting officer’s satisfaction, that—

(A) it has established appropriate policies and personnel training and an internal control and review system that provide assurances that unallowable costs subject to penalties are precluded from being included in the contractor’s proposal for settlement of indirect costs; and

(B) the unallowable costs subject to the penalty were inadvertently incorporated into the proposal.

(4) **Applicability of Contract Disputes Procedure to Disallowance of Cost and Assessment of Penalty.**—An action of the head of an agency under subsection (a) or (b)—

(1) shall be considered a final decision for the purposes of section 7103 of title 41; and

(2) is appealable in the manner provided in section 7104(a) of title 41.


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**Editorial Notes**

**Codification**


**Prior Provisions**

A prior section 3743 was renumbered section 7273 of this title.

**Amendments**

2021—Pub. L. 116–283, §1832(c)(1), transferred subsecs. (a) to (d) of section 2324 of this title to this section. Subsec. (b). Pub. L. 116–283, §1832(c)(2), realigned margins of pars. (1) and (2) and inserted par. (2) heading.

**Statutory Notes and Related Subsidiaries**

**Effective Date**

Section and amendment by Pub. L. 116–283 effective Jan. 1, 2022, with additional provisions for delayed implementation and applicability of existing law, see section 1801(d) of Pub. L. 116–283, set out as an Effective Date of 2021 Amendment note preceding section 3001 of this title.

§ 3744. Specific costs not allowable

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

(1) Costs of entertainment, including amusement, diversion, and social activities and any costs directly associated with such costs (such as tickets to shows or sports events, meals, lodging, rentals, transportation, and gratuities).

(2) Costs incurred to influence (directly or indirectly) legislative action on any matter pending before Congress, a State legislature, or a legislative body of a political subdivision of a State.

(3) Costs incurred in defense of any civil or criminal fraud proceeding or similar proceeding (including filing of any false certification) brought by the United States where the contractor is found liable or has pleaded nolo contendere to a charge of fraud or similar proceeding (including filing of a false certification).

(4) Payments of fines and penalties resulting from violations of, or failure to comply with,
Federal, State, local, or foreign laws and regulations, except when incurred as a result of compliance with specific terms and conditions of the contract or specific written instructions from the contracting officer authorizing in advance such payments in accordance with applicable provisions of the Federal Acquisition Regulation.

(5) Costs of membership in any social, dining, or country club or organization.

(6) Costs of alcoholic beverages.

(7) Contributions or donations, regardless of the recipient.

(8) Costs of advertising designed to promote the contractor or its products.

(9) Costs of promotional items and memorabilia, including models, gifts, and souvenirs.

(10) Costs for travel by commercial aircraft which exceed the amount of the standard commercial fare.

(11) Costs incurred in making any payment (commonly known as a “golden parachute payment”) which is—

(i) in an amount in excess of the normal severance pay paid by the contractor to an employee upon termination of employment; and

(ii) is paid to the employee contingent upon, and following, a change in management control over, or ownership of, the contractor or a substantial portion of the contractor’s assets.

(12) Costs of commercial insurance that protects against the costs of the contractor for correction of the contractor’s own defects in materials or workmanship.

(13) Costs of severance pay paid by the contractor to foreign nationals employed by the contractor under a service contract performed outside the United States, to the extent that the amount of severance pay paid in any case exceeds the amount paid in the industry involved under the customary or prevailing practice for firms in that industry providing similar services in the United States, as determined under the Federal Acquisition Regulation.

(14) Costs of severance pay paid by the contractor to a foreign national employed by the contractor under a service contract performed in a foreign country if the termination of the employment of the foreign national is the result of the closing of, or the curtailment of activities at, a United States military facility in that country at the request of the government of that country.

(15) Costs incurred by a contractor in connection with any criminal, civil, or administrative proceeding commenced by the United States or a State, to the extent provided in section 3750 of this title.

(16) Costs of compensation of contractor and subcontractor employees for a fiscal year, regardless of the contract funding source, to the extent that such compensation exceeds $487,000 per year, adjusted annually to reflect the change in the Employment Cost Index for all workers, as calculated by the Bureau of Labor Statistics, except that the head of an executive agency may establish one or more narrowly targeted exceptions for scientists, engineers, or other specialists upon a determination that such exceptions are needed to ensure that the executive agency has continued access to needed skills and capabilities.

(b) Waiver of Severance Pay Restrictions for Foreign Nationals.—

(1) Head of an Agency Determination.—Pursuant to the Federal Acquisition Regulation and subject to the availability of appropriations, the head of an agency awarding a covered contract (other than a contract to which subsection (d) applies) may waive the application of the provisions of subsections (a)(13) and (a)(14) to that contract if the head of the agency determines that—

(A) the application of such provisions to the contract would adversely affect the continuation of a program, project, or activity that provides significant support services for members of the armed forces stationed or deployed outside the United States;

(B) the contractor has taken (or has established plans to take) appropriate actions within the contractor’s control to minimize the amount and number of incidents of the payment of severance pay by the contractor to employees under the contract who are foreign nationals; and

(C) the payment of severance pay is necessary in order to comply with a law that is generally applicable to a significant number of businesses in the country in which the foreign national receiving the payment performed services under the contract or is necessary to comply with a collective bargaining agreement.

(2) Solicitation to Include Statement about Waiver.—The head of an agency shall include in the solicitation for a covered contract a statement indicating—

(A) that a waiver has been granted under paragraph (1) for the contract; or

(B) whether the head of the agency will consider granting such a waiver, and, if the agency head will consider granting a waiver,
the criteria to be used in granting the waiver.

(3) Determination to be made before contract awarded.—The head of an agency shall make the final determination regarding whether to grant a waiver under paragraph (1) with respect to a covered contract before award of the contract.

(c) Establishment of definitions, exclusions, limitations, and qualifications.—The provisions of the Federal Acquisition Regulation implementing this subchapter may establish appropriate definitions, exclusions, limitations, and qualifications.

(d) Specific costs under military banking contracts relating to foreign nationals.—

(1) Authority.—The Secretary of Defense may provide in a military banking contract that the provisions of subsections (a)(13) and (a)(14) shall not apply to costs incurred under the contract by the contractor for payment of mandated foreign national severance pay. The Secretary may include such a provision in a military banking contract only if the Secretary determines, with respect to that contract, that the contractor has taken (or has established plans to take) appropriate actions within the contractor’s control to minimize the amount and number of incidents of the payment of severance pay by the contractor employees under the contract who are foreign nationals.

(2) Definitions.—In paragraph (1):

(A) Military banking contract.—The term “military banking contract” means a contract between the Secretary and a financial institution under which the financial institution operates a military banking facility outside the United States for use by members of the armed forces stationed or deployed outside the United States and other authorized personnel.

(B) Mandated foreign national severance pay.—The term “mandated foreign national severance pay” means severance pay paid by a contractor to a foreign national employee the payment of which by the contractor is required in order to comply with a law that is generally applicable to a significant number of businesses in the country in which the foreign national receiving the payment performed services under the contract.

(3) Exception for foreign-owned financial institutions.—Paragraph (1) does not apply to a contract with a financial institution that is owned or controlled by citizens or nationals of a foreign country, as determined by the Secretary of Defense. Such a determination shall be made in accordance with the criteria set out in paragraph (1) of section 4(g) of the Buy American Act (as added by section 7002(2) of the Omnibus Trade and Competitiveness Act of 1988) and the policy guidance referred to in paragraph (2)(A) of that section.


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of former section 2324(e)(3)(B) as subsaps. (A) and (B), respectively, and, in subpar. (A), substituted “paragraph (1)” for “subparagraph (A)”.


Subsec. (c). Pub. L. 116–283, §1322(d)(4), after redesignation of par. (4) of section 2324(e)(3) of this title as subsec. (c) of this section, inserted heading and substituted “this subchapter” for “this section”.

Subsec. (d). Pub. L. 116–283, §1322(d)(5)(A), (B), after redesignation of par. (2) of section 2324(e)(3) of this title as subsec. (d) of this section, inserted heading, redesignated subsaps. (A) to (C) as pars. (1) to (3), respectively, and realigned margins.

Subsec. (d)(1). Pub. L. 116–283, §1322(d)(5)(A), (C), inserted heading and substituted “subsections (a)(13) and (a)(14)” for “paragraphs (1)(M) and (1)(N)”.

Subsec. (d)(2). Pub. L. 116–283, §1322(d)(5)(D), inserted par. heading, substituted “paragraph (1)” for “subparagraph (A)” in introductory provisions, redesignated cls. (1) and (11) of former section 2324(e)(2)(B) as subsaps. (A) and (B), respectively, and inserted subpar. headings.


Statutory Notes and Related Subsidiaries

Effective Date

Section and amendment by Pub. L. 116–283 effective Jan. 1, 2022, with additional provisions for delayed implementation and applicability of existing law, see section 1801(d) of Pub. L. 116–283, set out as an Effective Date of 2021 Amendment note preceding section 3001 of this title.

Regulations

Pub. L. 99–145, title IX, §911(b), Nov. 8, 1985, 99 Stat. 685, provided that: “(1) Not later than 150 days after the date of the enactment of this Act [Nov. 8, 1985], the Secretary of Defense shall prescribe the regulations required by subsections (e) and (f) of former section 2324 of title 10, United States Code [see 10 U.S.C. 3741, 3745], as added by subsection (a). Such regulations shall be published in accordance with section 22 of the Office of Federal Procurement Policy Act ([former] 41 U.S.C. 418b) [now 41 U.S.C. 1707].”

“(2) The Secretary shall review such regulations at least once every five years. The results of each such review shall be made public.”

§ 3745. Required regulations

(a) In General.—The Federal Acquisition Regulation shall contain provisions on the allowability of contractor costs. Such provisions shall define in detail and in specific terms those costs which are unallowable, in whole or in part, under covered contracts.

(b) Specific Items.—The regulations shall, at a minimum, clarify the cost principles applicable to contractor costs of the following:

(1) Air shows.

(2) Membership in civic, community, and professional organizations.

(3) Recruitment.

(4) Employee morale and welfare.

(5) Actions to influence (directly or indirectly) executive branch action on regulatory and contract matters (other than costs incurred in regard to contract proposals pursuant to solicited or unsolicited bids).

(6) Community relations.

(7) Dining facilities.

(8) Professional and consulting services, including legal services.

(9) Compensation.

(10) Selling and marketing.

(11) Travel.

(12) Public relations.

(13) Hotel and meal expenses.

(14) Expense of corporate aircraft.

(15) Company-furnished automobiles.

(16) Advertising.

(17) Conventions.

(c) Additional Requirements.—

(1) When Questioned Costs May Be Resolved.—The Federal Acquisition Regulation shall require that a contracting officer not resolve any questioned costs until he has obtained—

(A) adequate documentation with respect to such costs; and

(B) the opinion of the contract auditor on the allowability of such costs.

(2) Presence of Contract Auditor.—The Federal Acquisition Regulation shall provide that, to the maximum extent practicable, the contract auditor be present at any negotiation or meeting with the contractor regarding a determination of the allowability of indirect costs of the contractor.

(3) Settlement to Reflect Amount of Individual Questioned Costs.—The Federal Acquisition Regulation shall require that all categories of costs designated in the report of the contract auditor as questioned with respect to a proposal for settlement be resolved in such a manner that the amount of the individual questioned costs that are paid will be reflected in the settlement.


Editorial Notes

Codification


Another section 1322(e) of Pub. L. 116–283 amended section 3746 of this title.

Prior Provisions

A prior section 3745 was renumbered section 7275 of this title.

Amendments

2021—Pub. L. 116–283, §1322(e)(1)(A), transferred subsec. (f) of section 2324 of this title to this section and struck out subsec. (f) designation and heading “Required Regulations” at beginning.

Subsec. (a). Pub. L. 116–283, §1322(e)(1)(B), (2), redesignated first two sentences of par. (1) of section 2324(f) of this title as subsec. (a) of this section and inserted heading. Third sentence designated subsec. (b).

Subsec. (b). Pub. L. 116–283, §1322(e)(1)(C), (3), designated third sentence of subsec. (a) as subsec. (b), inserted heading, and redesignated subsaps. (A) to (Q) as pars. (1) to (17), respectively.