

AMENDMENTS

2021—Pub. L. 116-283, §1832(b)(4), transferred subpar. (B) of section 2324(l)(1) of this title to this section, struck out subpar. (B) designation at beginning, and substituted “section 3741(2) of this title” for “subparagraph (A)”.

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.

§ 3743. Effect of submission of unallowable costs

(a) **INDIRECT COST THAT VIOLATES A FAR COST PRINCIPLE.**—The head of an agency shall require that a covered contract provide that if the contractor submits to the agency a proposal for settlement of indirect costs incurred by the contractor for any period after such costs have been accrued and if that proposal includes the submission of a cost which is unallowable because the cost violates a cost principle in the Federal Acquisition Regulation or applicable agency supplement to the Federal Acquisition Regulation, the cost shall be disallowed.

(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 under subsection (b) to be waived in the case of a contractor's proposal 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 re-submits 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.

(d) **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.

(Added and amended Pub. L. 116-283, div. A, title XVIII, §1832(a), (c), Jan. 1, 2021, 134 Stat. 4218, 4219.)

Editorial Notes

CODIFICATION

The text of subsec. (a) of section 2324 of this title, which was transferred to this section by Pub. L. 116-283, §1832(c)(1), was based on Pub. L. 99-145, title IX, §911(a)(1), Nov. 8, 1985, 99 Stat. 682; Pub. L. 102-484, div. A, title VIII, §818(a)(1)(A), Oct. 23, 1992, 106 Stat. 2457; Pub. L. 103-355, title II, §2101(a), Oct. 13, 1994, 108 Stat. 3306.

The text of subsec. (b) of section 2324 of this title, which was transferred to this section and amended by Pub. L. 116-283, §1832(c), was based on Pub. L. 99-145, title IX, §911(a)(1), Nov. 8, 1985, 99 Stat. 682; Pub. L. 102-484, div. A, title VIII, §818(a)(1)(B), (2), Oct. 23, 1992, 106 Stat. 2457, 2458; Pub. L. 103-355, title II, §2101(a)(2), Oct. 13, 1994, 108 Stat. 3306.

The text of subsec. (c) of section 2324 of this title, which was transferred to this section by Pub. L. 116-283, §1832(c)(1), was based on Pub. L. 102-484, div. A, title VIII, §818(a)(5), Oct. 23, 1992, 106 Stat. 2458; Pub. L. 103-355, title II, §2101(a)(3), Oct. 13, 1994, 108 Stat. 3307.

The text of subsec. (d) of section 2324 of this title, which was transferred to this section by Pub. L. 116-283, §1832(c)(1), was based on Pub. L. 99-145, title IX, §911(a)(1), Nov. 8, 1985, 99 Stat. 683; Pub. L. 102-484, div. A, title VIII, §818(a)(4), Oct. 23, 1992, 106 Stat. 2458; Pub. L. 103-355, title II, §2101(a)(4), Oct. 13, 1994, 108 Stat. 3307; Pub. L. 111-350, §5(b)(19)(A), (B), Jan. 4, 2011, 124 Stat. 3844.

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)¹ Costs of compensation of any contractor employee for a fiscal year, regardless of the contract funding source, to the extent that such compensation exceeds \$625,000 adjusted annually for the U.S. Bureau of Labor Statistics Employment Cost Index for total compensation for private industry workers, by occupational and industry group not seasonally adjusted, except that the Secretary of Defense may establish exceptions for positions in the science, technology, engineering, mathematics, medical, and cybersecurity fields and other fields requiring unique areas of expertise upon a determination that such exceptions are needed to ensure that the Department of Defense has continued access to needed skills and capabilities.

(16)¹ 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.

(17) Costs incurred by a contractor in connection with a congressional investigation or inquiry into an issue that is the subject matter of a proceeding resulting in a disposition as described in section 3750(c) of this title.

(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

¹ So in original. There are two pars. (16).