

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 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 con-

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

tract, 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 to 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.

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

Editorial Notes

REFERENCES IN TEXT

Section 4 of the Buy American Act (as added by section 7002(2) of the Omnibus Trade and Competitiveness Act of 1988), referred to in subsec. (d)(3), was section 4 of act Mar. 3, 1933, ch. 212, title III, as added Pub. L. 100–418, title VII, § 7002(2), Aug. 23, 1988, 102 Stat. 1545. Section 4, which was classified to section 10b–1 of former Title 41, Public Contracts, was omitted from the Code in view of section 7004 of Pub. L. 100–418 which provided that the amendment by Pub. L. 100–418 which enacted section 4 ceased to be effective on Apr. 30, 1996. Section 4 was subsequently repealed by Pub. L. 111–350, § 7(b), Jan. 4, 2011, 124 Stat. 3855, which Act enacted Title 41, Public Contracts.

CODIFICATION

The text of subsec. (e) of section 2324 of this title, which was transferred to this section and amended by Pub. L. 116–283, § 1832(d), was based on Pub. L. 99–145, title IX, § 911(a)(1), Nov. 8, 1985, 99 Stat. 683; Pub. L. 99–190, § 101(b) [title VIII, § 8112(a)(1)], Dec. 19, 1985, 99 Stat. 1185, 1223; Pub. L. 100–180, div. A, title VIII, § 805(a), Dec. 4, 1987, 101 Stat. 1126; Pub. L. 100–370, § 1(f)(2)(A), July 19, 1988, 102 Stat. 846; Pub. L. 100–456, div. A, title III, § 322(a), title VIII, § 832(a), Sept. 29, 1988, 102 Stat. 1952, 2023; Pub. L. 100–700, § 8(b)(1), Nov. 19, 1988, 102 Stat. 4636; Pub. L. 101–189, div. A, title III,

§ 311(a)(1), Nov. 29, 1989, 103 Stat. 1411; Pub. L. 101–510, div. A, title XIII, § 1301(10), Nov. 5, 1990, 104 Stat. 1668; Pub. L. 102–190, div. A, title III, § 346(a), Dec. 5, 1991, 105 Stat. 1346; Pub. L. 102–484, div. A, title XIII, § 1352(b), Oct. 23, 1992, 106 Stat. 2559; Pub. L. 103–355, title II, § 2101(a)(5), (b), Oct. 13, 1994, 108 Stat. 3307, 3308; Pub. L. 104–106, div. D, title XLIII, § 4321(b)(9)(A), Feb. 10, 1996, 110 Stat. 672; Pub. L. 105–85, div. A, title VIII, § 808(a)(1), Nov. 18, 1997, 111 Stat. 1836; Pub. L. 111–350, § 5(b)(19)(C), (D), Jan. 4, 2011, 124 Stat. 3844; Pub. L. 112–81, div. A, title VIII, § 803(a), Dec. 31, 2011, 125 Stat. 1485; Pub. L. 113–66, div. A, title VIII, § 811(a), Dec. 26, 2013, 127 Stat. 806; Pub. L. 113–67, div. A, title VII, § 702(a)(2), Dec. 26, 2013, 127 Stat. 1189; Pub. L. 113–291, div. A, title VIII, § 857, Dec. 19, 2014, 128 Stat. 3460.

PRIOR PROVISIONS

A prior section 3744 was renumbered section 7274 of this title.

AMENDMENTS

2021—Pub. L. 116–283, § 1832(d)(1), transferred subsec. (e) of section 2324 of this title to this section, struck out subsec. (e) designation and heading “Specific Costs Not Allowable” at beginning, and redesignated pars. (1), (3), (4), and (2) as subsecs. (a) to (d), respectively.

Subsec. (a). Pub. L. 116–283, § 1832(d)(2)(A), (B), after redesignation of par. (1) of section 2324(e) of this title as subsec. (a) of this section, inserted heading and redesignated subpars. (A) to (Q) as pars. (1) to (17), respectively, including two subpars. (P) both redesignated par. (16).

Subsec. (a)(15). Pub. L. 116–283, § 1832(d)(2)(C), substituted “section 3750 of this title” for “subsection (k)”.

Subsec. (a)(17). Pub. L. 116–283, § 1832(d)(2)(D), substituted “section 3750(c) of this title” for “subsection (k)(2)”.

Subsec. (b). Pub. L. 116–283, § 1832(d)(3)(A), (B), after redesignation of par. (3) of section 2324(e) of this title as subsec. (b) of this section, inserted heading and redesignated subpars. (A) to (C) as pars. (1) to (3), respectively.

Subsec. (b)(1). Pub. L. 116–283, § 1832(d)(3)(A), (C), inserted heading, substituted “subsection (d)” for “paragraph (2)” and “subsections (a)(13) and (a)(14)” for “paragraphs (1)(M) and (1)(N)” in introductory provisions, and redesignated cls. (i) to (iii) of former section 2324(e)(3)(A) as subpars. (A) to (C), respectively.

Subsec. (b)(2). Pub. L. 116–283, § 1832(d)(3)(D), inserted heading, realigned margin, redesignated cls. (i) and (ii) of former section 2324(e)(3)(B) as subpars. (A) and (B), respectively, and, in subpar. (A), substituted “paragraph (1)” for “subparagraph (A)”.

Subsec. (b)(3). Pub. L. 116–283, § 1832(d)(3)(E), inserted heading, realigned margin, and substituted “paragraph (1)” for “subparagraph (A)”.

Subsec. (c). Pub. L. 116–283, § 1832(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, § 1832(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 subpars. (A) to (C) as pars. (1) to (3), respectively, and realigned margins.

Subsec. (d)(1). Pub. L. 116–283, § 1832(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, § 1832(d)(5)(D), inserted par. heading, substituted “paragraph (1)” for “subparagraph (A)” in introductory provisions, redesignated cls. (i) and (ii) of former section 2324(e)(2)(B) as subpars. (A) and (B), respectively, and inserted subpar. headings.

Subsec. (d)(3). Pub. L. 116–283, § 1832(d)(5)(E), inserted heading and substituted “Paragraph (1)” 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.

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. 3744, 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.

(Added and amended Pub. L. 116-283, div. A, title XVIII, §1832(a), (e), Jan. 1, 2021, 134 Stat. 4218, 4221.)

Editorial Notes**CODIFICATION**

The text of subsec. (f) of section 2324 of this title, which was transferred to this section and amended by Pub. L. 116-283, §1832(e), was based on Pub. L. 99-145, title IX, §911(a)(1), Nov. 8, 1985, 99 Stat. 683; Pub. L. 100-456, div. A, title VIII, §826(a), Sept. 29, 1988, 102 Stat. 1952; Pub. L. 100-463, title VIII, §8105(a), Oct. 1, 1988, 102 Stat. 2270-36; Pub. L. 100-526, title I, §106(a)(2), Oct. 24, 1988, 102 Stat. 2625; Pub. L. 102-484, div. A, title X, §1052(26)(A), Oct. 23, 1992, 106 Stat. 2500; Pub. L. 103-355, title II, §2101(a)(6), (c), Oct. 13, 1994, 108 Stat. 3307, 3308, as amended by Pub. L. 104-106, div. D, title XLIII, §4321(a)(5), Feb. 10, 1996, 110 Stat. 671.

Another section 1832(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, §1832(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, §1832(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, §1832(e)(1)(C), (3), designated third sentence of subsec. (a) as subsec. (b), inserted heading, and redesignated subpars. (A) to (Q) as pars. (1) to (17), respectively.

Subsec. (c). Pub. L. 116-283, §1832(e)(1)(D), (E), (4), redesignated pars. (2) to (4) of section 2324(f) of this title collectively as subsec. (c) of this section and individually as pars. (1) to (3), respectively, thereof, inserted subsec. and par. headings, and realigned margins.

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

For requirement to prescribe and periodically review regulations required by this section (formerly subsec. (f) of section 2324 of this title), see section 911(b) of Pub. L. 99-145, set out as a note under section 3744 of this title.