

**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.

**§ 3749. Burden of proof on contractor**

In a proceeding before the Armed Services Board of Contract Appeals, the United States Court of Federal Claims, or any other Federal court in which the reasonableness of indirect costs for which a contractor seeks reimbursement from the Department of Defense is in issue, the burden of proof shall be upon the contractor to establish that those costs are reasonable.

(Added and amended Pub. L. 116-283, div. A, title XVIII, §1832(a), (h), Jan. 1, 2021, 134 Stat. 4218, 4222.)

**Editorial Notes**

## CODIFICATION

The text of subsec. (j) of section 2324 of this title, which was transferred to this section and amended by Pub. L. 116-283, §1832(h), was based on Pub. L. 100-370, §1(f)(3)(A), July 19, 1988, 102 Stat. 846; Pub. L. 103-355, title II, §2101(a)(10), Oct. 13, 1994, 108 Stat. 3308.

## PRIOR PROVISIONS

A prior section 3749 was renumbered section 7279 of this title.

## AMENDMENTS

2021—Pub. L. 116-283, §1832(h), transferred subsec. (j) of section 2324 of this title to this section and struck out subsec. (j) designation and heading “Contractor To Have Burden of Proof” at beginning.

**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.

**§ 3750. Proceeding costs not allowable**

(a) DEFINITIONS.—In this section:

(1) COSTS.—The term “costs”, with respect to a proceeding—

(A) means all costs incurred by a contractor or subcontractor, or personal services contractor, whether before or after the commencement of any such proceeding; and

(B) includes—

- (i) administrative and clerical expenses;
- (ii) the cost of legal services, including legal services performed by an employee of the contractor or subcontractor, or personal services contractor;
- (iii) the cost of the services of accountants and consultants retained by the contractor or subcontractor, or personal services contractor; and
- (iv) the pay of directors, officers, and employees of the contractor or subcon-

tractor, or personal services contractor for time devoted by such directors, officers, and employees to such proceeding.

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

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

(b) IN GENERAL.—Except as otherwise provided in this section, costs incurred by a contractor or 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 or subcontractor, or personal services contractor employee submitting a complaint under section 4701 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 4701(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 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 subsection (b).

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

(3) In the case of any civil or administrative proceeding, the imposition of a monetary penalty or an order to take corrective action under section 4701 of this title by reason of the violation or failure referred to in subsection (b).

(4) A final decision—

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

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

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

by reason of the violation or failure referred to in subsection (b).

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

(d) COSTS ALLOWED BY SETTLEMENT AGREEMENT IN PROCEEDING COMMENCED BY UNITED STATES.—In the case of a proceeding referred to in subsection (b) that is commenced by the United States and is resolved by consent or compromise pursuant to an agreement entered into by a contractor or subcontractor, or personal services contractor and the United States, the costs incurred by the contractor or subcontractor, or personal services contractor in con-

nection with such proceeding that are otherwise not allowable as reimbursable costs under such subsection may be allowed to the extent specifically provided in such agreement.

(e) COSTS SPECIFICALLY AUTHORIZED IN PROCEEDING COMMENCED BY STATE.—In the case of a proceeding referred to in subsection (b) that is commenced by a State, the head of the agency or Secretary of the military department concerned that awarded the covered contract, subcontract, or personal services contract involved in the proceeding may allow the costs incurred by the contractor or subcontractor, or personal services contractor in connection with such proceeding as reimbursable costs if the agency head or Secretary 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 agency or military department.

(f) OTHER ALLOWABLE COSTS.—

(1) IN GENERAL.—Except as provided in paragraph (3), costs incurred by a contractor or subcontractor, or personal services contractor in connection with a criminal, civil, or administrative proceeding commenced by the United States 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 such 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 such 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—

- (i) the complexity of procurement litigation;
- (ii) generally accepted principles governing the award of legal fees in civil actions involving the United States as a party; and
- (iii) such 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 or subcontractor, or personal services contractor costs otherwise allowable as reimbursable costs under this subsection are not allowable if—

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

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

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

4222; Pub. L. 117–81, div. A, title XVII, §1701(b)(11), Dec. 27, 2021, 135 Stat. 2134.)

### Editorial Notes

#### CODIFICATION

The text of subsec. (k) of section 2324 of this title, which was transferred to this section and amended by Pub. L. 116–283, §1832(i), was based on Pub. L. 100–700, §8(b), Nov. 19, 1988, 102 Stat. 4636; Pub. L. 101–189, div. A, title VIII, §853(a)(1)(A), (b)(3), Nov. 29, 1989, 103 Stat. 1518; Pub. L. 103–355, title II, §2101(a)(11), Oct. 13, 1994, 108 Stat. 3308; Pub. L. 112–239, div. A, title VIII, §827(g), Jan. 2, 2013, 126 Stat. 1836; Pub. L. 114–261, §1(b)(1), Dec. 14, 2016, 130 Stat. 1362.

#### PRIOR PROVISIONS

Prior sections 3750 to 3756 were renumbered sections 7280 to 7286 of this title, respectively.

#### AMENDMENTS

2021—Subsec. (a). Pub. L. 116–283, §1832(i)(1)(A), (B), redesignated par. (6) of section 2324(k) of this title as subsec. (a) of this section, inserted heading, substituted “In this section” for “In this subsection” in introductory provisions, and redesignated subpars. (B), (C), and (A) as pars. (1) to (3), respectively.

Subsec. (a)(1). Pub. L. 116–283, §1832(i)(1)(C), inserted heading and redesignated cls. (i) and (ii) and its subcls. (I) to (IV) as subpars. (A) and (B) and cls. (i) to (iv), respectively.

Subsec. (a)(2), (3). Pub. L. 116–283, §1832(i)(1)(D), (E), inserted heading.

Subsec. (b). Pub. L. 116–283, §1832(i)(2), (3), redesignated par. (1) of subsec. (k) of section 2324 of this title as subsec. (b) of this section, inserted heading, substituted “this section” for “this subsection” and “section 4701” for “section 2409”, redesignated inline subpars. (A) and (B) as pars. (1) and (2), respectively, and reformatted text, and substituted “in section 4701(a)(1)” for “in subparagraphs (A) through (C) of section 2409(a)(1)” in par. (1) and “subsection (c)” for “paragraph (2)” in par. (2).

Subsec. (c). Pub. L. 116–283, §1832(i)(2), (4)(A)–(D), redesignated par. (2) of section 2324(k) of this title as subsec. (c) of this section, inserted heading, substituted “subsection (b)(2)” for “paragraph (1)(B)” in introductory provisions, and “subsection (b)” for “paragraph (1)” wherever appearing, and redesignated subpars. (A) to (E) as pars. (1) to (5), respectively.

Subsec. (c)(3). Pub. L. 116–283, §1832(i)(4)(E), substituted “section 4701” for “section 2409”.

Subsec. (c)(4). Pub. L. 116–283, §1832(i)(4)(F), redesignated cls. (i) to (iii) as subpars. (A) to (C), respectively.

Subsec. (c)(5). Pub. L. 116–283, §1832(i)(4)(G), substituted “paragraphs (1), (2), (3), or (4)” for “subparagraph (A), (B), (C), or (D)”.

Subsec. (d). Pub. L. 116–283, §1832(i)(2), (5), redesignated par. (3) of section 2324(k) of this title as subsec. (d) of this section, inserted heading, and substituted “subsection (b)” for “paragraph (1)” and “such subsection” for “such paragraph”.

Subsec. (e). Pub. L. 116–283, §1832(i)(2), (6), redesignated par. (4) of section 2324(k) of this title as subsec. (e) of this section, inserted heading, and substituted “subsection (b)” for “paragraph (1)”, “(1)” for “(A)”, and “(2)” for “(B)”.

Subsec. (f). Pub. L. 116–283, §1832(i)(2), (7)(A), (B), redesignated par. (5) of section 2324(k) of this title as subsec. (f) of this section, inserted heading, and redesignated subpars. (A) to (C) as pars. (1) to (3), respectively, and realigned margins.

Subsec. (f)(1). Pub. L. 116–283, §1832(i)(7)(A), (C), inserted heading and substituted “paragraph (3)” for “subparagraph (C)”, “subsection (b)” for “paragraph (1)”, and “paragraph (2)” for “subparagraph (B)”.

Subsec. (f)(2). Pub. L. 116–283, §1832(i)(7)(D)(i), (ii), inserted heading and redesignated cls. (i) and (ii) as subpars. (A) and (B), respectively.

Subsec. (f)(2)(A). Pub. L. 116–283, § 1832(i)(7)(D)(i), (iii), inserted heading and substituted “paragraph (1)” for “subparagraph (A)”.

Subsec. (f)(2)(B). Pub. L. 116–283, § 1832(i)(7)(D)(iv), (E), inserted heading, substituted “subparagraph (A)” for “clause (i)”, inserted dash after “consideration of”, and reorganized remainder of existing text into designated cls. (i) to (iii).

Subsec. (f)(3). Pub. L. 116–283, § 1832(i)(7)(F), as amended by Pub. L. 117–81, § 1701(b)(11), inserted heading, substituted “paragraph (1)” for “subparagraph (A)” and “under this subsection” for “under this paragraph”, inserted dash after “not allowable if”, redesignated inline cls. (i) and (ii) as subpars. (A) and (B), respectively, and reformatted text, and, in subpar. (B), substituted “subsection (b)” for “paragraph (1)”.

### Statutory Notes and Related Subsidiaries

#### EFFECTIVE DATE OF 2021 AMENDMENT

Amendment by Pub. L. 117–81 applicable as if included in the enactment of title XVIII of Pub. L. 116–283 as enacted, see section 1701(a)(2) of Pub. L. 117–81, set out in a note preceding section 3001 of this title and Effective Date note below.

#### 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. 100–700, § 8(d), Nov. 19, 1988, 102 Stat. 4638, provided that: “The regulations necessary for the implementation of section 306(e) of the Federal Property and Administrative Services Act of 1949 [now 41 U.S.C. 4304] (as added by subsection (a)) and section 2324(k)(5) of title 10, United States Code [see 10 U.S.C. 3750(f)] (as added by subsection (b))—

“(1) shall be prescribed not later than 120 days after the date of the enactment of this Act [Nov. 19, 1988]; and

“(2) shall apply to contracts entered into more than 30 days after the date on which such regulations are issued.”

### SUBCHAPTER II—OTHER ALLOWABLE COST PROVISIONS

Sec.	
3761.	Restructuring costs.
3762.	Independent research and development costs: allowable costs.
3763.	Bid and proposal costs: allowable costs.
[3764, 3765.]	Repealed.]

### Editorial Notes

#### AMENDMENTS

2021—Pub. L. 117–81, div. A, title XVII, § 1701(f)(5), (h)(2), Dec. 27, 2021, 135 Stat. 2139, 2140, amended subchapter heading generally and struck out items 3764 “Excessive pass-through charges” and 3765 “Institutions of higher education: reimbursement of indirect costs under Department of Defense contracts”. Prior to amendment, subchapter heading read as follows: “SUBCHAPTER 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 award-