

§ 3841. Examination of records of contractor

(a) **RECORDS DEFINED.**—In this section, the term “records” includes books, documents, accounting procedures and practices, and other data, regardless of type and regardless of whether such items are in written form, in the form of computer data, or in any other form.

(b) AGENCY AUTHORITY.—

(1) The head of an agency, acting through an authorized representative, is authorized to inspect the plant and audit the records of—

(A) a contractor performing a cost-reimbursement, incentive, time-and-materials, labor-hour, or price-redeterminable contract, or any combination of such contracts, made by that agency under a chapter 137 legacy provision; and

(B) a subcontractor performing any cost-reimbursement, incentive, time-and-materials, labor-hour, or price-redeterminable subcontract or any combination of such subcontracts under a contract referred to in subparagraph (A).

(2) The head of an agency, acting through an authorized representative, is authorized, for the purpose of evaluating the accuracy, completeness, and currency of certified cost or pricing data required to be submitted pursuant to chapter 271 of this title with respect to a contract or subcontract, to examine all records of the contractor or subcontractor related to—

(A) the proposal for the contract or subcontract;

(B) the discussions conducted on the proposal;

(C) pricing of the contract or subcontract; or

(D) performance of the contract or subcontract.

(c) DCAA SUBPOENA AUTHORITY.—

(1) **AUTHORITY TO REQUIRE THE PRODUCTION OF RECORDS.**—The Director of the Defense Contract Audit Agency (or any successor agency) may require by subpoena the production of any records of a contractor that the Secretary of Defense is authorized to audit or examine under subsection (b).

(2) **ENFORCEMENT OF SUBPOENA.**—Any such subpoena, in the case of contumacy or refusal to obey, shall be enforceable by order of an appropriate United States district court.

(3) **AUTHORITY NOT DELEGABLE.**—The authority provided by paragraph (1) may not be re-delegated.

(d) COMPTROLLER GENERAL AUTHORITY.—

(1) **IN GENERAL.**—Except as provided in paragraph (2), each contract awarded after using procedures other than sealed bid procedures shall provide that the Comptroller General and his representatives are authorized to examine any records of the contractor, or any of its subcontractors, that directly pertain to, and involve transactions relating to, the contract or subcontract and to interview any current employee regarding such transactions.

(2) **EXCEPTION FOR FOREIGN CONTRACTOR OR SUBCONTRACTOR.**—Paragraph (1) does not apply to a contract or subcontract with a foreign

contractor or foreign subcontractor if the head of the agency concerned determines, with the concurrence of the Comptroller General or his designee, that the application of that paragraph to the contract or subcontract would not be in the public interest. However, the concurrence of the Comptroller General or his designee is not required—

(A) where the contractor or subcontractor is a foreign government or agency thereof or is precluded by the laws of the country involved from making its records available for examination; and

(B) where the head of the agency determines, after taking into account the price and availability of the property and services from United States sources, that the public interest would be best served by not applying paragraph (1).

(3) **ADDITIONAL RECORDS NOT REQUIRED.**—Paragraph (1) may not be construed to require a contractor or subcontractor to create or maintain any record that the contractor or subcontractor does not maintain in the ordinary course of business or pursuant to another provision of law.

(e) **LIMITATION ON AUDITS RELATING TO INDIRECT COSTS.**—The head of an agency may not perform an audit of indirect costs under a contract, subcontract, or modification before or after entering into the contract, subcontract, or modification in any case in which the contracting officer determines that the objectives of the audit can reasonably be met by accepting the results of an audit that was conducted by any other department or agency of the Federal Government within one year preceding the date of the contracting officer's determination.

(f) **LIMITATION.**—The authority of the head of an agency under subsection (b), and the authority of the Comptroller General under subsection (d), with respect to a contract or subcontract shall expire three years after final payment under such contract or subcontract.

(g) **INAPPLICABILITY TO CERTAIN CONTRACTS.**—This section does not apply to the following contracts:

(1) Contracts for utility services at rates not exceeding those established to apply uniformly to the public, plus any applicable reasonable connection charge.

(2) A contract or subcontract that is for an amount not greater than the simplified acquisition threshold.

(h) **FORMS OF ORIGINAL RECORD STORAGE.**—Nothing in this section shall be construed to preclude a contractor from duplicating or storing original records in electronic form.

(i) **USE OF IMAGES OF ORIGINAL RECORDS.**—The head of an agency shall not require a contractor or subcontractor to provide original records in an audit carried out pursuant to this section if the contractor or subcontractor provides photographic or electronic images of the original records and meets the following requirements:

(1) The contractor or subcontractor has established procedures to ensure that the imaging process preserves the integrity, reliability, and security of the original records.

(2) The contractor or subcontractor maintains an effective indexing system to permit

timely and convenient access to the imaged records.

(3) The contractor or subcontractor retains the original records for a minimum of one year after imaging to permit periodic validation of the imaging systems.

(Added and amended Pub. L. 116-283, div. A, title XVIII, § 1835(a), (b), Jan. 1, 2021, 134 Stat. 4239.)

Editorial Notes

CODIFICATION

The text of subsecs. (a), (e), (g), (h), and (i) of section 2313 of this title, which were transferred to this section, redesignated as subsecs. (b), (f), (h), (i), and (j), respectively, and amended by Pub. L. 116-283, § 1835(b)(1)–(3), (6), was based on Pub. L. 103-355, title II, § 2201(a)(1), Oct. 13, 1994, 108 Stat. 3316, which amended section 2313 generally.

The text of subsec. (b) of section 2313 of this title, which was transferred to this section, redesignated as subsec. (c), and amended by Pub. L. 116-283, § 1835(b)(1), (4), was based on Pub. L. 103-355, title II, § 2201(a)(1), Oct. 13, 1994, 108 Stat. 3316; Pub. L. 104-106, div. A, title XV, § 1502(a)(1), Feb. 10, 1996, 110 Stat. 502; Pub. L. 106-65, div. A, title X, § 1032(a)(2), Oct. 5, 1999, 113 Stat. 751.

The text of subsec. (c) of section 2313 of this title, which was transferred to this section, redesignated as subsec. (d), and amended by Pub. L. 116-283, § 1835(b)(1), (5), was based on Pub. L. 103-355, title II, § 2201(a)(1), Oct. 13, 1994, 108 Stat. 3317; Pub. L. 110-417, [div. A], title VIII, § 871(b), Oct. 14, 2008, 122 Stat. 4555.

The text of subsec. (d) of section 2313 of this title, which was transferred to this section and redesignated as subsec. (e) by Pub. L. 116-283, § 1835(b)(1), was based on Pub. L. 104-201, div. A, title VIII, § 808(a), Sept. 23, 1996, 110 Stat. 2607, which amended subsec. (d) generally.

The text of subsec. (f) of section 2313 of this title, which was transferred to this section and redesignated as subsec. (e) by Pub. L. 116-283, § 1835(b)(1), was based on Pub. L. 103-355, title II, § 2201(a)(1), title IV, § 4102(c), Oct. 13, 1994, 108 Stat. 3317, 3340.

PRIOR PROVISIONS

A prior section 3841, added Pub. L. 85-861, § 1(94), Sept. 2, 1958, 72 Stat. 1483, related to separation or transfer to retired reserve of reserve nurses and medical specialists at age 50 if in a reserve grade below major, prior to repeal by Pub. L. 86-559, § 1(22), June 30, 1960, 74 Stat. 271.

AMENDMENTS

2021—Subsec. (a). Pub. L. 116-283, § 1835(b)(2), redesignated subsec. (i) of section 2313 of this title as subsec. (a) of this section.

Subsec. (b). Pub. L. 116-283, § 1835(b)(1), (3), redesignated subsec. (a) of section 2313 of this title as subsec. (b) of this section, realigned margins of pars. (1) and (2), and substituted “made by that agency under a chapter 137 legacy provision” for “made by that agency under this chapter” in par. (1)(A) and “chapter 271” for “section 2306a” in par. (2).

Subsec. (c). Pub. L. 116-283, § 1835(b)(1), (4), redesignated subsec. (b) of section 2313 of this title as subsec. (c) of this section, inserted heading and substituted “subsection (b)” for “subsection (a)” in par. (1), and inserted headings and realigned margins of pars. (2) and (3).

Subsec. (d). Pub. L. 116-283, § 1835(b)(1), (5), redesignated subsec. (c) of section 2313 of this title as subsec. (d) of this section and inserted headings and realigned margins of pars. (1) to (3).

Subsec. (e). Pub. L. 116-283, § 1835(b)(1), redesignated subsec. (d) of section 2313 of this title as subsec. (e) of this section.

Subsec. (f). Pub. L. 116-283, § 1835(b)(1), (6), redesignated subsec. (e) of section 2313 of this title as subsec.

(f) of this section and substituted “subsection (b)” for “subsection (a)” and “subsection (d)” for “subsection (c)”.

Subsecs. (g) to (i). Pub. L. 116-283, § 1835(b)(1), redesignated subsecs. (f) to (h) of section 2313 of this title as subsecs. (g) to (i), respectively, of this section.

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.

EXCEPTION FROM RECORDS EXAMINATION REQUIREMENT

Requirements under subsecs. (b)(2)(A)–(C) and (c) of this section (former subsecs. (a)(2)(A)–(C) and (b) of section 2313 of this title) not applicable to certain contracts valued at less than \$7,500,000 awarded to small business or nontraditional defense contractors, with certain exceptions, see section 873(b) of Pub. L. 114-92, set out in a Pilot Program for Streamlining Awards for Innovative Technology Projects note under section 3702 of this title.

DEPARTMENT OF DEFENSE ACCESS TO, USE OF, AND SAFEGUARDS AND PROTECTIONS FOR CONTRACTOR INTERNAL AUDIT REPORTS

Pub. L. 112-239, div. A, title VIII, § 832, Jan. 2, 2013, 126 Stat. 1844, provided that:

“(a) REVISED GUIDANCE REQUIRED.—Not later than 180 days after the date of the enactment of this Act [Jan. 2, 2013], the Director of the Defense Contract Audit Agency shall revise guidance on access to defense contractor internal audit reports (including the Contract Audit Manual) to incorporate the requirements of this section.

“(b) DOCUMENTATION REQUIREMENTS.—The revised guidance shall ensure that requests for access to defense contractor internal audit reports are appropriately documented. The required documentation shall include, at a minimum, the following:

“(1) Written determination that access to such reports is necessary to complete required evaluations of contractor business systems.

“(2) A copy of any request from the Defense Contract Audit Agency to a contractor for access to such reports.

“(3) A record of response received from the contractor, including the contractor’s rationale or justification if access to requested reports was not granted.

“(b) [sic] SAFEGUARDS AND PROTECTIONS.—The revised guidance shall include appropriate safeguards and protections to ensure that contractor internal audit reports cannot be used by the Defense Contract Audit Agency for any purpose other than evaluating and testing the efficacy of contractor internal controls and the reliability of associated contractor business systems.

“(c) RISK-BASED AUDITING.—A determination by the Defense Contract Audit Agency that a contractor has a sound system of internal controls shall provide the basis for increased reliance on contractor business systems or a reduced level of testing with regard to specific audits, as appropriate. Internal audit reports provided by a contractor pursuant to this section may be considered in determining whether or not a contractor has a sound system of internal controls, but shall not be the sole basis for such a determination.

“(d) COMPTROLLER GENERAL REVIEW.—Not later than one year after the date of the enactment of this Act, the Comptroller General of the United States shall initiate a review of the documentation required by subsection (a). Not later than 90 days after completion of the review, the Comptroller General 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 results of the review, with findings and recommendations for improving the audit processes of the Defense Contract Audit Agency.”

Executive Documents

EXEMPTION OF FUNCTIONS

Functions with respect to purchases authorized to be made outside limits of United States or District of Columbia under Foreign Assistance Act of 1961, as amended, as exempt, see Ex. Ord. No. 11223, May 12, 1965, 30 F.R. 6635, set out as a note under section 2393 of Title 22, Foreign Relations and Intercourse.

FOREIGN CONTRACTORS

Secretaries of Defense, Army, Navy, or Air Force, or their designees, to determine, prior to exercising authority provided in amendment of this section by Pub. L. 89-607 to exempt certain contracts with foreign contractors from requirement of an examination-of-records clause, that all reasonable efforts have been made to include such examination-of-records clause, as required by par. (11) of Part I of Ex. Ord. No. 10789, and that alternate sources of supply are not reasonably available, see par. (11) of Part I of Ex. Ord. No. 10789, Nov. 14, 1958, 23 F.R. 8897, as amended, set out as a note under section 1431 of Title 50, War and National Defense.

§ 3842. Performance of incurred cost audits

(a) COMPLIANCE WITH STANDARDS OF RISK AND MATERIALITY.—Not later than October 1, 2020, the Secretary of Defense shall comply with commercially accepted standards of risk and materiality in the performance of each incurred cost audit of costs associated with a contract of the Department of Defense.

(b) CONDITIONS FOR THE USE OF QUALIFIED AUDITORS TO PERFORM INCURRED COST AUDITS.—(1) To support the need of the Department of Defense for timely and effective incurred cost audits, and to ensure that the Defense Contract Audit Agency is able to allocate resources to higher-risk and more complex audits, the Secretary of Defense shall use qualified private auditors to perform a sufficient number of incurred cost audits of contracts of the Department of Defense to—

(A) eliminate, by October 1, 2020, any backlog of incurred cost audits of the Defense Contract Audit Agency;

(B) ensure that incurred cost audits are completed not later than one year after the date of receipt of a qualified incurred cost submission;

(C) maintain an appropriate mix of Government and private sector capacity to meet the current and future needs of the Department of Defense for the performance of incurred cost audits;

(D) ensure that qualified private auditors perform incurred cost audits on an ongoing basis to improve the efficiency and effectiveness of the performance of incurred cost audits; and

(E) limit multiyear auditing to ensure that multiyear auditing is conducted only—

(i) to address outstanding incurred cost audits for which a qualified incurred cost submission was submitted to the Defense Contract Audit Agency more than 12 months before the date of the enactment of this section; or

(ii) when the contractor being audited submits a written request, including a justification for the use of multiyear auditing, to the Under Secretary of Defense (Comptroller).

(2) The Secretary of Defense shall consult with Federal agencies that have awarded contracts or task orders to qualified private auditors to ensure that the Department of Defense is using, as appropriate, best practices relating to contracting with qualified private auditors.

(3) The Secretary of Defense shall ensure that a qualified private auditor performing an incurred cost audit under this section—

(A) has no conflict of interest in performing such an audit, as defined by generally accepted government auditing standards;

(B) possesses the necessary independence to perform such an audit, as defined by generally accepted government auditing standards;

(C) signs a nondisclosure agreement, as appropriate, to protect proprietary or nonpublic data;

(D) accesses and uses proprietary or nonpublic data furnished to the qualified private auditor only for the purposes stated in the contract;

(E) takes all reasonable steps to protect proprietary and nonpublic data furnished during the audit; and

(F) does not use proprietary or nonpublic data provided to the qualified private auditor under the authority of this section to compete for Government or nongovernment contracts.

(c) PROCEDURES FOR THE USE OF QUALIFIED PRIVATE AUDITORS.—(1) Not later than October 1, 2018, the Secretary of Defense shall submit to the congressional defense committees a plan to implement the requirements of subsection (b). Such plan shall include, at a minimum—

(A) a description of the incurred cost audits that the Secretary determines are appropriate to be conducted by qualified private auditors, including the approximate number and dollar value of such incurred cost audits;

(B) an estimate of the number and dollar value of incurred cost audits to be conducted by qualified private auditors for each of the fiscal years 2019 through 2025 necessary to meet the requirements of subsection (b); and

(C) all other elements of an acquisition plan as required by the Federal Acquisition Regulation.

(2) Not later than April 1, 2019, the Secretary of Defense or a Federal department or agency authorized by the Secretary shall award a contract or issue a task order under an existing contract to two or more qualified private auditors to perform incurred cost audits of costs associated with contracts of the Department of Defense. The Defense Contract Management Agency or a contract administration office of a military department shall use a contract or a task order awarded or issued pursuant to this paragraph for the performance of an incurred cost audit, if doing so will assist the Secretary in meeting the requirements in subsection (b).

(3) To improve the quality of incurred cost audits and reduce duplication of performance of such audits, the Secretary of Defense may provide a qualified private auditor with informa-