

(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 executive agency concerned determines, with the concurrence of the Comptroller General or the designee of the Comptroller General, that applying paragraph (1) to the contract or subcontract would not be in the public interest. The concurrence of the Comptroller General or the designee is not required when—

(A) the contractor or subcontractor is—

- (i) the government of a foreign country or an agency of that government; or
- (ii) precluded by the laws of the country involved from making its records available for examination; and

(B) the executive 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) does not require a contractor or subcontractor to create or maintain a record that the contractor or subcontractor does not maintain in the ordinary course of business or pursuant to another law.

(e) LIMITATION ON AUDITS RELATING TO INDIRECT COSTS.—An executive 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 when 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 another department or agency of the Federal Government within one year preceding the date of the contracting officer's determination.

(f) EXPIRATION OF AUTHORITY.—The authority of an executive agency under subsection (b) and the authority of the Comptroller General under subsection (d) shall expire 3 years after final payment under the 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 not greater than the simplified acquisition threshold.

(h) ELECTRONIC FORM ALLOWED.—This section does not preclude a contractor from duplicating or storing original records in electronic form.

(i) ORIGINAL RECORDS NOT REQUIRED.—An executive 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) PRESERVATION PROCEDURES ESTABLISHED.—The contractor or subcontractor has established procedures to ensure that the im-

aging process preserves the integrity, reliability, and security of the original records.

(2) INDEXING SYSTEM MAINTAINED.—The contractor or subcontractor maintains an effective indexing system to permit timely and convenient access to the imaged records.

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

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3797.)

HISTORICAL AND REVISION NOTES

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
4706(a) .....	41:254d(i).	June 30, 1949, ch. 288, title III, §304(a)(1), (b), (g)-(i), as added Pub. L. 103-355, title II, §2251(a), Oct. 13, 1994, 108 Stat. 3318, 3320.
4706(b)(1) ....	41:254d(a)(1).	June 30, 1949, ch. 288, title III, §304(a)(2), as added Pub. L. 103-355, title II, §2251(a), Oct. 13, 1994, 108 Stat. 3318; Pub. L. 104-106, title XLIII, §4321(e)(5), Feb. 10, 1996, 110 Stat. 675.
4706(b)(2) ....	41:254d(a)(2).	
4706(c) .....	41:254d(b).	June 30, 1949, ch. 288, title III, §304(c), as added Pub. L. 103-355, title II, §2251(a), Oct. 13, 1994, 108 Stat. 3319; Pub. L. 110-417, title VIII, §871(a), Oct. 14, 2008, 122 Stat. 4555.
4706(d) .....	41:254d(c).	
4706(e) .....	41:254d(d).	June 30, 1949, ch. 288, title III, §304(d), as added Pub. L. 103-355, title II, §2251(a), Oct. 13, 1994, 108 Stat. 3319; Pub. L. 104-201, title VIII, §808(b), Sept. 23, 1996, 110 Stat. 2607.
4706(f) .....	41:254d(e).	June 30, 1949, ch. 288, title III, §304(f), as added and amended Pub. L. 103-355, title II, §2251(a), title IV, §4103(d), Oct. 13, 1994, 108 Stat. 3320, 3341.
4706(g) .....	41:254d(f).	
4706(h) .....	41:254d(g).	
4706(i) .....	41:254d(h).	

In subsection (c)(4), the words “Committee on Oversight and Government Reform” are substituted for “Committee on Government Operations” on authority of section 1(a)(6) of Public Law 104-14 (2 U.S.C. note prec. 21), Rule X(1)(h) of the Rules of the House of Representatives, adopted by House Resolution No. 5 (106th Congress, January 6, 1999), and Rule X(1)(m) of the Rules of the House of Representatives, adopted by House Resolution No. 6 (110th Congress, January 5, 2007). The words “Committee on Homeland Security and Governmental Affairs” are substituted for “Committee on Governmental Affairs” on authority of Senate Resolution No. 445 (108th Congress, October 9, 2004).

REFERENCES IN TEXT

The Inspector General Act of 1978, referred to in subsec. (c)(1), is Pub. L. 95-452, Oct. 12, 1978, 92 Stat. 1101, which is set out in the Appendix to Title 5, Government Organization and Employees.

§ 4707. Remission of liquidated damages

When a contract made on behalf of the Federal Government by the head of a Federal agency, or by an authorized officer of the agency, includes a provision for liquidated damages for delay, the Secretary of the Treasury on recommendation of the head of the agency may remit any part of the damages as the Secretary of the Treasury believes is just and equitable.

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3799.)

HISTORICAL AND REVISION NOTES

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
4707 .....	41:256a.	Sept. 5, 1950, ch. 849, §10(a), 64 Stat. 591; Pub. L. 104-316, title II, §202(u), Oct. 19, 1996, 110 Stat. 3845.

**§ 4708. Payment of reimbursable indirect costs in cost-type research and development contracts with educational institutions**

A cost-type research and development contract (including a grant) with a university, college, or other educational institution may provide for payment of reimbursable indirect costs on the basis of predetermined fixed-percentage rates applied to the total of the reimbursable direct costs incurred or to an element of the total of the reimbursable direct costs incurred.

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3799.)

HISTORICAL AND REVISION NOTES

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
4708 .....	41:254a.	Pub. L. 87-638, Sept. 5, 1962, 76 Stat. 437.

The words “On and after September 5, 1962” are omitted as obsolete.

**§ 4709. Implementation of electronic commerce capability**

(a) **ROLE OF HEAD OF EXECUTIVE AGENCY.**—The head of each executive agency shall implement the electronic commerce capability required by section 2301 of this title. In implementing the capability, the head of an executive agency shall consult with the Administrator.

(b) **PROGRAM MANAGER.**—The head of each executive agency shall designate a program manager to implement the electronic commerce capability for the agency. The program manager reports directly to an official at a level not lower than the senior procurement executive designated for the agency under section 1702(c) of this title.

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3800.)

HISTORICAL AND REVISION NOTES

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
4709 .....	41:252c.	June 30, 1949, ch. 288, title III, §302C, as added Pub. L. 103-355, title IX, §9003, Oct. 13, 1994, 108 Stat. 3403; Pub. L. 105-85, title VIII, §850(f)(4)(A), Nov. 18, 1997, 111 Stat. 1850.

**§ 4710. Limitations on tiering of subcontractors**

(a) **DEFINITION.**—In this section, the term “executive agency” has the same meaning given in section 133 of this title.

(b) **REGULATIONS.**—For executive agencies other than the Department of Defense, the Federal Acquisition Regulation shall—

- (1) require contractors to minimize the excessive use of subcontractors, or of tiers of subcontractors, that add no or negligible value; and
- (2) ensure that neither a contractor nor a subcontractor receives indirect costs or profit

on work performed by a lower-tier subcontractor to which the higher-tier contractor or subcontractor adds no or negligible value (but not to limit charges for indirect costs and profit based on the direct costs of managing lower-tier subcontractors).

(c) **COVERED CONTRACTS.**—This section applies to any cost-reimbursement type contract or task or delivery order in an amount greater than the simplified acquisition threshold (as defined by section 134 of this title).

(d) **RULE OF CONSTRUCTION.**—Nothing in this section shall be construed as limiting the ability of the Department of Defense to implement more restrictive limitations on the tiering of subcontractors.

(e) **APPLICABILITY.**—The Department of Defense shall continue to be subject to guidance on limitations on tiering of subcontractors issued by the Department of Defense pursuant to section 852 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Public Law 109-364, 10 U.S.C. 2324 note).

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3800.)

HISTORICAL AND REVISION NOTES

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
4710 .....	41:254b note.	Pub. L. 110-417, [div. A], title VIII, §866, Oct. 14, 2008, 122 Stat. 4551.

In subsection (b), the words “Not later than one year after the date of the enactment of this Act” are omitted because of section 6(f) of the bill. The word “shall” is substituted for the words “shall be amended” to reflect the permanence of the provision.

**§ 4711. Linking of award and incentive fees to acquisition outcomes**

(a) **DEFINITION.**—In this section, the term “executive agency” has the same meaning given in section 133 of this title.

(b) **GUIDANCE FOR EXECUTIVE AGENCIES ON LINKING OF AWARD AND INCENTIVE FEES TO ACQUISITION OUTCOMES.**—The Federal Acquisition Regulation shall provide executive agencies other than the Department of Defense with instructions, including definitions, on the appropriate use of award and incentive fees in Federal acquisition programs.

(c) **ELEMENTS.**—The regulations under subsection (b) shall—

- (1) ensure that all new contracts using award fees link the fees to acquisition outcomes (which shall be defined in terms of program cost, schedule, and performance);
- (2) establish standards for identifying the appropriate level of officials authorized to approve the use of award and incentive fees in new contracts;
- (3) provide guidance on the circumstances in which contractor performance may be judged to be “excellent” or “superior” and the percentage of the available award fee which contractors should be paid for the performance;
- (4) establish standards for determining the percentage of the available award fee, if any, which contractors should be paid for performance that is judged to be “acceptable”, “average”, “expected”, “good”, or “satisfactory”;