

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 item, as defined in section 103 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 awarded for or on behalf of the Department of Defense on or after May 1, 2007.”

[Pub. L. 115-232, div. A, title VIII, § 836(f)(5), (h), Aug. 13, 2018, 132 Stat. 1871, 1874, provided that, effective Jan. 1, 2020, subject to a savings provision, section 852(b)(2)(A)(ii) of Pub. L. 109-364, set out above, is amended by striking “a commercial item, as defined in section 103 of title 41” and inserting “a commercial product or a commercial service, as defined in sections 103 and 103a, respectively, of title 41”.]

PAYMENT OF RESTRUCTURING COSTS UNDER DEFENSE CONTRACTS

Pub. L. 103-337, div. A, title VIII, § 818, Oct. 5, 1994, 108 Stat. 2821, as amended by Pub. L. 105-85, div. A, title VIII, § 804(d), Nov. 18, 1997, 111 Stat. 1834, which related to regulations concerning allowability of restructuring costs associated with business combinations under defense contracts, was repealed by Pub. L. 115-232, div. A, title VIII, § 812(b)(20), Aug. 13, 2018, 132 Stat. 1848.

REIMBURSEMENT OF INDIRECT COSTS OF INSTITUTIONS OF HIGHER EDUCATION UNDER DEPARTMENT OF DEFENSE CONTRACTS

Pub. L. 103-160, div. A, title VIII, § 841, Nov. 30, 1993, 107 Stat. 1719, as amended by Pub. L. 105-244, title I, § 102(a)(2)(C), Oct. 7, 1998, 112 Stat. 1617, provided that:

“(a) PROHIBITION.—The Secretary of Defense may not by regulation place a limitation on the amount that the Department of Defense may reimburse an institution of higher education for allowable indirect costs incurred by the institution for work performed for the Department of Defense under a Department of Defense contract unless that same limitation is applied uni-

formly to all other organizations performing similar work for the Department of Defense under Department of Defense contracts.

“(b) WAIVER.—The Secretary of Defense may waive the application of the prohibition in subsection (a) in the case of a particular institution of higher education if the governing body of the institution requests the waiver in order to simplify the overall management by that institution of cost reimbursements by the Department of Defense for contracts awarded by the Department to the institution.

“(c) DEFINITIONS.—In this section:

“(1) The term ‘allowable indirect costs’ means costs that are generally considered allowable as indirect costs under regulations that establish the cost reimbursement principles applicable to an institution of higher education for purposes of Department of Defense contracts.

“(2) The term ‘institution of higher education’ has the meaning given such term in section 101 of the Higher Education Act of 1965 [20 U.S.C. 1001].”

ASSESSMENT OF REGULATIONS RELATING TO ALLOWABILITY OF COSTS TO PROMOTE EXPORT OF DEFENSE PRODUCTS; REPORT TO CONGRESS

Pub. L. 100-456, div. A, title VIII, § 826(c), Sept. 29, 1988, 102 Stat. 2022, as amended by Pub. L. 100-526, title I, § 106(a)(1)(A), Oct. 24, 1988, 102 Stat. 2625, directed Comptroller General of United States and Inspector General of Department of Defense, not later than 2 years after Sept. 29, 1988, to submit to Congress a report including an assessment of whether the regulations required by subsec. (f)(5) of this section provide the appropriate incentives to stimulate exports by the United States defense industry and provide cost savings to the United States and whether such regulations provide appropriate criteria to ensure that costs allowed are reasonably likely to provide future cost savings to the United States.

AIR TRAVEL EXPENSES OF DEFENSE CONTRACTOR PERSONNEL

Pub. L. 100-456, div. A, title VIII, § 833, Sept. 29, 1988, 102 Stat. 2024, as amended by Pub. L. 101-189, div. A, title VIII, § 853(a)(2), Nov. 29, 1989, 103 Stat. 1518, directed the Administrator of General Services to enter into negotiations with commercial air carriers for agreements that would permit personnel of contractors who were traveling solely in the performance of covered contracts to be transported by such carriers at the same discount rates as such carriers charged for travel by Federal Government employees traveling at Government expense, directed the Secretary of Defense, not later than 120 days after the first such agreement would go into effect, to prescribe regulations that would provide that costs in excess of the rates established under the agreement were not allowable if the rate had been available and travel could have reasonably been performed under the conditions required by the air carrier to qualify for such rate, and provided that section 833 of Pub. L. 100-456 would cease to be effective three years after Sept. 29, 1988.

BURDEN OF PROOF IN GOVERNMENT CONTRACT DISPUTE RESOLUTION

Pub. L. 99-145, title IX, § 933, Nov. 8, 1985, 99 Stat. 700, which provided that in proceeding before the Armed Services Board of Contract Appeals, United States Claims Court, or any other Federal court in which reasonableness of indirect costs for which a contractor seeks reimbursement from Department of Defense is in issue, the burden of proof is upon the contractor to establish that such costs are reasonable, was repealed and restated in subsec. (j) of this section by Pub. L. 100-370, § 1(f)(3)(A)(ii), (B), July 19, 1988, 102 Stat. 846.

§ 2325. Restructuring costs

(a) LIMITATION ON PAYMENT OF RESTRUCTURING COSTS.—(1) The Secretary of Defense may not

pay, under section 2324 of this title, a defense contractor for restructuring costs associated with a business combination of the contractor that occurs after November 18, 1997, unless the Secretary determines in writing either—

(A) that the amount of projected savings for the Department of Defense associated with the restructuring will be at least twice the amount of the costs allowed; or

(B) that the amount of projected savings for the Department of Defense associated with the restructuring will exceed the amount of the costs allowed and that the business combination will result in the preservation of a critical capability that otherwise might be lost to the Department.

(2) The Secretary may not delegate the authority to make a determination under paragraph (1), with respect to a business combination, to an official of the Department of Defense—

(A) below the level of an Assistant Secretary of Defense for cases in which the amount of restructuring costs is expected to exceed \$25,000,000 over a 5-year period; or

(B) below the level of the Director of the Defense Contract Management Agency for all other cases.

(b) DEFINITION.—In this section, the term “business combination” includes a merger or acquisition.

(Added Pub. L. 105-85, div. A, title VIII, §804(a)(1), Nov. 18, 1997, 111 Stat. 1832; amended Pub. L. 106-65, div. A, title X, §1066(a)(19), Oct. 5, 1999, 113 Stat. 771; Pub. L. 108-375, div. A, title VIII, §819, Oct. 28, 2004, 118 Stat. 2016; Pub. L. 112-239, div. A, title X, §1076(g)(2), Jan. 2, 2013, 126 Stat. 1955.)

PRIOR PROVISIONS

A prior section 2325, added Pub. L. 99-500, §101(c) [title X, §907(a)(1)], Oct. 18, 1986, 100 Stat. 1783-82, 1783-137, and Pub. L. 99-591, §101(c) [title X, §907(a)(1)], Oct. 30, 1986, 100 Stat. 3341-82, 3341-137; Pub. L. 99-661, div. A, title IX, formerly title IV, §907(a)(1), Nov. 14, 1986, 100 Stat. 3917, renumbered title IX, Pub. L. 100-26, §3(5), Apr. 21, 1987, 101 Stat. 273; amended Pub. L. 101-189, div. A, title XVI, §1622(c)(5), Nov. 29, 1989, 103 Stat. 1604; Pub. L. 101-510, div. A, title VIII, §810, Nov. 5, 1990, 104 Stat. 1595; Pub. L. 103-160, div. A, title IX, §904(d)(1), Nov. 30, 1993, 107 Stat. 1728, directed Secretary of Defense to ensure that requirements of Department of Defense with respect to procurement of supplies be stated in terms of functions to be performed, performance required, or essential physical characteristics, and related to preference for non-developmental items in procurement of supplies, prior to repeal by Pub. L. 103-355, title VIII, §8104(b)(1), Oct. 13, 1994, 108 Stat. 3391. See sections 2376 and 2377 of this title.

Another prior section 2325 was renumbered section 2345 of this title.

AMENDMENTS

2013—Subsec. (b). Pub. L. 112-239 redesignated subsec. (c) as (b) and struck out former subsec. (b) which required reports relating to business combinations occurring on or after August 15, 1994.

2004—Subsec. (a)(2). Pub. L. 108-375 substituted “paragraph (1), with respect to a business combination, to an official of the Department of Defense—” for “paragraph (1) to an official of the Department of Defense below the level of an Assistant Secretary of Defense.” and added subpars. (A) and (B).

1999—Subsec. (a)(1). Pub. L. 106-65 inserted “that occurs after November 18, 1997,” after “of the contractor” in introductory provisions.

EFFECTIVE DATE

Pub. L. 105-85, div. A, title VIII, §804(c), Nov. 18, 1997, 111 Stat. 1834, provided that: “Section 2325(a) of title 10, United States Code, as added by subsection (a), shall apply with respect to business combinations that occur after the date of the enactment of this Act [Nov. 18, 1997].”

GAO REPORTS

Pub. L. 105-85, div. A, title VIII, §804(b), Nov. 18, 1997, 111 Stat. 1832, directed the Comptroller General, not later than Apr. 1, 1998, to identify major market areas affected by business combinations of defense contractors since Jan. 1, 1990, and develop a methodology for determining the savings from business combinations of defense contractors on the prices paid on particular defense contracts, and to submit to committees of Congress a report describing the changes in numbers of businesses competing for major defense contracts since Jan. 1, 1990; and directed the Comptroller General, not later than Dec. 1, 1998, to submit to committees of Congress a report containing updated information on restructuring costs of business combinations paid by the Department of Defense pursuant to certifications under Pub. L. 103-337, §818 (set out as a note under section 2324 of this title), savings realized by the Department of Defense as a result of the business combinations for which the payment of restructuring costs was so certified, and an assessment of the savings on the prices paid on a meaningful sample of defense contracts.

§ 2326. Undefined contractual actions: restrictions

(a) IN GENERAL.—The head of an agency may not enter into an undefinitized contractual action unless the request to the head of the agency for authorization of the contractual action includes a description of the anticipated effect on requirements of the military department concerned if a delay is incurred for purposes of determining contractual terms, specifications, and price before performance is begun under the contractual action.

(b) LIMITATIONS ON OBLIGATION OF FUNDS.—(1) A contracting officer of the Department of Defense may not enter into an undefinitized contractual action unless the contractual action provides for agreement upon contractual terms, specifications, and price by the earlier of—

(A) the end of the 180-day period beginning on the date on which the contractor submits a qualifying proposal to definitize the contractual terms, specifications, and price; or

(B) the date on which the amount of funds obligated under the contractual action is equal to more than 50 percent of the negotiated overall ceiling price for the contractual action.

(2) Except as provided in paragraph (3), the contracting officer for an undefinitized contractual action may not obligate with respect to such contractual action an amount that is equal to more than 50 percent of the negotiated overall ceiling price until the contractual terms, specifications, and price are definitized for such contractual action.

(3) If a contractor submits a qualifying proposal (as defined in subsection (h)) to definitize an undefinitized contractual action before an amount equal to more than 50 percent of the ne-