

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-

gotiated overall ceiling price is obligated on such action, the contracting officer for such action may not obligate with respect to such contractual action an amount that is equal to more than 75 percent of the negotiated overall ceiling price until the contractual terms, specifications, and price are definitized for such contractual action.

(4) The head of an agency may waive the provisions of this subsection with respect to a contract of that agency if that head of an agency determines that the waiver is necessary in order to support any of the following operations:

- (A) A contingency operation.
- (B) A humanitarian or peacekeeping operation.

(5) This subsection does not apply to an undefinitized contractual action for the purchase of initial spares.

(c) **LIMITATION ON UNILATERAL DEFINITIZATION BY CONTRACTING OFFICER.**—With respect to any undefinitized contractual action with a value greater than \$50,000,000, if agreement is not reached on contractual terms, specifications, and price within the period or by the date provided in subsection (b)(1), the contracting officer may not unilaterally definitize those terms, specifications, or price over the objection of the contractor until—

- (1) the service acquisition executive for the military department that awarded the contract, or the Under Secretary of Defense for Acquisition and Sustainment if the contract was awarded by a Defense Agency or other component of the Department of Defense, approves the definitization in writing;
- (2) the contracting officer provides a copy of the written approval to the contractor; and
- (3) a period of 30 calendar days has elapsed after the written approval is provided to the contractor.

(d) **INCLUSION OF NON-URGENT REQUIREMENTS.**—Requirements for spare parts and support equipment that are not needed on an urgent basis may not be included in an undefinitized contractual action for spare parts and support equipment that are needed on an urgent basis unless the head of the agency approves such inclusion as being—

- (1) good business practice; and
- (2) in the best interests of the United States.

(e) **MODIFICATION OF SCOPE.**—The scope of an undefinitized contractual action under which performance has begun may not be modified unless the head of the agency approves such modification as being—

- (1) good business practice; and
- (2) in the best interests of the United States.

(f) **ALLOWABLE PROFIT.**—(1) The head of an agency shall ensure that the profit allowed on an undefinitized contractual action for which the final price is negotiated after a substantial portion of the performance required is completed reflects—

- (A) the possible reduced cost risk of the contractor with respect to costs incurred during performance of the contract before the final price is negotiated; and
- (B) the reduced cost risk of the contractor with respect to costs incurred during performance of the remaining portion of the contract.

(2) If a contractor submits a qualifying proposal to definitize an undefinitized contractual action and the contracting officer for such action definitizes the contract after the end of the 180-day period beginning on the date on which the contractor submitted the qualifying proposal, the head of the agency concerned shall ensure that the profit allowed on the contract accurately reflects the cost risk of the contractor as such risk existed on the date the contractor submitted the qualifying proposal.

(g) **TIME LIMIT.**—No undefinitized contractual action may extend beyond 90 days without a written determination by the Secretary of the military department concerned, the head of the Defense Agency concerned, the commander of the combatant command concerned, or the Under Secretary of Defense for Acquisition, Technology, and Logistics (as applicable) that it is in the best interests of the military department, the Defense Agency, the combatant command, or the Department of Defense, respectively, to continue the action.

(h) **FOREIGN MILITARY CONTRACTS.**—(1) Except as provided in paragraph (2), a contracting officer of the Department of Defense may not enter into an undefinitized contractual action for a foreign military sale unless the contractual action provides for agreement upon contractual terms, specifications, and price by the end of the 180-day period described in subsection (b)(1)(A).

(2) The requirement under paragraph (1) may be waived in accordance with subsection (b)(4).

(i) **APPLICABILITY.**—This section does not apply to the Coast Guard or the National Aeronautics and Space Administration.

(j) **DEFINITIONS.**—In this section:

(1) The term “undefinitized contractual action” means a new procurement action entered into by the head of an agency for which the contractual terms, specifications, or price are not agreed upon before performance is begun under the action. Such term does not include contractual actions with respect to the following:

- (A) Purchases in an amount not in excess of the amount of the simplified acquisition threshold.
- (B) Special access programs.
- (C) Congressionally mandated long-lead procurement contracts.

(2) The term “qualifying proposal” means a proposal that contains sufficient information to enable the Department of Defense to conduct a meaningful audit of the information contained in the proposal.

(Added Pub. L. 99-500, §101(c) [title X, §908(d)(1)(A)], Oct. 18, 1986, 100 Stat. 1783-82, 1783-140, and Pub. L. 99-591, §101(c) [title X, §908(d)(1)(A)], Oct. 30, 1986, 100 Stat. 3341-82, 3341-140; Pub. L. 99-661, div. A, title IX, formerly title IV, §908(d)(1)(A), Nov. 14, 1986, 100 Stat. 3920, 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)(6), Nov. 29, 1989, 103 Stat. 1604; Pub. L. 102-25, title VII, §701(d)(5), Apr. 6, 1991, 105 Stat. 114; Pub. L. 103-355, title I, §1505, Oct. 13, 1994, 108 Stat. 3298; Pub. L. 105-85, div. A, title VIII, §803(a), Nov. 18, 1997, 111 Stat. 1831; Pub. L. 114-328, div. A, title

VIII, § 811, Dec. 23, 2016, 130 Stat. 2268; Pub. L. 115-91, div. A, title VIII, § 815(a), (b), Dec. 12, 2017, 131 Stat. 1462.)

CODIFICATION

Pub. L. 99-591 is a corrected version of Pub. L. 99-500. Pub. L. 99-500, Pub. L. 99-591, and Pub. L. 99-661 added identical sections.

PRIOR PROVISIONS

A prior section 2326 was renumbered section 2346 of this title.

AMENDMENTS

2017—Subsec. (b)(3). Pub. L. 115-91, § 815(b), substituted “subsection (h)” for “subsection (g)”.

Subsecs. (c) to (j). Pub. L. 115-91, § 815(a), added subsec. (c) and redesignated former subsecs. (c) to (i) as (d) to (j), respectively.

2016—Subsec. (e). Pub. L. 114-328, § 811(1), designated existing provisions as par. (1), redesignated former pars. (1) and (2) as subpars. (A) and (B), respectively, of par. (1), and added par. (2).

Subsecs. (f) to (i). Pub. L. 114-328, § 811(2), (3), added subsecs. (f) and (g) and redesignated former subsecs. (f) and (g) as (h) and (i), respectively.

Subsec. (i)(1). Pub. L. 114-328, § 811(4)(A), redesignated subpars. (B) to (D) as (A) to (C), respectively, and struck out former subpar. (A) which read as follows: “Foreign military sales.”

Subsec. (i)(2). Pub. L. 114-328, § 811(4)(B), substituted “a meaningful audit of the information contained in the proposal.” for “complete and meaningful audits of the information contained in the proposal and of any other information that the Department is entitled to review in connection with the contract, as determined by the contracting officer.”

1997—Subsec. (b)(4). Pub. L. 105-85 amended par. (4) generally. Prior to amendment, par. (4) read as follows: “The head of an agency may waive the provisions of this subsection with respect to a contract of that agency if such head of an agency determines that the waiver is necessary in order to support a contingency operation.”

1994—Subsec. (b). Pub. L. 103-355, § 1505(a)(1), struck out “and expenditure” after “obligation” in heading.

Subsec. (b)(1)(B). Pub. L. 103-355, § 1505(a)(2), struck out “or expended” after “obligated”.

Subsec. (b)(2). Pub. L. 103-355, § 1505(a)(3), substituted “obligate” for “expend”.

Subsec. (b)(3). Pub. L. 103-355, § 1505(a)(4), substituted “obligated” for “expended” and “obligate” for “expend”.

Subsec. (b)(4), (5). Pub. L. 103-355, § 1505(b), added par. (4) and redesignated former par. (4) as (5).

Subsec. (g)(1)(B). Pub. L. 103-355, § 1505(c), substituted “simplified acquisition threshold” for “small purchase threshold”.

1991—Subsec. (g)(1)(B). Pub. L. 102-25 substituted “in an amount not in excess of the amount of the small purchase threshold” for “of less than \$25,000”.

1989—Subsec. (g)(1)(D). Pub. L. 101-189 substituted “Congressionally mandated” for “Congressionally-mandated”.

EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103-355, see section 10001 of Pub. L. 103-355, set out as a note under section 2302 of this title.

EFFECTIVE DATE

Pub. L. 99-500, § 101(c) [title X, § 908(d)(2)], Oct. 18, 1986, 100 Stat. 1783-82, 1783-142, Pub. L. 99-591, § 101(c) [title X, § 908(d)(2)], Oct. 30, 1986, 100 Stat. 3341-82, 3341-142, and Pub. L. 99-661, div. A, title IX, formerly title IV, § 908(d)(2), Nov. 14, 1986, 100 Stat. 3921, renumbered title IX, Pub. L. 100-26, § 3(5), Apr. 21, 1987, 101 Stat. 273, provided that: “Section 2326 of title 10, United States Code

(as added by subsection (d)(1)), applies to undefinitized contractual actions that are entered into after the end of the 180-day period beginning on the date of the enactment of this Act [Oct. 18, 1986].”

REGULATIONS

Pub. L. 115-91, div. A, title VIII, § 815(c), Dec. 12, 2017, 131 Stat. 1462, provided that: “Not later than 120 days after the date of the enactment of this Act [Dec. 12, 2017], the Secretary of Defense shall revise the Department of Defense Supplement to the Federal Acquisition Regulation to implement section 2326 of title 10, United States Code, as amended by this section.”

TRANSFER OF FUNCTIONS

For transfer of authorities, functions, personnel, and assets of the Coast Guard, including the authorities and functions of the Secretary of Transportation relating thereto, to the Department of Homeland Security, and for treatment of related references, see sections 468(b), 551(d), 552(d), and 557 of Title 6, Domestic Security, and the Department of Homeland Security Reorganization Plan of November 25, 2002, as modified, set out as a note under section 542 of Title 6.

REVISION OF DEFENSE SUPPLEMENT RELATING TO PAYMENT OF COSTS PRIOR TO DEFINITIZATION

Pub. L. 111-84, div. A, title VIII, § 812, Oct. 28, 2009, 123 Stat. 2406, provided that:

“(a) REVISION REQUIRED.—Not later than 180 days after the date of the enactment of this Act [Oct. 28, 2009], the Secretary of Defense shall revise the Defense Supplement to the Federal Acquisition Regulation to ensure that any limitations described in subsection (b) are applicable to all categories of undefinitized contractual actions (including undefinitized task orders and delivery orders).

“(b) LIMITATIONS.—The limitations referred to in subsection (a) are any limitations on the reimbursement of costs and the payment of profits or fees with respect to costs incurred before the definitization of an undefinitized contractual action of the Department of Defense, including—

“(1) such limitations as described in part 52.216-26 of the Federal Acquisition Regulation; and

“(2) any such limitations implementing the requirements of section 809 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181; 10 U.S.C. 2326 note).”

IMPLEMENTATION AND ENFORCEMENT OF REQUIREMENTS APPLICABLE TO UNDEFINITIZED CONTRACTUAL ACTIONS

Pub. L. 110-181, div. A, title VIII, § 809, Jan. 28, 2008, 122 Stat. 216, provided that:

“(a) GUIDANCE AND INSTRUCTIONS.—Not later than 180 days after the date of the enactment of this Act [Jan. 28, 2008], the Secretary of Defense shall issue guidance, with detailed implementation instructions, for the Department of Defense to ensure the implementation and enforcement of requirements applicable to undefinitized contractual actions.

“(b) ELEMENTS.—The guidance and instructions issued pursuant to subsection (a) shall address, at a minimum—

“(1) the circumstances in which it is, and is not, appropriate for Department of Defense officials to use undefinitized contractual actions;

“(2) approval requirements (including thresholds) for the use of undefinitized contractual actions;

“(3) procedures for ensuring that timelines for the definitization of undefinitized contractual actions are met;

“(4) procedures for ensuring compliance with regulatory limitations on the obligation of funds pursuant to undefinitized contractual actions;

“(5) procedures for ensuring compliance with regulatory limitations on profit or fee with respect to costs incurred before the definitization of an undefinitized contractual action; and

“(6) reporting requirements for undefinitized contractual actions that fail to meet required timelines for definitization or fail to comply with regulatory limitations on the obligation of funds or on profit or fee.

“(c) REPORTS.—

“(1) REPORT ON GUIDANCE AND INSTRUCTIONS.—Not later than 210 days after the date of the enactment of this Act [Jan. 28, 2008], 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 setting forth the guidance and instructions issued pursuant to subsection (a).

“(2) GAO REPORT.—Not later than two years after the date of the enactment of this Act, the Comptroller General of the United States shall submit to the congressional defense committees a report on the extent to which the guidance and instructions issued pursuant to subsection (a) have resulted in improvements to—

“(A) the level of insight that senior Department of Defense officials have into the use of undefinitized contractual actions;

“(B) the appropriate use of undefinitized contractual actions;

“(C) the timely definitization of undefinitized contractual actions; and

“(D) the negotiation of appropriate profits and fees for undefinitized contractual actions.”

LIMITATION ON USE OF FUNDS FOR UNDEFINITIZED CONTRACTUAL ACTIONS; OVERSIGHT BY INSPECTOR GENERAL; WAIVER AUTHORITY

Pub. L. 99-500, §101(c) [title X, §908(a)–(c), (e)], Oct. 18, 1986, 100 Stat. 1783–82, 1783–139, 1783–140, 1783–142, Pub. L. 99-591, §101(c) [title X, §908(a)–(c), (e)], Oct. 18, 1986, 100 Stat. 3341–82, 3341–139, 3341–140, 3341–142, and Pub. L. 99-661, div. A, title IX, formerly title IV, §908(a)–(c), (e), Nov. 14, 1986, 100 Stat. 3918, 3919, 3921, renumbered title IX and amended by Pub. L. 100-26, §§3(5), 5(2), Apr. 21, 1987, 101 Stat. 273, 274; Pub. L. 104-106, div. D, title XLIII, §4322(b)(2), Feb. 10, 1996, 110 Stat. 677, which related to limitations on funding for undefinitized contractual actions, Inspector General audits and oversight, and waiver authority, were repealed by Pub. L. 115-232, div. A, title VIII, §812(b)(21), Aug. 13, 2018, 132 Stat. 1848.

§ 2327. Contracts: consideration of national security objectives

(a) **DISCLOSURE OF OWNERSHIP OR CONTROL BY A FOREIGN GOVERNMENT.**—The head of an agency shall require a firm or a subsidiary of a firm that submits a bid or proposal in response to a solicitation issued by the Department of Defense to disclose in that bid or proposal any significant interest in such firm or subsidiary (or, in the case of a subsidiary, in the firm that owns the subsidiary) that is owned or controlled (whether directly or indirectly) by a foreign government or an agent or instrumentality of a foreign government, if such foreign government is the government of a country that the Secretary of State determines under section 6(j)(1)(A)¹ of the Export Administration Act of 1979 (50 U.S.C. 4605(j)(1)(A)) has repeatedly provided support for acts of international terrorism.

(b) **PROHIBITION ON ENTERING INTO CONTRACTS AGAINST THE INTERESTS OF THE UNITED STATES.**—Except as provided in subsection (c), the head of an agency may not enter into a contract with a firm or a subsidiary of a firm if—

(1) a foreign government owns or controls (whether directly or indirectly) a significant

interest in such firm or subsidiary (or, in the case of a subsidiary, in the firm that owns the subsidiary); and

(2) such foreign government is the government of a country that the Secretary of State determines under section 6(j)(1)(A)¹ of the Export Administration Act of 1979 (50 U.S.C. 4605(j)(1)(A)) has repeatedly provided support for acts of international terrorism.

(c) **WAIVER.**—(1)(A) If the Secretary of Defense determines under paragraph (2) that entering into a contract with a firm or a subsidiary of a firm described in subsection (b) is not inconsistent with the national security objectives of the United States, the head of an agency may enter into a contract with such firm or subsidiary if in the best interests of the Government.

(B) The Secretary shall maintain records of each contract entered into by reason of subparagraph (A). Such records shall include the following:

(i) The identity of the foreign government concerned.

(ii) The nature of the contract.

(iii) The extent of ownership or control of the firm or subsidiary concerned (or, if appropriate in the case of a subsidiary, of the firm that owns the subsidiary) by the foreign government concerned or the agency or instrumentality of such foreign government.

(iv) The reasons for entering into the contract.

(2) Upon the request of the head of an agency, the Secretary of Defense shall determine whether entering into a contract with a firm or subsidiary described in subsection (b) is inconsistent with the national security objectives of the United States. In making such a determination, the Secretary of Defense shall consider the following:

(A) The relationship of the United States with the foreign government concerned.

(B) The obligations of the United States under international agreements.

(C) The extent of the ownership or control of the firm or subsidiary (or, if appropriate in the case of a subsidiary, of the firm that owns the subsidiary) by the foreign government or an agent or instrumentality of the foreign government.

(D) Whether payments made, or information made available, to the firm or subsidiary under the contract could be used for purposes hostile to the interests of the United States.

(d) **LIST OF FIRMS SUBJECT TO PROHIBITION.**—(1) The Secretary of Defense shall develop and maintain a list of all firms and subsidiaries of firms that the Secretary has identified as being subject to the prohibition in subsection (b).

(2)(A) A person may request the Secretary to include on the list maintained under paragraph (1) any firm or subsidiary of a firm that the person believes to be owned or controlled by a foreign government described in subsection (b)(2). Upon receipt of such a request, the Secretary shall determine whether the conditions in paragraphs (1) and (2) of subsection (b) exist in the case of that firm or subsidiary. If the Secretary determines that such conditions do exist, the Secretary shall include the firm or subsidiary on the list.

¹ See References in Text note below.