

## CHAPTER 279—CONTRACTOR AUDITS AND ACCOUNTING

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### Editorial Notes

#### PRIOR PROVISIONS

A prior chapter 279 “CONTRACTOR AUDITS AND ACCOUNTING”, as added by Pub. L. 115–232, div. A, title VIII, §801(a), Aug. 13, 2018, 132 Stat. 1828, and consisting of reserved section 3841, was repealed by Pub. L. 116–283, div. A, title XVIII, §1835(a), Jan. 1, 2021, 134 Stat. 4239.

#### AMENDMENTS

2021—Pub. L. 117–81, div. A, title XVII, §1701(i)(7)(A), Dec. 27, 2021, 135 Stat. 2142, amended Pub. L. 116–283, div. A, title XVIII, §1835(a), Jan. 1, 2021, 134 Stat. 4239, which added this analysis, by substituting “[Reserved]” for “Contractor internal audit reports: Department of Defense access to, use of, and safeguards and protections for” in item 3843, for “Contractor business systems” in item 3844, and for “Defense Contract Audit Agency: legal resources and expertise” in item 3846.

### Statutory Notes and Related Subsidiaries

#### CONTRACTOR BUSINESS SYSTEMS

Pub. L. 115–232, div. A, title VIII, §824(b), Aug. 13, 2018, 132 Stat. 1856, provided that: “Not later than 120 days after the date of the enactment of this Act [Aug. 13, 2018], the Secretary of Defense shall revise the Defense Federal Acquisition Regulation Supplement to conform with the amendments to section 893 of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011 (Public Law 111–383; 10 U.S.C. 2302 note [now 10 U.S.C. 3841 note prec.] made by this section.”

Pub. L. 111–383, div. A, title VIII, §893, Jan. 7, 2011, 124 Stat. 4311, as amended by Pub. L. 112–81, div. A, title VIII, §816, Dec. 31, 2011, 125 Stat. 1493; Pub. L. 113–291, div. A, title X, §1071(b)(1)(C), Dec. 19, 2014, 128 Stat. 3505; Pub. L. 114–328, div. A, title VIII, §893, Dec. 23, 2016, 130 Stat. 2324; Pub. L. 115–91, div. A, title X, §1081(d)(8), Dec. 12, 2017, 131 Stat. 1600; Pub. L. 115–232, div. A, title VIII, §824(a), Aug. 13, 2018, 132 Stat. 1856; Pub. L. 116–283, div. A, title VIII, §806, Jan. 1, 2021, 134 Stat. 3742, provided that:

“(a) **IMPROVEMENT PROGRAM.**—The Secretary of Defense shall develop and initiate a program for the improvement of contractor business systems to ensure that such systems provide timely, reliable information for the management of Department of Defense programs by the contractor and by the Department.

“(b) **APPROVAL OR DISAPPROVAL OF BUSINESS SYSTEMS.**—The program developed pursuant to subsection (a) shall—

“(1) include clear and specific business system requirements that are identified and made publicly available for each type of contractor business system covered by the program;

“(2) establish a process for reviewing contractor business systems and identifying material weaknesses in such systems;

“(3) identify officials of the Department of Defense who are responsible for the approval or disapproval of contractor business systems;

“(4) provide for the approval of any contractor business system that does not have a material weakness; and

“(5) provide for—

“(A) the disapproval of any contractor business system that has a material weakness; and

“(B) reduced reliance on, and enhanced scrutiny of, data provided by a contractor business system that has been disapproved.

“(c) **REVIEW BY THIRD-PARTY INDEPENDENT AUDITORS.**—The review process for contractor business systems pursuant to subsection (b)(2) shall—

“(1) if a registered public accounting firm attests to the internal control assessment of a contractor, pursuant to section 404(b) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7262(b)), allow the contractor, subject to paragraph (3), to submit certified documentation from such registered public accounting firm that the contractor business systems of the contractor meet the business system requirements referred to in subsection (b)(1) and to thereby eliminate the need for further review of the contractor business systems by the Secretary of Defense;

“(2) limit the review, subject to paragraph (3), of the contractor business systems of a contractor that is not a covered contractor to confirming that the contractor uses the same contractor business system for its Government and commercial work and that the outputs of the contractor business system based on statistical sampling are reasonable; and

“(3) allow a milestone decision authority to require a review of a contractor business system of a contractor that submits documentation pursuant to paragraph (1) or that is not a covered contractor after determining in writing that such a review is necessary to appropriately manage contractual risk.

“(d) **REMEDIAL ACTIONS.**—The program developed pursuant to subsection (a) shall provide the following:

“(1) In the event a contractor business system is disapproved pursuant to subsection (b)(5), appropriate officials of the Department of Defense will be available to work with the contractor to develop a corrective action plan defining specific actions to be taken to address the material weaknesses identified in the system and a schedule for the implementation of such actions.

“(2) An appropriate official of the Department of Defense may withhold up to 10 percent of progress payments, performance-based payments, and interim payments under covered contracts from a covered contractor, as needed to protect the interests of the Department and ensure compliance, if one or more of the contractor business systems of the contractor has been disapproved pursuant to subsection (b)(5) and has not subsequently received approval.

“(3) The amount of funds to be withheld under paragraph (2) shall be reduced if a contractor adopts an effective corrective action plan pursuant to paragraph (1) and is effectively implementing such plan.

“(e) **GUIDANCE AND TRAINING.**—The program developed pursuant to subsection (a) shall provide guidance and training to appropriate government officials on the data that is produced by contractor business systems and the manner in which such data should be used to effectively manage Department of Defense programs.

“(f) **RULE OF CONSTRUCTION.**—Nothing in this section shall be construed to prohibit an official of the Department of Defense from reviewing, approving, or disapproving a contractor business system pursuant to any applicable law or regulation in force as of the date of the enactment of this Act during the period between the date of the enactment of this Act and the date on which the Secretary implements the requirements of this section with respect to such system.

“(g) **DEFINITIONS.**—In this section:

“(1) The term ‘contractor business system’ means an accounting system, estimating system, purchasing system, earned value management system, material management and accounting system, or property management system of a contractor.

“(2) The term ‘covered contractor’ means a contractor that has covered contracts with the United States Government accounting for greater than 1 per-

cent of its total gross revenue, except that the term does not include any contractor that is exempt, under section 1502 of title 41, United States Code, or regulations implementing that section, from using full cost accounting standards established in that section.

“(3) The term ‘covered contract’ means a contract that is subject to the cost accounting standards promulgated pursuant to section 1502 of title 41, United States Code, that could be affected if the data produced by a contractor business system has a material weakness.

“(4) The term ‘material weakness’ means a deficiency or combination of deficiencies in the internal control over information in contractor business systems, such that there is a reasonable possibility that a material misstatement of such information will not be prevented, or detected and corrected, on a timely basis. For purposes of this paragraph, a reasonable possibility exists when the likelihood of an event occurring—

“(A) is probable; or

“(B) is more than remote but less than likely.

“(5) The term ‘approved purchasing system’ has the meaning given the term in section 44.101 of the Federal Acquisition Regulation (or any similar regulation).

“(h) DEFENSE CONTRACT AUDIT AGENCY LEGAL RESOURCES AND EXPERTISE.—

“(1) REQUIREMENT.—The Secretary of Defense shall ensure that—

“(A) the Defense Contract Audit Agency has sufficient legal resources and expertise to conduct its work in compliance with applicable Department of Defense policies and procedures; and

“(B) such resources and expertise are provided in a manner that is consistent with the audit independence of the Defense Contract Audit Agency.

“(2) REPORT.—Not later than 180 days after the date of the enactment of this Act, the Secretary shall submit to the Committees on Armed Services of the Senate and the House of Representatives a report on the steps taken to comply with the requirements of this subsection.

“(i) CONSENT TO SUBCONTRACT.—If the contractor on a Department of Defense contract requiring a contracting officer’s written consent prior to the contractor entering into a subcontract has an approved purchasing system, the contracting officer may not withhold such consent without the written approval of the program manager.”

[Pub. L. 115-91, div. A, title X, §1081(d), Dec. 12, 2017, 131 Stat. 1599, provided that the amendment made by section 1081(d)(8) to section 893(c) of Pub. L. 114-328 (which amended section 893 of Pub. L. 111-383, set out above) is effective as of Dec. 23, 2016, and as if included in Pub. L. 114-328 as enacted.]

### § 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