

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. (1) of Part I of Ex. Ord. No. 10789, and that alternate sources of supply are not reasonably available, see par. (1) 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 information on past or ongoing audit results or other relevant information on the entities the qualified private auditor is auditing.

(4) The Secretary of Defense shall consider the results of an incurred cost audit performed under this section without regard to whether the Defense Contract Audit Agency or a qualified private auditor performed the audit.

(5) The contracting officer for a contract that is the subject of an incurred cost audit shall have the sole discretion to determine what action should be taken based on an audit finding on direct costs of the contract.

(d) QUALIFIED PRIVATE AUDITOR REQUIREMENTS.—(1) A qualified private auditor awarded a contract or issued a task order under subsection (c)(2) shall conduct an incurred cost audit in accordance with the generally accepted government auditing standards.

(2) A qualified private auditor awarded a contract or issued a task order under subsection (c)(2) shall develop and maintain complete and accurate working papers on each incurred cost audit. All working papers and reports on the incurred cost audit prepared by such qualified private auditor shall be the property of the Department of Defense, except that the qualified private auditor may retain a complete copy of all working papers to support such reports made pursuant to this section.

(3) A breach of contract by a qualified private auditor with respect to use of proprietary or nonpublic data may subject the qualified private auditor to—

(A) criminal, civil, administrative, and contractual actions for penalties, damages, and other appropriate remedies by the United States; and

(B) civil actions for damages and other appropriate remedies by the contractor or subcontractor whose data are affected by the breach.

(e) PEER REVIEW.—(1) Effective October 1, 2022, the Defense Contract Audit Agency may issue unqualified audit findings for an incurred cost audit only if the Defense Contract Audit Agency is peer reviewed by a commercial auditor and passes such peer review. Such peer review shall be conducted in accordance with the peer review requirements of generally accepted government auditing standards, including the requirements related to frequency of peer reviews, and shall be deemed to meet the requirements of the Defense Contract Audit Agency for a peer review under such standards.

(2) Not later than October 1, 2019, the Secretary of Defense shall provide to the Committees on Armed Services of the Senate and the House of Representatives an update on the process of securing a commercial auditor to perform the peer review referred to in paragraph (1).

(f) NUMERIC MATERIALITY STANDARDS FOR INCURRED COST AUDITS.—(1) Not later than October 1, 2020, the Department of Defense shall implement numeric materiality standards for incurred cost audits to be used by auditors that are consistent with commercially accepted standards of risk and materiality.

(2) Not later than October 1, 2019, the Secretary of Defense shall submit to the congressional defense committees a report containing proposed numeric materiality standards required under paragraph (1). In developing such standards, the Secretary shall consult with commercial auditors that conduct incurred cost audits, the advisory panel authorized under section 809 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114-92; 129 Stat. 889), and other governmental and nongovernmental entities with relevant expertise.

(g) TIMELINESS OF INCURRED COST AUDITS.—(1) The Secretary of Defense shall ensure that all incurred cost audits performed by qualified private auditors or the Defense Contract Audit Agency are performed in a timely manner.

(2) The Secretary of Defense shall notify a contractor of the Department of Defense within 60 days after receipt of an incurred cost submission from the contractor whether the submission is a qualified incurred cost submission.

(3) With respect to qualified incurred cost submissions received on or after the date of the enactment of this section, audit findings shall be issued for an incurred cost audit not later than one year after the date of receipt of such qualified incurred cost submission.

(4) Not later than October 1, 2020, and subject to paragraph (5), if audit findings are not issued within one year after the date of receipt of a qualified incurred cost submission, the audit shall be considered to be complete and no additional audit work shall be conducted.

(5) The Under Secretary of Defense (Comptroller) may waive the requirements of paragraph (4) on a case-by-case basis if the Director of the Defense Contract Audit Agency submits a written request. The Director of the Defense Contract Audit Agency shall include in the report required under section 3847 of this title the total number of waivers issued and the reasons for issuing each such waiver.

(h) REVIEW OF AUDIT PERFORMANCE.—Not later than April 1, 2025, the Comptroller General of the United States shall submit to the congressional defense committees a report that evaluates for the period beginning on October 1, 2019, and ending on August 31, 2023—

(1) the timeliness, individual cost, and quality of incurred cost audits, set forth separately by incurred cost audits performed by the Defense Contract Audit Agency and by qualified private auditors;

(2) the cost to contractors of the Department of Defense for incurred cost audits, set forth separately by incurred cost audits performed by the Defense Contract Audit Agency and by qualified private auditors;

(3) the effect, if any, on other types of audits conducted by the Defense Contract Audit Agency that results from incurred cost audits conducted by qualified private auditors; and

(4) the capability and capacity of qualified private auditors to conduct incurred cost audits for the Department of Defense.

(i) DEFINITIONS.—In this section:

(1) The term “commercial auditor” means a private entity engaged in the business of performing audits.

(2) The term “incurred cost audit” means an audit of charges to the Government by a contractor under a flexibly priced contract.

(3) The term “flexibly priced contract” has the meaning given the term “flexibly-priced contracts and subcontracts” in part 30 of the Federal Acquisition Regulation (section 30.001 of title 48, Code of Federal Regulations).

(4) The term “generally accepted government auditing standards” means the generally accepted government auditing standards of the Comptroller General of the United States.

(5) The term “numeric materiality standard” means a dollar amount of misstatements, including omissions, contained in an incurred cost audit that would be material if the misstatements, individually or in the aggregate, could reasonably be expected to influence the economic decisions of the Government made on the basis of the incurred cost audit.

(6) The term “qualified incurred cost submission” means a submission by a contractor

of costs incurred under a flexibly priced contract that has been qualified by the Department of Defense as sufficient to conduct an incurred cost audit.

(7) The term “qualified private auditor” means a commercial auditor—

(A) that performs audits in accordance with generally accepted government auditing standards; and

(B) that has received a passing peer review rating, as defined by generally accepted government auditing standards.

(Added Pub. L. 115–91, div. A, title VIII, §803(a), Dec. 12, 2017, 131 Stat. 1451, §2313b; amended Pub. L. 115–232, div. A, title X, §1081(a)(19), Aug. 13, 2018, 132 Stat. 1984; Pub. L. 116–92, div. A, title XVII, §1731(a)(41), Dec. 20, 2019, 133 Stat. 1814; renumbered §3842 and amended Pub. L. 116–283, div. A, title XVIII, §1835(c), (d)(1), Jan. 1, 2021, 134 Stat. 4240.)

### Editorial Notes

#### REFERENCES IN TEXT

The date of the enactment of this section, referred to in subsecs. (b)(1)(E)(i) and (g)(3), is the date of enactment of Pub. L. 115–91, which was approved Dec. 12, 2017.

Section 809 of the National Defense Authorization Act for Fiscal Year 2016, referred to in subsec. (f)(2), is section 809 of Pub. L. 114–92, div. A, title VIII, Nov. 25, 2015, 129 Stat. 889, which relates to the establishment of an advisory panel on streamlining acquisition regulations and is not classified to the Code.

#### PRIOR PROVISIONS

A prior section 3842, 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 55 if in a reserve grade above captain, prior to repeal by Pub. L. 86–559, §1(22), June 30, 1960, 74 Stat. 271.

#### AMENDMENTS

2021—Pub. L. 116–283, §1835(c), renumbered section 2313b of this title as this section.

Subsec. (g)(5). Pub. L. 116–283, §1835(d)(1), substituted “section 3847” for “section 2313a”.

2019—Subsec. (d)(1), (2). Pub. L. 116–92 substituted “a task order” for “an task order”.

2018—Subsec. (b)(1)(E). Pub. L. 115–232 redesignated cls. (A) and (B) as (i) and (ii), respectively.

### Statutory Notes and Related Subsidiaries

#### EFFECTIVE DATE OF 2021 AMENDMENT

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 a note preceding section 3001 of this title.

### § 3843. [Reserved]

(Added Pub. L. 116–283, div. A, title XVIII, §1835(e)(1), Jan. 1, 2021, 134 Stat. 4241; amended Pub. L. 117–81, div. A, title XVII, §1701(i)(7)(B)(i), Dec. 27, 2021, 135 Stat. 2142.)

### Editorial Notes

#### PRIOR PROVISIONS

A prior section 3843, added Pub. L. 85–861, §1(94), Sept. 2, 1958, 72 Stat. 1483; amended Pub. L. 86–559, §1(23), June 30, 1960, 74 Stat. 271; Pub. L. 99–145, title XIII,