

WHISTLEBLOWER PROTECTIONS FOR CONTRACTORS ACT

NOVEMBER 29, 2016.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. CHAFFETZ, from the Committee on Oversight and Government Reform, submitted the following

R E P O R T

[To accompany H.R. 5920]

[Including cost estimate of the Congressional Budget Office]

The Committee on Oversight and Government Reform, to whom was referred the bill (H.R. 5920) to enhance whistleblower protection for contractor and grantee employees, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

CONTENTS

	Page
Committee Statement and Views	2
Section-by-Section	3
Explanation of Amendments	4
Committee Consideration	4
Roll Call Votes	4
Correspondence	5
Application of Law to the Legislative Branch	7
Statement of Oversight Findings and Recommendations of the Committee	7
Statement of General Performance Goals and Objectives	7
Duplication of Federal Programs	7
Disclosure of Directed Rule Makings	7
Federal Advisory Committee Act	7
Unfunded Mandate Statement	7
Earmark Identification	7
Committee Estimate	8
Budget Authority and Congressional Budget Office Cost Estimate	8
Changes in Existing Law Made by the Bill, as Reported	9

COMMITTEE STATEMENT AND VIEWS

PURPOSE AND SUMMARY

H.R. 5920, the Whistleblower Protections for Contractors Act, expands whistleblower protections to federal contractors by providing subgrantees and personal services contractors the same whistleblower protections currently afforded to contractors, direct grant recipients and subcontractors. H.R. 5920 also prohibits reimbursement for legal fees in connection with any criminal, civil, or administrative proceedings that are accrued in defense against reprisal claims.

BACKGROUND AND NEED FOR LEGISLATION

H.R. 5920 extends whistleblower protections to subgrantees and personal service contractors on both defense and civilian contracts and grant awards. The bill also makes permanent the current whistleblower protection pilot program for civilian contract and grant employees.

Specifically, the bill extends to “personal services contractors” certain whistleblower protections. Under the Federal Acquisition Regulation (FAR), a personal services contract “is characterized by the employer-employee relationship it creates between the Government and the contractor’s personnel.”¹ While such contractors are critical partners with the Federal Government and well-positioned to identify waste, fraud, and abuse, this category of contractors is not currently afforded the same whistleblower protections as other categories of contractors.

Under H.R. 5920, whistleblower protections currently authorized for Department of Defense contractors, subcontractors, grantees, or subgrantees under 10 U.S.C. § 2409, are extended to personal services contractors. Similarly, H.R. 5920 extends to subgrantees and personal services contractors the whistleblower protections currently authorized for contractors, subcontractors, and grantees under Section 4712(a)(1) of title 41, United States Code.

H.R. 5920 also makes permanent protections which prohibit an employee of a contractor, subcontractor, or grantee, subgrantee, or personal services contractor from being discharged, demoted, or otherwise discriminated against as a reprisal for disclosing information that the employee reasonably believes is evidence of gross mismanagement of a federal contract or grant, a gross waste of federal funds, an abuse of authority relating to a federal contract or grant, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a federal contract (including the competition for or negotiation of a contract) or grant.

These protections were part of a pilot program passed as part of the National Defense Authorization Act for Fiscal Year 2013 signed into law on January 2, 2013.² The four-year pilot program authorized whistleblower protections for civilian grant and contract employees from July 1, 2013 through January 1, 2017. The pilot program expanded the scope of protections implemented in the Amer-

¹Federal Acquisition Regulation, 37.104—Personal Services Contract, http://farsite.hill.af.mil/reghtml/regs/far2afmcfars/fardfars/far/37.htm#P52_7302 (Last accessed 092616).

²National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112–239, Division A, Title VIII, § 828 (2013).

ican Recovery and Reinvestment Act of 2009, which included whistleblower protections for recipients of stimulus fund contracts.³

Upon introducing H.R. 5920, the original sponsors discussed the need for the enhanced and expended whistleblower protections provided by this legislation. In a bipartisan joint press release, House sponsors stated, “Whistleblowers are the front line of defense against waste, fraud, and abuse. The employees who work on federal contracts and grants see firsthand when taxpayer money is being wasted, and they must be protected against retaliation when they blow the whistle on wrongdoing. This bill makes such protections permanent and ensures more employees are covered.”⁴

H.R. 5920 also prohibits reimbursement for legal fees accrued in defense against whistleblower retaliation claims, and makes clear that, for contracts in existence at the time of the bill’s enactment, when there is a major modification of the contract, the head of the contracting agency is required to add a clause applying the bill’s amendments.

LEGISLATIVE HISTORY

H.R. 5920 was introduced by Ranking Member Elijah E. Cummings (D–MD) on July 21, 2016 and referred to the Committee on Oversight and Government Reform. In addition, the bill was referred to the Committee on Armed Services. H.R. 5920 was favorably reported by the Committee on Oversight and Government Reform by unanimous consent on September 15, 2016, without amendment.

Similar legislation, S. 795, was introduced in the Senate by Senator Claire McCaskill (D–MO) on March 18, 2015 and referred to the Senate Homeland Security and Governmental Affairs Committee (HSGAC), with HSGAC Chairman Ron Johnson (R–WI) as an original cosponsor. On June 7, 2016, HSGAC ordered S. 795 favorably reported, with an amendment. On June 23, 2016, S. 795 was passed by unanimous consent in the Senate, with an amendment, and referred to the Committee on Oversight and Government Reform and the Committee on Armed Services in the House.

SECTION-BY-SECTION

Section 1. Short title

Designates the short title of the bill as the “Whistleblower Protections for Contractors Act.”

Section 2. Enhancement of whistleblower protection for contractor and grantee employees

Subsection (a) expands whistleblower protections to employees of subgrantees with regard to civilian grants and to employees of personal services contractors with regard to both defense and civilian contracts. It also permanently extends the civilian pilot program of

³American Recovery and Reinvestment Act of 2009, Pub. L. No. 111–5, Division A, Title XV, § 1553 (2009).

⁴Press release issued by Representatives Elijah E. Cummings, Jason Chaffetz, Tammy Duckworth, Hakeem Jeffries, John Conyers, Jr., and Stephen Lynch entitled, “House Members Introduce Bipartisan Legislation to Expand Whistleblower Protections for Federal Contractors” (July 22, 2016), <https://conyers.house.gov/media-center/press-releases/house-members-introduce-bipartisan-legislation-expand-whistleblower> (Last accessed 09/25/16).

whistleblower protections in 41 U.S.C. § 4712, and makes necessary technical and conforming amendments.

Subsection (b) prohibits reimbursement for legal fees in connection with any criminal, civil or administrative proceedings that are accrued in defense against reprisal claims.

Subsection (c) requires that, for contracts in existence at the time of the bill's enactment, when there is a major modification of the contract, the head of the contracting agency add a clause applying the bill's amendments.

EXPLANATION OF AMENDMENTS

No amendments to H.R. 5920 were offered or adopted during Full Committee consideration of the bill.

COMMITTEE CONSIDERATION

On September 15, 2016 the Committee met in open session and ordered reported favorably the bill, H.R. 5920, by unanimous consent, a quorum being present.

ROLL CALL VOTES

No roll call votes were requested or conducted during Full Committee consideration of H.R. 5920.

CORRESPONDENCE

COMMITTEE ON ARMED SERVICES

U.S. House of Representatives

Washington, DC 20515-6035

ONE HUNDRED FOURTEENTH CONGRESS

WILLIAM M. "MAC" THORNBERRY, TEXAS, CHAIRMAN
 WALTER B. JONES, NORTH CAROLINA
 J. RANDY FORBES, VIRGINIA
 JET MILLER, FLORIDA
 JOE WALSON, SOUTH CAROLINA
 FRANK A. LUCONZO, NEW JERSEY
 ROB BISHOP, UTAH
 MICHAEL R. TURNER, OHIO
 JOHN KLINE, MINNESOTA
 MIKE ROGERS, ALABAMA
 HENRY FRANKS, ARIZONA
 BILL SHUSTER, PENNSYLVANIA
 K. MICHAEL CONAWAY, TEXAS
 DOUG LAMBOURN, COLORADO
 ROBERT J. WITTMANN, VIRGINIA
 DUNCAN HUNTER, CALIFORNIA
 JOHN FLEMING, LOUISIANA
 MIKE COFFMAN, COLORADO
 CHRISTOPHER P. GIBSON, NEW YORK
 VICKY HARTZLER, MISSOURI
 JOSEPH J. HICK, NEVADA
 AUSTIN SCOTT, GEORGIA
 MO BROOKS, ALABAMA
 RICHARD E. NEUMI, FLORIDA
 PAUL COOK, CALIFORNIA
 JIM BRIDENSTINE, OKLAHOMA
 BRADY WENSTRUP, OHIO
 JACK WALORSKI, INDIANA
 BRADLEY BYRNE, ALABAMA
 SAM GRAVES, MISSOURI
 PIVAN K. ZINKE, MONTANA
 ELSIE M. STEFANK, NEW YORK
 MARTHA MCGALLY, ARIZONA
 STEPHEN KNIGHT, CALIFORNIA
 THOMAS MACARTHUR, NEW JERSEY
 STEVE RUSSELL, OKLAHOMA

ADAM SMITH, WASHINGTON, RANKING MEMBER
 LORETTA SANCHEZ, CALIFORNIA
 ROBERT A. BRADY, PENNSYLVANIA
 SUSAN A. DAVIS, CALIFORNIA
 JAMES R. LANGRISH, RHODE ISLAND
 RICK LARSEN, WASHINGTON
 JIM COOPER, TENNESSEE
 MADEIRA Z. NORRIS, OHIO
 JOE COURTNEY, CONNECTICUT
 MIYUNGAS, MASSACHUSETTS
 JOHN GARAMENDI, CALIFORNIA
 HENRY C. "HANK" JOHNSON, JR., GEORGIA
 JACKIE SPEER, CALIFORNIA
 JOAQUIN CASTRO, TEXAS
 TERRY DUDOWORTH, ILLINOIS
 SCOTT H. PETERS, CALIFORNIA
 MARK A. VEASEY, TEXAS
 TULSI GABBARD, HAWAII
 TIMOTHY J. WALZ, MINNESOTA
 RETO O'Rourke, TEXAS
 DONALD NORCROSS, NEW JERSEY
 RUBEN GALLAGHER, ARIZONA
 MARK TAKAI, HAWAII
 GWYN GRAHAM, FLORIDA
 BRAD ASHFORD, NEBRASKA
 SETH ROULTON, MASSACHUSETTS
 PETE AGUILAR, CALIFORNIA

ROBERT L. SAMMONS, R. STAFF DIRECTOR

November 16, 2016

The Honorable Jason Chaffetz
 Chairman, Committee on Oversight and Government Reform
 U.S. House of Representatives
 2157 Rayburn House Office Building
 Washington, D.C. 20515

Dear Mr. Chairman:

I write concerning H.R. 5920, the *Whistleblower Protections for Contractors Act*, which has been referred to the Committee on Armed Services. There are certain provisions in the bill that fall within the Rule X jurisdiction of the Committee on Armed Services.

In order to expedite this legislation for floor consideration, the Committee on Armed Services will forgo action on this bill. This, of course, is conditional on our mutual understanding that forgoing consideration of the bill does not prejudice the Committee on Armed Services with respect to any future jurisdictional claim over the provisions contained in the bill or similar legislation that fall within the committee's Rule X jurisdiction. I request you urge the Speaker to appoint members of the Committee on Armed Services to any conference committee convened to consider such provisions.

Please place a copy of this letter and your response acknowledging our jurisdictional interest into the committee report on H.R. 5920 and into the *Congressional Record* during consideration of the measure on the House floor.

Sincerely,

William M. "Mac" Thornberry
 Chairman

cc: The Honorable Paul D. Ryan, Speaker of the House
 The Honorable Adam Smith, Ranking Member, Committee on Armed Services
 The Honorable Elijah E. Cummings, Ranking Member, Committee on Oversight and Government Reform
 Mr. Thomas J. Wickham, Jr., Parliamentarian

JASON CHAFFETZ, UTAH
CHAIRMAN

ONE HUNDRED FOURTEENTH CONGRESS

ELIJAH E. CUMMINGS, MARYLAND
RANKING MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
2157 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6143

Macomber (202) 225-5073
Macomber (202) 225-5073
<http://oversight.house.gov>

November 18, 2016

The Honorable William "Mac" Thornberry
Chairman
Committee on Armed Services
2216 Rayburn HOB
Washington, D.C. 20515

Dear Mr. Chairman:

Thank you for your letter regarding H.R. 5920, the Whistleblower Protections for Contractors Act. As you noted, certain provisions of the bill fall within the jurisdiction of the Committee on Armed Services. I appreciate your willingness to forego action on the bill in the interest of expediting this legislation for floor consideration. I agree that foregoing consideration of the bill in no way diminishes or alters the jurisdiction of the Committee on Armed Services with response to the appointment of conferees or to any future jurisdictional claim over the subject matters contained in the bill or any similar legislation.

I will include a copy of our letter exchange on H.R. 5920 in the bill report filed by the Committee on Oversight and Government Reform, as well as in the *Congressional Record* during floor consideration, to memorialize our understanding.

Thank you for your assistance with this matter.

Sincerely,

Jason Chaffetz
Chairman

cc: The Honorable Paul D. Ryan, Speaker
The Honorable Elijah E. Cummings
The Honorable Adam Smith
The Honorable Thomas J. Wickham, Parliamentarian

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch where the bill relates to the terms and conditions of employment or access to public services and accommodations. This bill enhances whistleblower protection for contractor and grantee employees. As such this bill does not relate to employment or access to public services and accommodations.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause (2)(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the descriptive portions of this report.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee's performance goal and objective of the bill is to enhance whistleblower protection for contractor and grantee employees.

DUPLICATION OF FEDERAL PROGRAMS

No provision of this bill establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULE MAKINGS

The Committee estimates that enacting this bill does not direct the completion of any specific rule makings within the meaning of 5 U.S.C. 551.

FEDERAL ADVISORY COMMITTEE ACT

The Committee finds that the legislation does not establish or authorize the establishment of an advisory committee within the definition of 5 U.S.C. App., Section 5(b).

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandates Reform Act, P.L. 104–4) requires a statement as to whether the provisions of the reported include unfunded mandates. In compliance with this requirement the Committee has received a letter from the Congressional Budget Office included herein.

EARMARK IDENTIFICATION

This bill does not include any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI.

COMMITTEE ESTIMATE

Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs that would be incurred in carrying out this bill. However, clause 3(d)(2)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974.

BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause (3)(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for this bill from the Director of Congressional Budget Office:

SEPTEMBER 30, 2016.

Hon. JASON CHAFFETZ,
Chairman, Committee on Oversight and Government Reform,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 5920, the Whistleblower Protections for Contractors Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford.

Sincerely,

KEITH HALL.

Enclosure.

H.R. 5920—Whistleblower Protections for Contractors Act

H.R. 5920 would amend federal law to permanently extend legal protections to certain nonfederal employees (contractors, sub-contractors, grantees, and others employed by entities that receive federal funds) who report waste, fraud, or abuse involving federal funds. Specifically, under the bill, anyone who reports the misuse of federal funds could not be demoted, discharged, or discriminated against because of the disclosure. The current four-year pilot program that extends those same protections ends in December 2016.

The cost to implement H.R. 5920 would depend on the number of whistleblower claims made by those nonfederal employees. Evidence from the pilot program that currently protects certain nonfederal employees from such discrimination suggests that the number of such claims brought by such employees has totaled less than 20 for each of the 26 major federal agencies. CBO estimates that implementing H.R. 5920 would cost about \$3,000 to investigate each claim, or about \$5 million over the 2017–2021 period. Any such spending would be subject to the availability of appropriated funds. Enacting the bill could affect direct spending by agencies not funded through annual appropriations; therefore, pay-as-you-go procedures apply. CBO estimates, however, that any net increase

in spending by those agencies would be negligible. Enacting H.R. 5920 would not affect revenues.

CBO estimates that enacting H.R. 5920 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2027.

H.R. 5920 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

On May 27, 2016, CBO transmitted a cost estimate for S. 795, a bill to enhance whistleblower protection for contractor and grantee employees, as ordered reported by the Senate Committee on Homeland Security and Governmental Affairs on February 10, 2016. The two pieces of legislation are similar and CBO's estimates of their budgetary effects are the same.

The CBO staff contact for this estimate is Matthew Pickford. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in *italic*, and existing law in which no change is proposed is shown in roman):

TITLE 10, UNITED STATES CODE

* * * * *

SUBTITLE A—GENERAL MILITARY LAW

* * * * *

PART IV—SERVICE, SUPPLY, AND PROCUREMENT

* * * * *

CHAPTER 137—PROCUREMENT GENERALLY

* * * * *

§ 2324. Allowable costs under defense contracts

(a) **INDIRECT COST THAT VIOLATES A FAR COST PRINCIPLE.**—The head of an agency shall require that a covered contract provide that if the contractor submits to the agency a proposal for settlement of indirect costs incurred by the contractor for any period after such costs have been accrued and if that proposal includes the submission of a cost which is unallowable because the cost violates a cost principle in the Federal Acquisition Regulation or applicable agency supplement to the Federal Acquisition Regulation, the cost shall be disallowed.

(b) **PENALTY FOR VIOLATION OF COST PRINCIPLE.**—(1) If the head of the agency determines that a cost submitted by a contractor in

its proposal for settlement is expressly unallowable under a cost principle referred to in subsection (a) that defines the allowability of specific selected costs, the head of the agency shall assess a penalty against the contractor in an amount equal to—

(A) the amount of the disallowed cost allocated to covered contracts for which a proposal for settlement of indirect costs has been submitted; plus

(B) interest (to be computed based on provisions in the Federal Acquisition Regulation) to compensate the United States for the use of any funds which a contractor has been paid in excess of the amount to which the contractor was entitled.

(2) If the head of the agency determines that a proposal for settlement of indirect costs submitted by a contractor includes a cost determined to be unallowable in the case of such contractor before the submission of such proposal, the head of the agency shall assess a penalty against the contractor in an amount equal to two times the amount of the disallowed cost allocated to covered contracts for which a proposal for settlement of indirect costs has been submitted.

(c) WAIVER OF PENALTY.—The Federal Acquisition Regulation shall provide for a penalty under subsection (b) to be waived in the case of a contractor's proposal for settlement of indirect costs when—

(1) the contractor withdraws the proposal before the formal initiation of an audit of the proposal by the Federal Government and resubmits a revised proposal;

(2) the amount of unallowable costs subject to the penalty is insignificant; or

(3) the contractor demonstrates, to the contracting officer's satisfaction, that—

(A) it has established appropriate policies and personnel training and an internal control and review system that provide assurances that unallowable costs subject to penalties are precluded from being included in the contractor's proposal for settlement of indirect costs; and

(B) the unallowable costs subject to the penalty were inadvertently incorporated into the proposal.

(d) APPLICABILITY OF CONTRACT DISPUTES PROCEDURE TO DISALLOWANCE OF COST AND ASSESSMENT OF PENALTY.—An action of the head of an agency under subsection (a) or (b)—

(1) shall be considered a final decision for the purposes of section 7103 of title 41; and

(2) is appealable in the manner provided in section 7104(a) of title 41.

(e) SPECIFIC COSTS NOT ALLOWABLE.—(1) The following costs are not allowable under a covered contract:

(A) Costs of entertainment, including amusement, diversion, and social activities and any costs directly associated with such costs (such as tickets to shows or sports events, meals, lodging, rentals, transportation, and gratuities).

(B) Costs incurred to influence (directly or indirectly) legislative action on any matter pending before Congress, a State legislature, or a legislative body of a political subdivision of a State.

(C) Costs incurred in defense of any civil or criminal fraud proceeding or similar proceeding (including filing of any false certification) brought by the United States where the contractor is found liable or has pleaded nolo contendere to a charge of fraud or similar proceeding (including filing of a false certification).

(D) Payments of fines and penalties resulting from violations of, or failure to comply with, Federal, State, local, or foreign laws and regulations, except when incurred as a result of compliance with specific terms and conditions of the contract or specific written instructions from the contracting officer authorizing in advance such payments in accordance with applicable provisions of the Federal Acquisition Regulation.

(E) Costs of membership in any social, dining, or country club or organization.

(F) Costs of alcoholic beverages.

(G) Contributions or donations, regardless of the recipient.

(H) Costs of advertising designed to promote the contractor or its products.

(I) Costs of promotional items and memorabilia, including models, gifts, and souvenirs.

(J) Costs for travel by commercial aircraft which exceed the amount of the standard commercial fare.

(K) Costs incurred in making any payment (commonly known as a "golden parachute payment") which is—

(i) in an amount in excess of the normal severance pay paid by the contractor to an employee upon termination of employment; and

(ii) is paid to the employee contingent upon, and following, a change in management control over, or ownership of, the contractor or a substantial portion of the contractor's assets.

(L) Costs of commercial insurance that protects against the costs of the contractor for correction of the contractor's own defects in materials or workmanship.

(M) Costs of severance pay paid by the contractor to foreign nationals employed by the contractor under a service contract performed outside the United States, to the extent that the amount of severance pay paid in any case exceeds the amount paid in the industry involved under the customary or prevailing practice for firms in that industry providing similar services in the United States, as determined under the Federal Acquisition Regulation.

(N) Costs of severance pay paid by the contractor to a foreign national employed by the contractor under a service contract performed in a foreign country if the termination of the employment of the foreign national is the result of the closing of, or the curtailment of activities at, a United States military facility in that country at the request of the government of that country.

(O) Costs incurred by a contractor in connection with any criminal, civil, or administrative proceeding commenced by the United States or a State, to the extent provided in subsection (k).

(P) Costs of compensation of any contractor employee for a fiscal year, regardless of the contract funding source, to the extent that such compensation exceeds \$625,000 adjusted annually for the U.S. Bureau of Labor Statistics Employment Cost Index for total compensation for private industry workers, by occupational and industry group not seasonally adjusted, except that the Secretary of Defense may establish exceptions for positions in the science, technology, engineering, mathematics, medical, and cybersecurity fields and other fields requiring unique areas of expertise upon a determination that such exceptions are needed to ensure that the Department of Defense has continued access to needed skills and capabilities.

(P) Costs of compensation of contractor and subcontractor employees for a fiscal year, regardless of the contract funding source, to the extent that such compensation exceeds \$487,000 per year, adjusted annually to reflect the change in the Employment Cost Index for all workers, as calculated by the Bureau of Labor Statistics, except that the head of an executive agency may establish one or more narrowly targeted exceptions for scientists, engineers, or other specialists upon a determination that such exceptions are needed to ensure that the executive agency has continued access to needed skills and capabilities.

(Q) Costs incurred by a contractor in connection with a congressional investigation or inquiry into an issue that is the subject matter of a proceeding resulting in a disposition as described in subsection (k)(2).

(2)(A) The Secretary of Defense may provide in a military banking contract that the provisions of paragraphs (1)(M) and (1)(N) shall not apply to costs incurred under the contract by the contractor for payment of mandated foreign national severance pay. The Secretary may include such a provision in a military banking contract only if the Secretary determines, with respect to that contract, that the contractor has taken (or has established plans to take) appropriate actions within the contractor's control to minimize the amount and number of incidents of the payment of severance pay by the contractor to employees under the contract who are foreign nationals.

(B) In subparagraph (A):

(i) The term "military banking contract" means a contract between the Secretary and a financial institution under which the financial institution operates a military banking facility outside the United States for use by members of the armed forces stationed or deployed outside the United States and other authorized personnel.

(ii) The term "mandated foreign national severance pay" means severance pay paid by a contractor to a foreign national employee the payment of which by the contractor is required in order to comply with a law that is generally applicable to a significant number of businesses in the country in which the foreign national receiving the payment performed services under the contract.

(C) Subparagraph (A) does not apply to a contract with a financial institution that is owned or controlled by citizens or nationals of a foreign country, as determined by the Secretary of Defense.

Such a determination shall be made in accordance with the criteria set out in paragraph (1) of section 4(g) of the Buy American Act (as added by section 7002(2) of the Omnibus Trade and Competitiveness Act of 1988) and the policy guidance referred to in paragraph (2)(A) of that section.

(3)(A) Pursuant to the Federal Acquisition Regulation and subject to the availability of appropriations, the head of an agency awarding a covered contract (other than a contract to which paragraph (2) applies) may waive the application of the provisions of paragraphs (1)(M) and (1)(N) to that contract if the head of the agency determines that—

(i) the application of such provisions to the contract would adversely affect the continuation of a program, project, or activity that provides significant support services for members of the armed forces stationed or deployed outside the United States;

(ii) the contractor has taken (or has established plans to take) appropriate actions within the contractor's control to minimize the amount and number of incidents of the payment of severance pay by the contractor to employees under the contract who are foreign nationals; and

(iii) the payment of severance pay is necessary in order to comply with a law that is generally applicable to a significant number of businesses in the country in which the foreign national receiving the payment performed services under the contract or is necessary to comply with a collective bargaining agreement.

(B) The head of an agency shall include in the solicitation for a covered contract a statement indicating—

(i) that a waiver has been granted under subparagraph (A) for the contract; or

(ii) whether the head of the agency will consider granting such a waiver, and, if the agency head will consider granting a waiver, the criteria to be used in granting the waiver.

(C) The head of an agency shall make the final determination regarding whether to grant a waiver under subparagraph (A) with respect to a covered contract before award of the contract.

(4) The provisions of the Federal Acquisition Regulation implementing this section may establish appropriate definitions, exclusions, limitations, and qualifications.

(f) REQUIRED REGULATIONS.—(1) The Federal Acquisition Regulation shall contain provisions on the allowability of contractor costs. Such provisions shall define in detail and in specific terms those costs which are unallowable, in whole or in part, under covered contracts. The regulations shall, at a minimum, clarify the cost principles applicable to contractor costs of the following:

(A) Air shows.

(B) Membership in civic, community, and professional organizations.

(C) Recruitment.

(D) Employee morale and welfare.

(E) Actions to influence (directly or indirectly) executive branch action on regulatory and contract matters (other than costs incurred in regard to contract proposals pursuant to solicited or unsolicited bids).

- (F) Community relations.
- (G) Dining facilities.
- (H) Professional and consulting services, including legal services.
- (I) Compensation.
- (J) Selling and marketing.
- (K) Travel.
- (L) Public relations.
- (M) Hotel and meal expenses.
- (N) Expense of corporate aircraft.
- (O) Company-furnished automobiles.
- (P) Advertising.
- (Q) Conventions.

(2) The Federal Acquisition Regulation shall require that a contracting officer not resolve any questioned costs until he has obtained—

- (A) adequate documentation with respect to such costs; and
- (B) the opinion of the contract auditor on the allowability of such costs.

(3) The Federal Acquisition Regulation shall provide that, to the maximum extent practicable, the contract auditor be present at any negotiation or meeting with the contractor regarding a determination of the allowability of indirect costs of the contractor.

(4) The Federal Acquisition Regulation shall require that all categories of costs designated in the report of the contract auditor as questioned with respect to a proposal for settlement be resolved in such a manner that the amount of the individual questioned costs that are paid will be reflected in the settlement.

(g) **APPLICABILITY OF REGULATIONS TO SUBCONTRACTORS.**—The regulations referred to in subsections (e) and (f)(1) shall require prime contractors of a covered contract, to the maximum extent practicable, to apply the provisions of such regulations to all subcontractors of the covered contract.

(h) **CONTRACTOR CERTIFICATION REQUIRED.**—(1) A proposal for settlement of indirect costs applicable to a covered contract shall include a certification by an official of the contractor that, to the best of the certifying official's knowledge and belief, all indirect costs included in the proposal are allowable. Any such certification shall be in a form prescribed in the Federal Acquisition Regulation.

(2) The head of the agency or the Secretary of the military department concerned may, in an exceptional case, waive the requirement for certification under paragraph (1) in the case of any contract if the head of the agency or the Secretary—

- (A) determines in such case that it would be in the interest of the United States to waive such certification; and
- (B) states in writing the reasons for that determination and makes such determination available to the public.

(i) **PENALTIES FOR SUBMISSION OF COST KNOWN AS NOT ALLOWABLE.**—The submission to an agency of a proposal for settlement of costs for any period after such costs have been accrued that includes a cost that is expressly specified by statute or regulation as being unallowable, with the knowledge that such cost is unallowable, shall be subject to the provisions of section 287 of title 18 and section 3729 of title 31.

(j) **CONTRACTOR TO HAVE BURDEN OF PROOF.**—In a proceeding before the Armed Services Board of Contract Appeals, the United States Court of Federal Claims, or any other Federal court in which the reasonableness of indirect costs for which a contractor seeks reimbursement from the Department of Defense is in issue, the burden of proof shall be upon the contractor to establish that those costs are reasonable.

(k) **PROCEEDING COSTS NOT ALLOWABLE.**—(1) Except as otherwise provided in this subsection, costs incurred by a contractor or subcontractor, or personal services contractor in connection with any criminal, civil, or administrative proceeding commenced by the United States, by a State, or by a contractor or subcontractor, or personal services contractor employee submitting a complaint under section 2409 of this title are not allowable as reimbursable costs under a covered contract, subcontract, or personal services contract if the proceeding (A) relates to a violation of, or failure to comply with, a Federal or State statute or regulation or to any other activity described in subparagraphs (A) through (C) of section 2409(a)(1) of this title, and (B) results in a disposition described in paragraph (2).

(2) A disposition referred to in paragraph (1)(B) is any of the following:

(A) In the case of a criminal proceeding, a conviction (including a conviction pursuant to a plea of *nolo contendere*) by reason of the violation or failure referred to in paragraph (1).

(B) In the case of a civil or administrative proceeding involving an allegation of fraud or similar misconduct, a determination of contractor or subcontractor, or personal services contractor liability on the basis of the violation or failure referred to in paragraph (1).

(C) In the case of any civil or administrative proceeding, the imposition of a monetary penalty or an order to take corrective action under section 2409 of this title by reason of the violation or failure referred to in paragraph (1).

(D) A final decision—

(i) to debar or suspend the contractor or subcontractor, or personal services contractor;

(ii) to rescind or void the contract, subcontract, or personal services contract; or

(iii) to terminate the contract, subcontract, or personal services contract for default;

by reason of the violation or failure referred to in paragraph (1).

(E) A disposition of the proceeding by consent or compromise if such action could have resulted in a disposition described in subparagraph (A), (B), (C), or (D).

(3) In the case of a proceeding referred to in paragraph (1) that is commenced by the United States and is resolved by consent or compromise pursuant to an agreement entered into by a contractor or subcontractor, or personal services contractor and the United States, the costs incurred by the contractor or subcontractor, or personal services contractor in connection with such proceeding that are otherwise not allowable as reimbursable costs under such paragraph may be allowed to the extent specifically provided in such agreement.

(4) In the case of a proceeding referred to in paragraph (1) that is commenced by a State, the head of the agency or Secretary of the military department concerned that awarded the covered contract, *subcontract*, or *personal services contract* involved in the proceeding may allow the costs incurred by the contractor or *subcontractor*, or *personal services contractor* in connection with such proceeding as reimbursable costs if the agency head or Secretary determines, in accordance with the Federal Acquisition Regulation, that the costs were incurred as a result of (A) a specific term or condition of the contract, *subcontract*, or *personal services contract*, or (B) specific written instructions of the agency or military department.

(5)(A) Except as provided in subparagraph (C), costs incurred by a contractor or *subcontractor*, or *personal services contractor* in connection with a criminal, civil, or administrative proceeding commenced by the United States or a State in connection with a covered contract, *subcontract*, or *personal services contract* may be allowed as reimbursable costs under the contract, *subcontract*, or *personal services contract* if such costs are not disallowable under paragraph (1), but only to the extent provided in subparagraph (B).

(B)(i) The amount of the costs allowable under subparagraph (A) in any case may not exceed the amount equal to 80 percent of the amount of the costs incurred, to the extent that such costs are determined to be otherwise allowable and allocable under the Federal Acquisition Regulation.

(ii) Regulations issued for the purpose of clause (i) shall provide for appropriate consideration of the complexity of procurement litigation, generally accepted principles governing the award of legal fees in civil actions involving the United States as a party, and such other factors as may be appropriate.

(C) In the case of a proceeding referred to in subparagraph (A), contractor or *subcontractor*, or *personal services contractor* costs otherwise allowable as reimbursable costs under this paragraph are not allowable if (i) such proceeding involves the same contractor or *subcontractor*, or *personal services contractor* misconduct alleged as the basis of another criminal, civil, or administrative proceeding, and (ii) the costs of such other proceeding are not allowable under paragraph (1).

(6) In this subsection:

(A) The term “proceeding” includes an investigation.

(B) The term “costs”, with respect to a proceeding—

(i) means all costs incurred by a contractor or *subcontractor*, or *personal services contractor*, whether before or after the commencement of any such proceeding; and

(ii) includes—

(I) administrative and clerical expenses;

(II) the cost of legal services, including legal services performed by an employee of the contractor or *subcontractor*, or *personal services contractor*;

(III) the cost of the services of accountants and consultants retained by the contractor or *subcontractor*, or *personal services contractor*; and

(IV) the pay of directors, officers, and employees of the contractor or *subcontractor*, or *personal services*

contractor for time devoted by such directors, officers, and employees to such proceeding.

(C) The term “penalty” does not include restitution, reimbursement, or compensatory damages.

(1) DEFINITIONS.—In this section:

(1)(A) The term “covered contract” means a contract for an amount in excess of \$500,000 that is entered into by the head of an agency, except that such term does not include a fixed-price contract without cost incentives or any firm fixed-price contract for the purchase of commercial items.

(B) Effective on October 1 of each year that is divisible by five, the amount set forth in subparagraph (A) shall be adjusted to the equivalent amount in constant fiscal year 1994 dollars. An amount, as so adjusted, that is not evenly divisible by \$50,000 shall be rounded to the nearest multiple of \$50,000. In the case of an amount that is evenly divisible by \$25,000 but is not evenly divisible by \$50,000, the amount shall be rounded to the next higher multiple of \$50,000.

(2) The term “head of the agency” or “agency head” does not include the Secretary of a military department.

(3) The term “agency” means the Department of Defense, the Coast Guard, and the National Aeronautics and Space Administration.

(4) The term “compensation”, for a year, means the total amount of wages, salary, bonuses and deferred compensation for the year, whether paid, earned, or otherwise accruing, as recorded in an employer’s cost accounting records for the year.

(6) The term “fiscal year” means a fiscal year established by a contractor for accounting purposes.

* * * * *

CHAPTER 141—MISCELLANEOUS PROCUREMENT PROVISIONS

* * * * *

§ 2409. Contractor employees: protection from reprisal for disclosure of certain information

(a) PROHIBITION OF REPRISALS.—(1) An employee of a contractor, subcontractor, grantee, or subgrantee or *personal services contractor* may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a person or body described in paragraph (2) information that the employee reasonably believes is evidence of the following:

(A) Gross mismanagement of a Department of Defense contract or grant, a gross waste of Department funds, an abuse of authority relating to a Department contract or grant, or a violation of law, rule, or regulation related to a Department contract (including the competition for or negotiation of a contract) or grant.

(B) Gross mismanagement of a National Aeronautics and Space Administration contract or grant, a gross waste of Administration funds, an abuse of authority relating to an Administration contract or grant, or a violation of law, rule, or

regulation related to an Administration contract (including the competition for or negotiation of a contract) or grant.

(C) A substantial and specific danger to public health or safety.

(2) The persons and bodies described in this paragraph are the persons and bodies as follows:

(A) A Member of Congress or a representative of a committee of Congress.

(B) An Inspector General.

(C) The Government Accountability Office.

(D) An employee of the Department of Defense or the National Aeronautics and Space Administration, as applicable, responsible for contract oversight or management.

(E) An authorized official of the Department of Justice or other law enforcement agency.

(F) A court or grand jury.

(G) A management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct.

(3) For the purposes of paragraph (1)—

(A) an employee who initiates or provides evidence of contractor or subcontractor misconduct in any judicial or administrative proceeding relating to waste, fraud, or abuse on a Department of Defense or National Aeronautics and Space Administration contract or grant shall be deemed to have made a disclosure covered by such paragraph; and

(B) a reprisal described in paragraph (1) is prohibited even if it is undertaken at the request of a Department or Administration official, unless the request takes the form of a nondiscretionary directive and is within the authority of the Department or Administration official making the request.

(b) INVESTIGATION OF COMPLAINTS.—(1) A person who believes that the person has been subjected to a reprisal prohibited by subsection (a) may submit a complaint to the Inspector General of the Department of Defense, or the Inspector General of the National Aeronautics and Space Administration in the case of a complaint regarding the National Aeronautics and Space Administration. Unless the Inspector General determines that the complaint is frivolous, fails to allege a violation of the prohibition in subsection (a), or has previously been addressed in another Federal or State judicial or administrative proceeding initiated by the complainant, the Inspector General shall investigate the complaint and, upon completion of such investigation, submit a report of the findings of the investigation to the person, the contractor concerned, and the head of the agency.

(2)(A) Except as provided under subparagraph (B), the Inspector General shall make a determination that a complaint is frivolous, fails to allege a violation of the prohibition in subsection (a), or has previously been addressed in another Federal or State judicial or administrative proceeding initiated by the complainant or submit a report under paragraph (1) within 180 days after receiving the complaint.

(B) If the Inspector General is unable to complete an investigation in time to submit a report within the 180-day period specified in subparagraph (A) and the person submitting the complaint

agrees to an extension of time, the Inspector General shall submit a report under paragraph (1) within such additional period of time, up to 180 days, as shall be agreed upon between the Inspector General and the person submitting the complaint.

(3) The Inspector General may not respond to any inquiry or disclose any information from or about any person alleging the reprisal, except to the extent that such response or disclosure is—

(A) made with the consent of the person alleging the reprisal;

(B) made in accordance with the provisions of section 552a of title 5 or as required by any other applicable Federal law; or

(C) necessary to conduct an investigation of the alleged reprisal.

(4) A complaint may not be brought under this subsection more than three years after the date on which the alleged reprisal took place.

(c) REMEDY AND ENFORCEMENT AUTHORITY.—(1) Not later than 30 days after receiving an Inspector General report pursuant to subsection (b), the head of the agency concerned shall determine whether there is sufficient basis to conclude that the contractor concerned has subjected the complainant to a reprisal prohibited by subsection (a) and shall either issue an order denying relief or shall take one or more of the following actions:

(A) Order the contractor to take affirmative action to abate the reprisal.

(B) Order the contractor to reinstate the person to the position that the person held before the reprisal, together with compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.

(C) Order the contractor to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal, as determined by the head of the agency.

(2) If the head of an executive agency issues an order denying relief under paragraph (1) or has not issued an order within 210 days after the submission of a complaint under subsection (b), or in the case of an extension of time under paragraph (b)(2)(B), not later than 30 days after the expiration of the extension of time, and there is no showing that such delay is due to the bad faith of the complainant, the complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint, and the complainant may bring a de novo action at law or equity against the contractor to seek compensatory damages and other relief available under this section in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. Such an action shall, at the request of either party to the action, be tried by the court with a jury. An action under this paragraph may not be brought more than two years after the date on which remedies are deemed to have been exhausted.

(3) An Inspector General determination and an agency head order denying relief under paragraph (2) shall be admissible in evidence in any de novo action at law or equity brought pursuant to this subsection.

(4) Whenever a person fails to comply with an order issued under paragraph (1), the head of the agency shall file an action for enforcement of such order in the United States district court for a district in which the reprisal was found to have occurred. In any action brought under this paragraph, the court may grant appropriate relief, including injunctive relief, compensatory and exemplary damages, and reasonable attorney fees and costs. The person upon whose behalf an order was issued may also file such an action or join in an action filed by the head of the agency.

(5) Any person adversely affected or aggrieved by an order issued under paragraph (1) may obtain review of the order's conformance with this subsection, and any regulations issued to carry out this section, in the United States court of appeals for a circuit in which the reprisal is alleged in the order to have occurred. No petition seeking such review may be filed more than 60 days after issuance of the order by the head of the agency. Review shall conform to chapter 7 of title 5. Filing such an appeal shall not act to stay the enforcement of the order of the head of an agency, unless a stay is specifically entered by the court.

(6) The legal burdens of proof specified in section 1221(e) of title 5 shall be controlling for the purposes of any investigation conducted by an Inspector General, decision by the head of an agency, or judicial or administrative proceeding to determine whether discrimination prohibited under this section has occurred.

(7) The rights and remedies provided for in this section may not be waived by any agreement, policy, form, or condition of employment.

(d) NOTIFICATION OF EMPLOYEES.—The Secretary of Defense and the Administrator of the National Aeronautics and Space Administration shall ensure that contractors and subcontractors of the Department of Defense and the National Aeronautics and Space Administration, as applicable, inform their employees in writing of the rights and remedies provided under this section, in the predominant native language of the workforce.

(e) EXCEPTIONS.—(1) This section shall not apply to any element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 3003(4)).

(2) This section shall not apply to any disclosure made by an employee of a contractor, subcontractor, or grantee of an element of the intelligence community if such disclosure—

(A) relates to an activity of an element of the intelligence community; or

(B) was discovered during contract, subcontract, or grantee services provided to an element of the intelligence community.

(f) CONSTRUCTION.—Nothing in this section may be construed to authorize the discharge of, demotion of, or discrimination against an employee for a disclosure other than a disclosure protected by subsection (a) or to modify or derogate from a right or remedy otherwise available to the employee.

(g) DEFINITIONS.—In this section:

(1) The term “agency” means an agency named in section 2303 of this title.

(2) The term “head of an agency” has the meaning provided by section 2302(1) of this title.

(3) The term “contract” means a contract awarded by the head of an agency.

(4) The term “contractor” means a person awarded a contract with an agency.

(5) The term “Inspector General” means an Inspector General appointed under the Inspector General Act of 1978 and any Inspector General that receives funding from, or has oversight over contracts awarded for or on behalf of, the Secretary of Defense.

(6) The term “abuse of authority” means the following:

(A) An arbitrary and capricious exercise of authority that is inconsistent with the mission of the Department of Defense or the successful performance of a Department contract or grant.

(B) An arbitrary and capricious exercise of authority that is inconsistent with the mission of the National Aeronautics and Space Administration or the successful performance of an Administration contract or grant.

(7) The term “grantee” means a person awarded a grant with an agency.

* * * * *

TITLE 41, UNITED STATES CODE

* * * * *

SUBTITLE I—FEDERAL PROCUREMENT POLICY

* * * * *

CHAPTER 43—ALLOWABLE COSTS

* * * * *

§ 4304. Specific costs not allowable

(a) SPECIFIC COSTS.—The following costs are not allowable under a covered contract:

(1) Costs of entertainment, including amusement, diversion, and social activities, and any costs directly associated with those costs (such as tickets to shows or sports events, meals, lodging, rentals, transportation, and gratuities).

(2) Costs incurred to influence (directly or indirectly) legislative action on any matter pending before Congress, a State legislature, or a legislative body of a political subdivision of a State.

(3) Costs incurred in defense of any civil or criminal fraud proceeding or similar proceeding (including filing of any false certification) brought by the Federal Government where the contractor is found liable or had pleaded nolo contendere to a

charge of fraud or similar proceeding (including filing of a false certification).

(4) Payments of fines and penalties resulting from violations of, or failure to comply with, Federal, State, local, or foreign laws and regulations, except when incurred as a result of compliance with specific terms and conditions of the contract or specific written instructions from the contracting officer authorizing in advance those payments in accordance with applicable provisions of the Federal Acquisition Regulation.

(5) Costs of membership in any social, dining, or country club or organization.

(6) Costs of alcoholic beverages.

(7) Contributions or donations, regardless of the recipient.

(8) Costs of advertising designed to promote the contractor or its products.

(9) Costs of promotional items and memorabilia, including models, gifts, and souvenirs.

(10) Costs for travel by commercial aircraft that exceed the amount of the standard commercial fare.

(11) Costs incurred in making any payment (commonly known as a "golden parachute payment") that is—

(A) in an amount in excess of the normal severance pay paid by the contractor to an employee on termination of employment; and

(B) paid to the employee contingent on, and following, a change in management control over, or ownership of, the contractor or a substantial portion of the contractor's assets.

(12) Costs of commercial insurance that protects against the costs of the contractor for correction of the contractor's own defects in materials or workmanship.

(13) Costs of severance pay paid by the contractor to foreign nationals employed by the contractor under a service contract performed outside the United States, to the extent that the amount of severance pay paid in any case exceeds the amount paid in the industry involved under the customary or prevailing practice for firms in that industry providing similar services in the United States, as determined under the Federal Acquisition Regulation.

(14) Costs of severance pay paid by the contractor to a foreign national employed by the contractor under a service contract performed in a foreign country if the termination of the employment of the foreign national is the result of the closing of, or the curtailment of activities at, a Federal Government facility in that country at the request of the government of that country.

(15) Costs incurred by a contractor *or subcontractor, or personal service contractor* in connection with any criminal, civil, or administrative proceeding commenced by the Federal Government or a State, to the extent provided in section 4310 of this title.

(16) Costs of compensation of senior executives of contractors for a fiscal year, regardless of the contract funding source, to the extent that the compensation exceeds the benchmark com-

pensation amount determined applicable for the fiscal year by the Administrator under section 1127 of this title.

(b) WAIVER OF SEVERANCE PAY RESTRICTIONS FOR FOREIGN NATIONALS.—

(1) EXECUTIVE AGENCY DETERMINATION.—Pursuant to the Federal Acquisition Regulation and subject to the availability of appropriations, an executive agency, in awarding a covered contract, may waive the application of paragraphs (13) and (14) of subsection (a) to that contract if the executive agency determines that—

(A) the application of those provisions to that contract would adversely affect the continuation of a program, project, or activity that provides significant support services for employees of the executive agency posted outside the United States;

(B) the contractor has taken (or has established plans to take) appropriate actions within the contractor's control to minimize the amount and number of incidents of the payment of severance pay by the contractor to employees under the contract who are foreign nationals; and

(C) the payment of severance pay is necessary to comply with a law that is generally applicable to a significant number of businesses in the country in which the foreign national receiving the payment performed services under the contract or is necessary to comply with a collective bargaining agreement.

(2) SOLICITATION TO INCLUDE STATEMENT ABOUT WAIVER.—An executive agency shall include in the solicitation for a covered contract a statement indicating—

(A) that a waiver has been granted under paragraph (1) for the contract; or

(B) whether the executive agency will consider granting a waiver and, if the executive agency will consider granting a waiver, the criteria to be used in granting the waiver.

(3) DETERMINATION TO BE MADE BEFORE CONTRACT AWARDED.—An executive agency shall make the final determination whether to grant a waiver under paragraph (1) with respect to a covered contract before award of the contract.

(c) ESTABLISHMENT OF DEFINITIONS, EXCLUSIONS, LIMITATIONS, AND QUALIFICATIONS.—The provisions of the Federal Acquisition Regulation implementing this chapter may establish appropriate definitions, exclusions, limitations, and qualifications. A submission by a contractor of costs that are incurred by the contractor and that are claimed to be allowable under Department of Energy management and operating contracts shall be considered a proposal for settlement of indirect costs incurred by the contractor for any period after those costs have been accrued.

* * * * *

§ 4310. Proceeding costs not allowable

(a) DEFINITIONS.—In this section:

(1) COSTS.—The term “costs”, with respect to a proceeding, means all costs incurred by a contractor, *subcontractor*, or *per-*

sonal services contractor, whether before or after the commencement of the proceeding, including—

(A) administrative and clerical expenses;

(B) the cost of legal services, including legal services performed by an employee of the contractor, *subcontractor*, or *personal services contractor*;

(C) the cost of the services of accountants and consultants retained by the contractor, *subcontractor*, or *personal services contractor*; and

(D) the pay of directors, officers, and employees of the contractor, *subcontractor*, or *personal services contractor* for time devoted by those directors, officers, and employees to the proceeding.

(2) PENALTY.—The term “penalty” does not include restitution, reimbursement, or compensatory damages.

(3) PROCEEDING.—The term “proceeding” includes an investigation.

(b) IN GENERAL.—Except as otherwise provided in this section, costs incurred by a contractor, *subcontractor*, or *personal services contractor* in connection with a criminal, civil, or administrative proceeding commenced by the Federal Government or a State are not allowable as reimbursable costs under a covered contract, *subcontract*, or *personal services contract* if the proceeding—

(1) relates to a violation of, or failure to comply with, a Federal or State statute or regulation or to any other activity described in section 4712(a)(1) of this title; and

(2) results in a disposition described in subsection (c).

(c) COVERED DISPOSITIONS.—A disposition referred to in subsection (b)(2) is any of the following:

(1) In a criminal proceeding, a conviction (including a conviction pursuant to a plea of *nolo contendere*) by reason of the violation or failure referred to in subsection (b).

(2) In a civil or administrative proceeding involving an allegation of fraud or similar misconduct, a determination of contractor, *subcontractor*, or *personal services contractor* liability on the basis of the violation or failure referred to in subsection (b).

(3) In any civil or administrative proceeding, the imposition of a monetary penalty by reason of the violation or failure referred to in subsection (b).

(4) A final decision to do any of the following, by reason of the violation or failure referred to in subsection (b):

(A) Debar or suspend the contractor, *subcontractor*, or *personal services contractor*.

(B) Rescind or void the contract, *subcontract*, or *personal services contract*.

(C) Terminate the contract, *subcontract*, or *personal services contract* for default.

(5) A disposition of the proceeding by consent or compromise if the disposition could have resulted in a disposition described in paragraph (1), (2), (3), or (4).

(d) COSTS ALLOWED BY SETTLEMENT AGREEMENT IN PROCEEDING COMMENCED BY FEDERAL GOVERNMENT.—In the case of a proceeding referred to in subsection (b) that is commenced by the Federal Government and is resolved by consent or compromise pursu-

ant to an agreement entered into by a contractor, *subcontractor*, or *personal services contractor* and the Federal Government, the costs incurred by the contractor, *subcontractor*, or *personal services contractor* in connection with the proceeding that are otherwise not allowable as reimbursable costs under subsection (b) may be allowed to the extent specifically provided in that agreement.

(e) COSTS SPECIFICALLY AUTHORIZED BY EXECUTIVE AGENCY IN PROCEEDING COMMENCED BY STATE.—In the case of a proceeding referred to in subsection (b) that is commenced by a State, the executive agency that awarded the covered contract, *subcontract*, or *personal services contract* involved in the proceeding may allow the costs incurred by the contractor, *subcontractor*, or *personal services contractor* in connection with the proceeding as reimbursable costs if the executive agency determines, in accordance with the Federal Acquisition Regulation, that the costs were incurred as a result of—

- (1) a specific term or condition of the contract, *subcontract*, or *personal services contract*; or
- (2) specific written instructions of the executive agency.

(f) OTHER ALLOWABLE COSTS.—

(1) IN GENERAL.—Except as provided in paragraph (3), costs incurred by a contractor, *subcontractor*, or *personal services contractor* in connection with a criminal, civil, or administrative proceeding commenced by the Federal Government or a State in connection with a covered contract, *subcontract*, or *personal services contract* may be allowed as reimbursable costs under the contract, *subcontract*, or *personal services contract* if the costs are not disallowable under subsection (b), but only to the extent provided in paragraph (2).

(2) AMOUNT OF ALLOWABLE COSTS.—

(A) MAXIMUM AMOUNT ALLOWED.—The amount of the costs allowable under paragraph (1) in any case may not exceed the amount equal to 80 percent of the amount of the costs incurred, to the extent that the costs are determined to be otherwise allowable and allocable under the Federal Acquisition Regulation.

(B) CONTENT OF REGULATIONS.—Regulations issued for the purpose of subparagraph (A) shall provide for appropriate consideration of the complexity of procurement litigation, generally accepted principles governing the award of legal fees in civil actions involving the Federal Government as a party, and other factors as may be appropriate.

(3) WHEN OTHERWISE ALLOWABLE COSTS ARE NOT ALLOWABLE.—In the case of a proceeding referred to in paragraph (1), contractor, *subcontractor*, or *personal services contractor* costs otherwise allowable as reimbursable costs under this subsection are not allowable if—

(A) the proceeding involves the same contractor, *subcontractor*, or *personal services contractor* misconduct alleged as the basis of another criminal, civil, or administrative proceeding; and

(B) the costs of the other proceeding are not allowable under subsection (b).

* * * * *

CHAPTER 47—MISCELLANEOUS

Sec

4701. Determinations and decisions.

* * * * *

[4712. Pilot program for enhancement of contractor protection from reprisal for disclosure of certain information.]

4712. Enhancement of contractor protection from reprisal for disclosure of certain information.

* * * * *

§ 4712. [Pilot program for enhancement] *Enhancement of contractor protection from reprisal for disclosure of certain information*

(a) PROHIBITION OF REPRISALS.—

(1) IN GENERAL.—An employee of a contractor, subcontractor, **[or grantee]** *grantee, or subgrantee or personal services contractor* may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a person or body described in paragraph (2) information that the employee reasonably believes is evidence of gross mismanagement of a Federal contract or grant, a gross waste of Federal funds, an abuse of authority relating to a Federal contract or grant, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a Federal contract (including the competition for or negotiation of a contract) or grant.

(2) PERSONS AND BODIES COVERED.—The persons and bodies described in this paragraph are the persons and bodies as follows:

- (A) A Member of Congress or a representative of a committee of Congress.
- (B) An Inspector General.
- (C) The Government Accountability Office.
- (D) A Federal employee responsible for contract or grant oversight or management at the relevant agency.
- (E) An authorized official of the Department of Justice or other law enforcement agency.
- (F) A court or grand jury.
- (G) A management official or other employee of the contractor, subcontractor, or grantee who has the responsibility to investigate, discover, or address misconduct.

(3) RULES OF CONSTRUCTION.—For the purposes of paragraph

(1)—

(A) an employee who initiates or provides evidence of contractor, subcontractor, or grantee misconduct in any judicial or administrative proceeding relating to waste, fraud, or abuse on a Federal contract or grant shall be deemed to have made a disclosure covered by such paragraph; and

(B) a reprisal described in paragraph (1) is prohibited even if it is undertaken at the request of an executive branch official, unless the request takes the form of a non-discretionary directive and is within the authority of the executive branch official making the request.

(b) INVESTIGATION OF COMPLAINTS.—

(1) SUBMISSION OF COMPLAINT.—A person who believes that the person has been subjected to a reprisal prohibited by subsection (a) may submit a complaint to the Inspector General of the executive agency involved. Unless the Inspector General determines that the complaint is frivolous, fails to allege a violation of the prohibition in subsection (a), or has previously been addressed in another Federal or State judicial or administrative proceeding initiated by the complainant, the Inspector General shall investigate the complaint and, upon completion of such investigation, submit a report of the findings of the investigation to the person, the contractor or grantee concerned, and the head of the agency.

(2) INSPECTOR GENERAL ACTION.—

(A) DETERMINATION OR SUBMISSION OF REPORT ON FINDINGS.—Except as provided under subparagraph (B), the Inspector General shall make a determination that a complaint is frivolous, fails to allege a violation of the prohibition in subsection (a), or has previously been addressed in another Federal or State judicial or administrative proceeding initiated by the complainant or submit a report under paragraph (1) within 180 days after receiving the complaint.

(B) EXTENSION OF TIME.—If the Inspector General is unable to complete an investigation in time to submit a report within the 180-day period specified in subparagraph (A) and the person submitting the complaint agrees to an extension of time, the Inspector General shall submit a report under paragraph (1) within such additional period of time, up to 180 days, as shall be agreed upon between the Inspector General and the person submitting the complaint.

(3) PROHIBITION ON DISCLOSURE.—The Inspector General may not respond to any inquiry or disclose any information from or about any person alleging the reprisal, except to the extent that such response or disclosure is—

(A) made with the consent of the person alleging the reprisal;

(B) made in accordance with the provisions of section 552a of title 5 or as required by any other applicable Federal law; or

(C) necessary to conduct an investigation of the alleged reprisal.

(4) TIME LIMITATION.—A complaint may not be brought under this subsection more than three years after the date on which the alleged reprisal took place.

(c) REMEDY AND ENFORCEMENT AUTHORITY.—

(1) IN GENERAL.—Not later than 30 days after receiving an Inspector General report pursuant to subsection (b), the head of the executive agency concerned shall determine whether there is sufficient basis to conclude that the contractor or grantee concerned has subjected the complainant to a reprisal prohibited by subsection (a) and shall either issue an order denying relief or shall take one or more of the following actions:

(A) Order the contractor or grantee to take affirmative action to abate the reprisal.

(B) Order the contractor or grantee to reinstate the person to the position that the person held before the reprisal, together with compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.

(C) Order the contractor or grantee to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal, as determined by the head of the executive agency.

(2) EXHAUSTION OF REMEDIES.—If the head of an executive agency issues an order denying relief under paragraph (1) or has not issued an order within 210 days after the submission of a complaint under subsection (b), or in the case of an extension of time under paragraph (b)(2)(B), not later than 30 days after the expiration of the extension of time, and there is no showing that such delay is due to the bad faith of the complainant, the complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint, and the complainant may bring a de novo action at law or equity against the contractor or grantee to seek compensatory damages and other relief available under this section in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. Such an action shall, at the request of either party to the action, be tried by the court with a jury. An action under this paragraph may not be brought more than two years after the date on which remedies are deemed to have been exhausted.

(3) ADMISSIBILITY OF EVIDENCE.—An Inspector General determination and an agency head order denying relief under paragraph (2) shall be admissible in evidence in any de novo action at law or equity brought pursuant to this subsection.

(4) ENFORCEMENT OF ORDERS.—Whenever a person fails to comply with an order issued under paragraph (1), the head of the executive agency concerned shall file an action for enforcement of such order in the United States district court for a district in which the reprisal was found to have occurred. In any action brought under this paragraph, the court may grant appropriate relief, including injunctive relief, compensatory and exemplary damages, and attorney fees and costs. The person upon whose behalf an order was issued may also file such an action or join in an action filed by the head of the executive agency.

(5) JUDICIAL REVIEW.—Any person adversely affected or aggrieved by an order issued under paragraph (1) may obtain review of the order's conformance with this subsection, and any regulations issued to carry out this section, in the United States court of appeals for a circuit in which the reprisal is alleged in the order to have occurred. No petition seeking such review may be filed more than 60 days after issuance of the order by the head of the executive agency. Review shall con-

form to chapter 7 of title 5. Filing such an appeal shall not act to stay the enforcement of the order of the head of an executive agency, unless a stay is specifically entered by the court.

(6) BURDENS OF PROOF.—The legal burdens of proof specified in section 1221(e) of title 5 shall be controlling for the purposes of any investigation conducted by an Inspector General, decision by the head of an executive agency, or judicial or administrative proceeding to determine whether discrimination prohibited under this section has occurred.

(7) RIGHTS AND REMEDIES NOT WAIVABLE.—The rights and remedies provided for in this section may not be waived by any agreement, policy, form, or condition of employment.

(d) NOTIFICATION OF EMPLOYEES.—The head of each executive agency shall ensure that contractors, subcontractors, and grantees of the agency inform their employees in writing of the rights and remedies provided under this section, in the predominant native language of the workforce.

(e) CONSTRUCTION.—Nothing in this section may be construed to authorize the discharge of, demotion of, or discrimination against an employee for a disclosure other than a disclosure protected by subsection (a) or to modify or derogate from a right or remedy otherwise available to the employee.

(f) EXCEPTIONS.—(1) This section shall not apply to any element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4)).

(2) This section shall not apply to any disclosure made by an employee of a contractor, subcontractor, or grantee of an element of the intelligence community if such disclosure—

(A) relates to an activity of an element of the intelligence community; or

(B) was discovered during contract, subcontract, or grantee services provided to an element of the intelligence community.

(g) DEFINITIONS.—In this section:

(1) The term “abuse of authority” means an arbitrary and capricious exercise of authority that is inconsistent with the mission of the executive agency concerned or the successful performance of a contract or grant of such agency.

(2) The term “Inspector General” means an Inspector General appointed under the Inspector General Act of 1978 and any Inspector General that receives funding from, or has oversight over contracts or grants awarded for or on behalf of, the executive agency concerned.

(h) CONSTRUCTION.—Nothing in this section, or the amendments made by this section, shall be construed to provide any rights to disclose classified information not otherwise provided by law.

[(i) DURATION OF SECTION.—This section shall be in effect for the four-year period beginning on the date of the enactment of this section.]

* * * * *