

plementation and applicability of existing law, see section 1801(d) of Pub. L. 116-283, set out as an Effective Date of 2021 Amendment note preceding section 3001 of this title.

#### PILOT PROGRAM TO INCENTIVIZE PROGRESS PAYMENTS

Pub. L. 118-31, div. A, title VIII, § 874, Dec. 22, 2023, 137 Stat. 352, provided that:

“(a) PILOT PROGRAM.—The Under Secretary of Defense for Acquisition and Sustainment shall establish and implement a pilot program to incentivize contractor performance by paying covered contractors a progress payment rate that is up to 10 percent higher than the customary progress payment rate on a contract-by-contract basis.

“(b) INCENTIVE CRITERIA.—The Under Secretary shall develop and establish clear and measurable criteria for the payment to contractors of higher progress payments as described in subsection (a), including criteria for qualifying for such payments and the amount of such payments.

“(c) APPLICABILITY.—The Under Secretary shall apply the criteria established under subsection (b) and any associated incentive on a contract-by-contract basis when determining whether to pay a contractor a higher progress payment under the pilot program established under subsection (a) and the amount of such payment.

“(d) PARTICIPATION VOLUNTARY.—Participation in the pilot program established under subsection (a) shall be on a voluntary basis.

“(e) NOTICE AND COMMENT.—The Under Secretary shall issue the regulations implementing the pilot program established under subsection (a) and establishing the criteria required by subsection (b) after notice and an opportunity for public comment of not more than 30 days.

“(f) REPORT.—Not later than September 30, 2024, and annually thereafter, the Under Secretary for Acquisition and Sustainment shall submit to the Committees on Armed Services of the Senate and House of Representatives a report on the implementation and activities of the pilot program established under subsection (a), including a comprehensive list of contractors that received increased progress payments under the pilot program and the contracts with respect to which such increased progress payments were made.

“(g) DEFINITIONS.—In this section:

“(1) COVERED CONTRACTOR.—The term ‘covered contractor’ means a contractor of the Department of Defense that is eligible for progress payments under section 3804 of title 10, United States Code.

“(2) CUSTOMARY PROGRESS PAYMENT RATE.—The term ‘customary progress payment rate’ refers to the rate of progress payments provided for under section 3804 of title 10, United States Code, and payable in accordance with the applicable provisions of the Federal Acquisition Regulation and the Defense Federal Acquisition Regulation Supplement.

“(3) UNDER SECRETARY.—The term ‘Under Secretary’ means the Under Secretary for Acquisition and Sustainment.

“(h) SUNSET.—

“(1) IN GENERAL.—Except as provided by paragraph (2), the authority to carry out the pilot program established under subsection (a) shall terminate on January 1, 2029.

“(2) EXISTING CONTRACTS.—Notwithstanding paragraph (1), a contractor that the Under Secretary determines under the pilot program established under subsection (a) shall be paid a higher progress payment under such pilot program with respect to a contract in effect as of the date described in paragraph (1) shall receive such higher progress payments until the earlier of—

“(A) the termination or expiration of the contract; or

“(B) the date on which the contractor becomes ineligible for progress payments or higher progress payments under such pilot program.”

#### WAIVERS OF CERTAIN CONDITIONS FOR PROGRESS PAYMENTS UNDER CERTAIN CONTRACTS DURING THE COVID-19 NATIONAL EMERGENCY

Pub. L. 116-283, div. A, title VIII, § 891, Jan. 1, 2021, 134 Stat. 3793, provided that:

“(a) WAIVER OF PROGRESS PAYMENTS REQUIREMENTS.—The Secretary of Defense may waive the requirements of section 2307(e)(2) of title 10, United States Code [now 10 U.S.C. 3804(b)], with respect to progress payments for any undefinitized contractual action (as defined in section 2326 of title 10, United States Code [see 10 U.S.C. 3377(b)(1)]; in this section referred to as ‘UCA’) if the Secretary determines that the waiver is necessary due to the national emergency for the Coronavirus Disease 2019 (COVID-19) and—

“(1) a contractor performing the contract for which a UCA is entered into has not already received increased progress payments from the Secretary of Defense on contractual actions other than UCAs; or

“(2) a contractor performing the contract for which a UCA is entered into, and that has received increased progress payments from the Secretary of Defense on contractual actions other than UCAs, can demonstrate that the contractor has promptly provided the amount of the increase to any subcontractors (at any tier), small business concerns (as defined under section 3 of the Small Business Act (15 U.S.C. 632)), or suppliers of the contractor.

“(b) DEFINITIZATION.—With respect to a UCA that not been definitized for a period of 180 days beginning on the date on which such UCA was entered into, the Secretary of Defense may only use the waiver authority described in subsection (a) if the Secretary (or a designee at a level not below the head of a contracting activity) provides a certification to the congressional defense committees [Committees on Armed Services and Appropriations of the Senate and the House of Representatives] that such UCA will be definitized within 60 days after the date on which the waiver is issued.

“(c) SUBMISSION.—For each use of the waiver authority under subsection (a), the Secretary of Defense shall submit to the congressional defense committees an estimate of the amounts to be provided to subcontractors (at any tier), small business concerns, and suppliers, including an identification of the specific entities receiving an amount from an increased progress payment described under such subsection (a).”

#### § 3805. Payments for commercial products and commercial services

(a) TERMS AND CONDITIONS FOR PAYMENTS.—Payments under section 3801 of this title for commercial products and commercial services may be made under such terms and conditions as the head of the agency determines are appropriate or customary in the commercial marketplace and are in the best interests of the United States.

(b) SECURITY FOR PAYMENTS.—The head of the agency shall obtain adequate security for such payments. If the security is in the form of a lien in favor of the United States, such lien is paramount to all other liens and is effective immediately upon the first payment, without filing, notice, or other action by the United States.

(c) LIMITATION ON ADVANCE PAYMENTS.—Advance payments made under section 3801 of this title for commercial products and commercial services may include payments, in a total amount of not more than 15 percent of the contract price, in advance of any performance of work under the contract.

(d) NONAPPLICATION OF CERTAIN CONDITIONS.—The conditions of sections 3803 and 3804 of this title need not be applied if they would be inconsistent, as determined by the head of the agency, with commercial terms and conditions pursuant to this section.

(Added and amended Pub. L. 116–283, div. A, title XVIII, §1834(a), (f), Jan. 1, 2021, 134 Stat. 4234, 4236.)

### Editorial Notes

#### CODIFICATION

The text of subsec. (f) of section 2307 of this title, which was transferred to this section and amended by Pub. L. 116–283, §1834(f), was based on Pub. L. 103–355, title II, §2001(f), Oct. 13, 1994, 108 Stat. 3302; Pub. L. 115–232, div. A, title VIII, §836(c)(6), Aug. 13, 2018, 132 Stat. 1866.

#### AMENDMENTS

2021—Pub. L. 116–283, §1834(f)(1)(A), transferred subsec. (f) of section 2307 of this title to this section and struck out subsec. (f) designation and heading “Conditions for Payments for Commercial Products and Commercial Services” at beginning.

Subsec. (a). Pub. L. 116–283, §1834(f)(1)(B), (4), after transfer of section 2307(f) of this title to this section, redesignated par. (1) as subsec. (a), inserted heading, and substituted “section 3801 of this title” for “subsection (a)”.

Subsec. (b). Pub. L. 116–283, §1834(f)(4), inserted heading.

Pub. L. 116–283, §1834(f)(2), which directed the designation of “the second sentence of subsection (a) as subsection (b)”, was executed by designating the second and third sentences of subsec. (a) as (b), to reflect the probable intent of Congress.

Subsec. (c). Pub. L. 116–283, §1834(f)(1)(B), (5), after transfer of section 2307(f) of this title to this section, redesignated par. (2) as subsec. (c), inserted heading, and substituted “section 3801 of this title” for “subsection (a)”.

Subsec. (d). Pub. L. 116–283, §1834(f)(1)(B), (6), after transfer of section 2307(f) of this title to this section, redesignated par. (3) as subsec. (d), inserted heading, and substituted “sections 3803 and 3804 of this title” for “subsections (d) and (e)” and “this section” for “paragraphs (1) and (2)”.

### Statutory Notes and Related Subsidiaries

#### EFFECTIVE DATE

Section and 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 an Effective Date of 2021 Amendment note preceding section 3001 of this title.

### § 3806. Action in case of fraud

(a) REMEDY COORDINATION OFFICIAL DEFINED.—In this section, the term “remedy coordination official”, with respect to an agency, means the person or entity in that agency who coordinates within that agency the administration of criminal, civil, administrative, and contractual remedies resulting from investigations of fraud or corruption related to procurement activities.

(b) RECOMMENDATION TO REDUCE OR SUSPEND PAYMENTS.—In any case in which the remedy coordination official of an agency finds that there is substantial evidence that the request of a contractor for advance, partial, or progress payment under a contract awarded by that agency

is based on fraud, the remedy coordination official shall recommend that the head of the agency reduce or suspend further payments to such contractor.

(c) REDUCTION OR SUSPENSION OF PAYMENTS.—The head of an agency receiving a recommendation under subsection (b) in the case of a contractor’s request for payment under a contract shall determine whether there is substantial evidence that the request is based on fraud. Upon making such a determination, the agency head may reduce or suspend further payments to the contractor under such contract.

(d) EXTENT OF REDUCTION OR SUSPENSION.—The extent of any reduction or suspension of payments by the head of an agency under subsection (c) on the basis of fraud shall be reasonably commensurate with the anticipated loss to the United States resulting from the fraud.

(e) WRITTEN JUSTIFICATION.—A written justification for each decision of the head of an agency whether to reduce or suspend payments under subsection (c) and for each recommendation received by such agency head in connection with such decision shall be prepared and be retained in the files of such agency.

(f) NOTICE.—The head of an agency shall prescribe procedures to ensure that, before such agency head decides to reduce or suspend payments in the case of a contractor under subsection (c), the contractor is afforded notice of the proposed reduction or suspension and an opportunity to submit matters to the head of the agency in response to such proposed reduction or suspension.

(g) REVIEW.—Not later than 180 days after the date on which the head of an agency reduces or suspends payments to a contractor under subsection (c), the remedy coordination official of such agency shall—

(1) review the determination of fraud on which the reduction or suspension is based; and

(2) transmit a recommendation to the head of such agency whether the suspension or reduction should continue.

(h) ANNUAL REPORT.—The head of an agency shall prepare for each year a report containing the recommendations made by the remedy coordination official of that agency to reduce or suspend payments under subsection (c), the actions taken on the recommendations and the reasons for such actions, and an assessment of the effects of such actions on the Federal Government. The Secretary of each military department shall transmit the annual report of such department to the Secretary of Defense. Each such report shall be available to any member of Congress upon request.

(i) RESTRICTION ON DELEGATION.—The head of an agency may not delegate responsibilities under this section to any person in a position below level IV of the Executive Schedule.

(j) INAPPLICABILITY TO COAST GUARD.—This section applies to the agencies named in paragraphs (1), (2), (3), (4), and (6) of section 3063 of this title.

(Added and amended Pub. L. 116–283, div. A, title XVIII, §1834(a), (g), Jan. 1, 2021, 134 Stat. 4234, 4237.)