Public Law 100-700
100th Congress

An Act

To amend title 18, United States Code, to provide increased penalties for certain major frauds against the United States.

Nov. 19, 1988
[H.R. 3911]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Major Fraud Act of 1988.
Contracts.
18 USC 1001 note.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Major Fraud Act of 1988".

SEC. 2. CHAPTER 47 AMENDMENT.

(a) IN GENERAL.—Chapter 47 of title 18, United States Code, is amended by adding at the end the following:

"§ 1031. Major fraud against the United States

"(a) Whoever knowingly executes, or attempts to execute, any scheme or artifice with the intent—

"(1) to defraud the United States; or

"(2) to obtain money or property by means of false or fraudulent pretenses, representations, or promises,

in any procurement of property or services as a prime contractor with the United States or as a subcontractor or supplier on a contract in which there is a prime contract with the United States, if the value of the contract, subcontract, or any constituent part thereof, for such property or services is $1,000,000 or more shall, subject to the applicability of subsection (c) of this section, be fined not more than $1,000,000, or imprisoned not more than 10 years, or both.

"(b) The fine imposed for an offense under this section may exceed the maximum otherwise provided by law, if such fine does not exceed $5,000,000 and—

"(1) the gross loss to the Government or the gross gain to a defendant is $500,000 or greater; or

"(2) the offense involves a conscious or reckless risk of serious personal injury.

"(c) The maximum fine imposed upon a defendant for a prosecution including a prosecution with multiple counts under this section shall not exceed $10,000,000.

"(d) Nothing in this section shall preclude a court from imposing any other sentences available under this title, including without limitation a fine up to twice the amount of the gross loss or gross gain involved in the offense pursuant to 18 U.S.C. section 3571(d).

"(e) In determining the amount of the fine, the court shall consider the factors set forth in 18 U.S.C. sections 3553 and 3572, and the factors set forth in the guidelines and policy statements of the United States Sentencing Commission, including— Courts, U.S.

"(1) the need to reflect the seriousness of the offense, including the harm or loss to the victim and the gain to the defendant;

"(2) whether the defendant previously has been fined for a similar offense; and

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"(3) any other pertinent equitable considerations.

"(f) A prosecution of an offense under this section may be commenced any time not later than 7 years after the offense is committed, plus any additional time otherwise allowed by law.

"(g) Any individual who—

Discrimination, prohibition.

"(1) is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by an employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of a prosecution under this section (including investigation for, initiation of, testimony for, or assistance in such prosecution), and

"(2) was not a participant in the unlawful activity that is the subject of said prosecution, may, in a civil action, obtain all relief necessary to make such individual whole. Such relief shall include reinstatement with the same seniority status such individual would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorney's fees."

18 USC 1031 note.

(b) SENTENCING GUIDELINES.—Pursuant to its authority under section 994(p) of title 28, United States Code and section 21 of the Sentencing Act of 1987, the United States Sentencing Commission shall promulgate guidelines, or shall amend existing guidelines, to provide for appropriate penalty enhancements, where conscious or reckless risk of serious personal injury resulting from the fraud has occurred. The Commission shall consider the appropriateness of assigning to such a defendant an offense level under Chapter Two of the sentencing guidelines that is at least two levels greater than the level that would have been assigned had conscious or reckless risk of serious personal injury not resulted from the fraud.

(c) CLERICAL AMENDMENT —The table of sections at the beginning of chapter 47 of title 18, United States Code, is amended by adding at the end the following new item:

"1031 Major fraud against the United States.".

SEC. 3. LIMITATION ON ALLOWABILITY OF COSTS OF CONTRACTORS INCURRED IN CERTAIN PROCEEDINGS.

(a) IN GENERAL.—Chapter 15 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"§ 293. Limitation on Government contract costs

"(a) Any proceeding costs incurred in connection with any proceeding brought by the United States or a State government that relates to a violation of, or failure to comply with, any Federal or State law or regulation on the part of the contractor are not allowable costs in a covered contract if the proceeding results in any of the following:

"(1) an indictment by a Federal grand jury, or a conviction (including a conviction pursuant to a plea of nolo contendere) by reason of such violation or failure to comply;

"(2) the assessment of a monetary penalty by reason of a civil or administrative finding of such violation or failure to comply;

"(3) a civil judgment containing a finding of liability, or an administrative finding of liability, by reason of such violation or

failure to comply, if the charges which are the subject of the proceeding involve fraud or similar offenses;

"(4) a decision to debar or suspend the contractor or rescind, void, or terminate a contract for default, by reason of such violation or failure to comply; or

"(5) the resolution of the proceeding by consent or compromise, where the penalty or relief sought by the government included the actions described in paragraphs (1) through (5).

"(b) In any proceeding brought by the United States or a State government that does not result in any of the actions described in paragraphs (1) through (5) of subsection (a), costs for legal services incurred by a contractor in connection with such proceeding shall not be allowed in excess of the rate specified in the Equal Access to Justice Act (28 U.S.C. 2412(d)(2)(A); 5 U.S.C. 504(a)) unless the responsible contracting officer finds that a special factor (such as the limited availability of qualified attorneys or agents) justifies an award of higher rates.

"(c) For purposes of this section—

"(1) the term 'covered contract' means a contract for an amount more than $100,000 entered into by a department or agency of the United States other than a fixed-price contract without cost incentives;

"(2) the term 'proceeding' means a civil, criminal, or an administrative investigation, prosecution, or proceeding; and

"(3) the term 'proceeding costs' means all costs relating to a proceeding incurred before, during, or after the commencement of the proceeding, and such term includes—

"(A) administrative and clerical expenses;

"(B) the cost of legal services (whether performed by an employee of the contractor or otherwise);

"(C) the cost of the services of accountants and consultants retained by a contractor; and

"(D) the salaries and wages of employees, including officers and directors.".

(b) AMENDMENT TO CHAPTER ANALYSIS.—The chapter analysis for chapter 15 of title 18, United States Code, is amended by adding at the end thereof the following:

"293. Limitation on Government contract costs.".

(c) APPLICABILITY.—The amendments made by this section shall apply to contracts entered into after the date of the enactment of this Act. 18 USC 293 note.

SEC. 4. ESTABLISHMENT OF ADDITIONAL ASSISTANT UNITED STATES ATTORNEY AND SUPPORT PROVISIONS.

(a) ESTABLISHMENT OF POSITIONS.—Subject to the funding authorization limitations in section 5(a), there are hereby established within the Department of Justice additional Assistant United States Attorney positions and additional support staff positions for prosecuting cases under both the criminal and civil statutes.

(b) FUNCTION OF PERSONNEL.—The primary function of individuals selected for the positions specified in subsection (a) shall be dedicated to the investigation and prosecution of fraud against the Government.

(c) LOCATIONS.—The Attorney General shall determine the locations for assignment of such personnel. In making such determination the Attorney General shall consider concentrations of

Government programs and procurements and concentrations of pending Government fraud investigations and allegations.

SEC. 5. AUTHORIZATION OF APPROPRIATIONS.

(a) AUTHORIZATION.—Subject to the provisions of subsection (b), for the purpose of carrying out the purposes of this Act there are authorized to be appropriated $8,000,000 for fiscal year 1989, and such sums as may be necessary for each of the four succeeding fiscal years, to be available until expended.

(b) LIMITATION.—Before expending funds appropriated pursuant to subsection (a) to carry out the purposes of this section, the Attorney General shall utilize available existing resources within the Department of Justice for such purposes.

28 USC 522 note.

SEC. 6. CONGRESSIONAL OVERSIGHT.

Reports.

Commencing with the first year after the date of enactment of this section, the Attorney General shall annually report to the Congress with respect to—

(1) the number of referrals of fraud cases by the Department of Defense of defense contractors (with specific statistics with respect to the one hundred largest contractors), the number of open investigation of such contractors, and a breakdown of to which United States Attorney's Office or other component of the Department of Justice each such case was referred;

(2) the number of referrals of fraud cases from other agencies or sources;

(3) the number of attorneys and support staff assigned pursuant to this Act;

(4) the number of investigative agents assigned to each investigation and the period of time each investigation has been opened;

(5) the number of convictions and acquittals achieved by individuals assigned to positions established by the Act; and

(6) the sentences, recoveries, and penalties achieved by individuals assigned to positions established by this Act.

Courts, U.S. District of Columbia.

SEC. 7. RELIEF OF PAULETTE MENDES-SILVA.

(a) Notwithstanding section 2675 of title 28, United States Code, and section 2401(b) of such title, or any other limitation on actions at law or in equity, the United States District Court for the District of Columbia shall have jurisdiction to hear, determine, and render judgment on any claim of Paulette Mendes-Silva against the United States for personal injuries which she allegedly incurred after an innoculation on March 12, 1963, by an employee of the Public Health Service of the United States Department of Health, Education, and Welfare. Any such claim of Paulette Mendes-Silva shall be brought within six months after the date of the enactment of this Act. The court shall apply the laws of the District of Columbia in such case.

(b) Nothing in this section shall be construed as an inference of liability on the part of the United States.

SEC. 8. LIMITATIONS ON ALLOWABILITY OF COSTS INCURRED BY FEDERAL GOVERNMENT CONTRACTORS IN CERTAIN PROCEEDINGS.

(a) AMENDMENT TO THE FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT OF 1949.—(1) Title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251 et seq.) is

amended by inserting after section 305 the following new section 306:

"LIMITATIONS ON ALLOWABILITY OF COSTS INCURRED BY CONTRACTORS IN CERTAIN PROCEEDINGS

"SEC. 306. (a) Except as otherwise provided in this section, costs incurred by a contractor in connection with any criminal, civil, or administrative proceeding commenced by the United States or a State are not allowable as reimbursable costs under a covered contract if the proceeding (1) relates to a violation of, or a failure to comply with, a Federal or State statute or regulation, and (2) results in a disposition described in subsection (b). 41 USC 256.

"(b) A disposition referred to in subsection (a)(2) is any of the following:

"(1) 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 subsection (a).

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

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

"(4) A final decision by an appropriate official of an executive agency—

"(A) to debar or suspend the contractor;

"(B) to rescind or void the contract; or

"(C) to terminate the contract for default,

by reason of the violation or failure referred to in subsection (a).

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

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

"(d) In the case of a proceeding referred to in subsection (a) that is commenced by a State, the head of the executive agency that awarded the covered contract involved in the proceeding may allow the costs incurred by the contractor in connection with such proceeding as reimbursable costs if the agency head determines, under regulations prescribed by such agency head, that the costs were incurred as a result of (1) a specific term or condition of the contract, or (2) specific written instructions of the agency. Regulations.

"(e)(1) Except as provided in paragraph (3), costs incurred by a contractor in connection with a criminal, civil, or administrative proceeding commenced by the United States or a State in connection with a covered contract may be allowed as reimbursable costs under the contract if such costs are not disallowable under subsection (a), but only to the extent provided in paragraph (2).

"(2)(A) 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 such costs are determined to be otherwise allowable and allocable under the single Government-wide procurement regulation issued pursuant to section 4(4)(A) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(4)(A)).

"(B) 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 United States as a party, and such other factors as may be appropriate.

"(3) In the case of a proceeding referred to in paragraph (1), contractor costs otherwise allowable as reimbursable costs under this subsection are not allowable if (A) such proceeding involves the same contractor misconduct alleged as the basis of another criminal, civil, or administrative proceeding, and (B) the costs of such other proceeding are not allowable under subsection (a).

"(f) As used in this section:

"(1) The term 'covered contract' means a contract for an amount more than $100,000 entered into by an executive agency other than a fixed-price contract without cost incentives.

"(2) The term 'proceeding' includes an investigation.

"(3) The term 'costs', with respect to a proceeding—

"(A) means all costs incurred by a contractor, whether before or after the commencement of such proceeding; and

"(B) includes—

"(i) administrative and clerical expenses;

"(ii) the cost of legal services, including legal services performed by an employee of the contractor;

"(iii) the cost of the services of accountants and consultants retained by the contractor; and

"(iv) the pay of directors, officers, and employees of the contractor for time devoted by such directors, officers, and employees to such proceeding.

"(4) The term 'penalty' does not include restitution, reimbursement, or compensatory damages.".

(2) The table of contents in the first section of such Act is amended by inserting after the item relating to section 305 the following new item:

"306. Limitation on allowability of costs incurred by contractors in certain proceedings.".

(b) AMENDMENTS TO TITLE 10.—Section 2324 of title 10, United States Code, is amended—

(1) in subsection (e)—

(A) by striking out subparagraph (N) and inserting in lieu thereof the following:

"(N) 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).";

(B) by striking out paragraph (2); and

(C) by redesignating paragraph (3) as paragraph (2); and

(2) by striking out subsection (k) and inserting in lieu thereof the following:

"(k)(1) Except as otherwise provided in this subsection, costs incurred by a contractor in connection with any criminal, civil, or administrative proceeding commenced by the United States or a

State are not allowable as reimbursable costs under a covered contract if the proceeding (A) relates to a violation of, or failure to comply with, a Federal or State statute or regulation, 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 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 by reason of the violation or failure referred to in paragraph (1).

"(D) A final decision by the Department of Defense—

"(i) to debar or suspend the contractor;

"(ii) to rescind or void the contract; or

"(iii) to terminate the 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 and the United States, the costs incurred by the 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 that awarded the covered contract involved in the proceeding may allow the costs incurred by the contractor in connection with such proceeding as reimbursable costs if the agency head determines, under regulations prescribed by such agency head, that the costs were incurred as a result of (A) a specific term or condition of the contract, or (B) specific written instructions of the agency.

"(5)(A) Except as provided in subparagraph (C), costs incurred by a contractor in connection with a criminal, civil, or administrative proceeding commenced by the United States or a State in connection with a covered contract may be allowed as reimbursable costs under the 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 single Government-wide procurement regulation issued pursuant to section 4(4)(A) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(4)(A)).

"(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 costs otherwise allowable as reimbursable costs under this paragraph are not allowable if (i) such proceeding involves the same 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).

"(l)(1) In this section, the term 'covered contract' means a contract for an amount more than $100,000 entered into by the Department of Defense other than a fixed-price contract without cost incentives.

"(2) In subsection (k):

"(A) The term 'proceeding' includes an investigation.

"(B) The term 'costs', with respect to a proceeding—

"(i) means all costs incurred by a 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;

"(III) the cost of the services of accountants and consultants retained by the contractor; and

"(IV) the pay of directors, officers, and employees of the 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.".

10 USC 2324 note.

(c) TECHNICAL AMENDMENT.—Section 832(b) of the National Defense Authorization Act, Fiscal Year 1989 is repealed.

10 USC 2324 note.

(d) REGULATIONS.—The regulations necessary for the implementation of section 306(e) of the Federal Property and Administrative Services Act of 1949 (as added by subsection (a)) and section 2324(k)(5) of title 10, United States Code (as added by subsection (b))—

(1) shall be prescribed not later than 120 days after the date of the enactment of this Act; and

(2) shall apply to contracts entered into more than 30 days after the date on which such regulations are issued.

10 USC 2324 note.

(e) EFFECTIVE DATE.—The amendments made by subsections (a) and (b) shall take effect with respect to contracts awarded after the date of the enactment of this Act.

SEC. 9. QUI TAM ACTIONS.

(a) AWARDS OF DAMAGES.—Section 3730(d) of title 31, United States Code, is amended—

(1) by redesignating paragraph (3) as paragraph (4); and

(2) by inserting after paragraph (2) the following new paragraph:

"(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of

section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.".

(b) TECHNICAL AMENDMENTS.—Section 3730 of title 28, United States Code, is amended— 31 USC 3730.

(1) in subsection (c)(4) by inserting "the" after "Government proceeds with"; and

(2) in subsection (d)(4), as redesignated by subsection (a)(1) of this section, by striking out "actions" and inserting in lieu thereof "action".

Approved November 19, 1988.

LEGISLATIVE HISTORY—H.R. 3911:

HOUSE REPORTS: No. 100-610 (Comm. on the Judiciary).
SENATE REPORTS: No. 100-503 (Comm. on the Judiciary).
CONGRESSIONAL RECORD, Vol. 134 (1988):
May 10, considered and passed House.
Oct. 18, considered and passed Senate, amended.
Oct. 20, House concurred in Senate amendment.