105

AMENDMENT TO H.R. 2647, AS REPORTED

OFFERED BY MR. GRAYSON OF FLORIDA

At the end of title VIII, add the following new section:

1 **SEC. 830. PENALTY FOR COST OVERRUNS IN PERFORM-**
2 **ANCE OF CERTAIN DEFENSE CONTRACTS.**
3 (a) IN GENERAL.—
4 (1) PENALTIES FOR COST OVERRUNS.—Chapter
5 137 of title 10, United States Code, is amended by
6 inserting after section 2324 the following new sec-
7 tion:
8 **"§ 2324a. Penalty for cost overruns in performance of**
9 **certain defense contracts**
10 "(a) PENALTY FOR COST OVERRUNS.—In the case
11 of any covered contract being performed during a fiscal
12 year, the head of the agency shall determine if there is
13 a cost overrun as of the end of the fiscal year for such
14 contract and shall assess a penalty against the contractor
15 in an amount equal to 10 percent of any such cost over-
16 run.
17 "(b) COST ESTIMATE.—At the time an offeror sub-
18 mits a final bid or proposal for a covered contract to the
19 Department of Defense, or a contractor submits a pro-

1 posed modification to a covered contract to the Depart-
2 ment, the offeror or contractor shall submit a cost esti-
3 mate for such contract or modification.

4 "(c) EXCEPTION.—A penalty under subsection (a)
5 shall not be assessed with respect to a cost overrun if the
6 cost overrun occurs because of a failure of presupposed
7 conditions as described in section 2-615 of the Uniform
8 Commercial Code.

9 "(d) WAIVER.—A penalty under subsection (a) may
10 be waived by the head of the agency concerned with re-
11 spect to a cost overrun for a covered contract, but only
12 if the cost overrun is not attributable to the contractor's
13 performance of the contract, as determined by the head
14 of the agency. The authority to issue a waiver under this
15 subsection may not be delegated.

16 "(e) APPLICABILITY OF CONTRACT DISPUTES PRO-
17 CEDURE TO ASSESSMENT OF PENALTY.—An action of the
18 head of an agency under subsection (a) for any fiscal
19 year—

20 "(1) shall be considered a final decision for the
21 purposes of section 6 of the Contract Disputes Act
22 of 1978 (41 U.S.C. 605); and

23 "(2) is appealable in the manner provided in
24 section 7 of such Act (41 U.S.C. 606).

25 "(f) DEFINITIONS.—In this section:

1 "(1) The term 'covered contract' means a con-
2 tract that is awarded by the Department of Defense
3 through the use of a solicitation for competitive pro-
4 posals, in an amount greater than the simplified ac-
5 quisition threshold, and that is a cost-reimbursement
6 contract or a time-and-materials contract.
7 "(2) The term 'cost overrun', with respect to a
8 covered contract, means the amount by which—
9 "(A) the amount requested by the con-
10 tractor for reimbursement by the Department
11 of Defense under the contract for a fiscal year,
12 exceeds
13 "(B) the amount of the cost estimated of
14 the contract for that fiscal year.
15 "(3) The term 'cost estimate', with respect to
16 a covered contract or modification to a covered con-
17 tract, means the cost estimate of the contract or
18 modification by the contractor submitted under sub-
19 section (b).
20 "(g) REPORT.—Not later than 180 days after the end
21 of each fiscal year, the Secretary of Defense shall submit
22 to Congress, and post on a publicly available website of
23 the Department of Defense, a report containing the fol-
24 lowing:

1 "(1) A list of each contractor with a cost over-
2 run during the preceding fiscal year for which a pen-
3 alty was assessed under this section, including iden-
4 tification of the contractor and the covered contract
5 involved, the cost estimate of the covered contract,
6 the cost overrun for the covered contract, and the
7 amount of the penalty assessed for the cost overrun.
8 "(2) A list of each waiver issued by the head
9 of an agency under subsection (b) during the pre-
10 ceding fiscal year, including identification of the con-
11 tractor and the covered contract involved, the cost
12 estimate of the covered contract, the cost overrun
13 for the covered contract, and the amount of the pen-
14 alty waived.".
15 (2) CLERICAL AMENDMENT.—The table of sec-
16 tions at the beginning of such chapter is amended
17 by adding at the end the following new item:

"2324a. Penalty for cost overruns in performance of certain defense contracts.".

18 (b) EFFECTIVE DATE.—Section 2324a of title 10,
19 United States Code, as added by subsection (a), shall take
20 effect on October 1, 2009.