

**PART 25—FOREIGN ACQUISITION**

30. Section 25.405 is amended by revising paragraph (e) to read as follows:

**25.405 Procedures.**

\* \* \* \* \*

(e) Within three days after a contract award for an eligible product, agencies shall give unsuccessful offerors from designated or NAFTA countries notice in accordance with 14.409-1 and 15.1002. "Day," for purposes of the notification process, means calendar day, except that the period will run until a day which is not a Saturday, Sunday, or legal holiday.

**PART 36—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS**

31. Section 36.304 is amended by revising the introductory text to read as follows:

**36.304 Notice of award.**

When a notice of award is issued, it shall be done in writing or electronically, shall contain information required by 14.408, and shall—

\* \* \* \* \*

32. Section 36.607 is amended by designating the existing text as paragraph (a) and adding paragraph (b) to read as follows:

**36.607 Release of information on firm selection.**

\* \* \* \* \*

(b) Debriefings of successful and unsuccessful firms will be held after final selection has taken place and will be conducted, to the extent practicable, in accordance with 15.1004 (b) through (g). Note that 15.1004 (d)(2) through (d)(5) does not apply to architect-engineer contracts.

**PART 51—USE OF GOVERNMENT SOURCES BY CONTRACTORS**

33. Section 51.101 is amended at the end of paragraph (a)(1) by removing "or" and at the end of paragraph (a)(2) by removing the period and inserting "; or" and by adding paragraph (a)(3) to read as follows:

**51.101 Policy.**

(a) \* \* \*

(3) A contract under the Javits-Wagner-O'Day Act (41 U.S.C. 46, *et seq.*) if:

(i) the nonprofit agency requesting use of the supplies and services is providing a commodity or service to the Federal Government, and

(ii) the supplies or services received are directly used in making or providing a commodity or service, approved by the Committee for Purchase From

People Who Are Blind or Severely Disabled, to the Federal Government (See Subpart 8.7).

\* \* \* \* \*

34. Section 51.102 is amended by revising the second sentence of paragraph (a) introductory text to read as follows:

**51.102 Authorization to use Government supply sources.**

(a) \* \* \* Except for findings under 51.101(a)(3), the determination shall be based on, but not limited to, considerations of the following factors:

\* \* \* \* \*

**PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

35. Section 52.215-16 is amended by revising the date in the provision heading and by revising paragraph (c); by adding paragraph (h); by removing Alternate II and redesignating Alternate III as Alternate II; and revising Alternates I and II to read as follows:

**52.215-16 Contract Award.**

\* \* \* \* \*

**Contract Award (Oct 1995)**

\* \* \* \* \*

(c) The Government intends to evaluate proposals and award a contract after conducting written or oral discussions with all responsible offerors whose proposals have been determined to be within the competitive range. However, each initial offer should contain the offeror's best terms from a cost or price and technical standpoint.

\* \* \* \* \*

(h) The Government may disclose the following information in post-award debriefings to other offerors: (1) the overall evaluated cost or price and technical rating of the successful offeror; (2) the overall ranking of all offerors, when any ranking was developed by the agency during source selection; (3) a summary of the rationale for award; and (4) for acquisitions of commercial end items, the make and model of the item to be delivered by the successful offeror.

(End of provision)

*Alternate I* (OCT 1995). As prescribed in 15.407(d)(4)(i), substitute the following paragraph (d) for paragraph (d) of the basic provision:

(d) The Government may accept any item or combination of items, unless doing so is precluded by a restrictive limitation in the solicitation or offer.

*Alternate II* (OCT 1995). As prescribed in 15.407(d)(4)(ii), substitute the following paragraph (c) for paragraph (c) of the basic provision:

(c) The Government intends to evaluate proposals and award a contract without discussions with offerors (except communications conducted for the purpose of minor clarification). Therefore, each initial offer should contain the offeror's best terms from a cost or price and technical standpoint.

However, the Government reserves the right to conduct discussions if later determined by the Contracting Officer to be necessary.

[FR Doc. 95-19859 Filed 8-15-95; 8:45 am]

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**48 CFR Parts 31, 42, and 52**

[FAC 90-31; FAR Case 94-751; Item III]

RIN 9000-AG20

**Federal Acquisition Regulation; Penalties on Unallowable Indirect Costs**

**AGENCIES:** Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Final rule.

**SUMMARY:** This final rule is issued pursuant to the Federal Acquisition Streamlining Act of 1994 to amend the Federal Acquisition Regulation (FAR) to implement the requirements for penalties for unallowable costs. This regulatory action was subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

**EFFECTIVE DATE:** October 1, 1995.

**FOR FURTHER INFORMATION CONTACT:** Mr. Clarence Belton, Cost Principles Team Leader, at (703) 602-2357 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAC 90-31, FAR case 94-751.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

The Federal Acquisition Streamlining Act of 1994, Pub. L. 103-355 (the Act), provides authorities that streamline the acquisition process and minimize burdensome Government-unique requirements. Major changes that can be expected in the acquisition process as a result of the Act's implementation include changes in the areas of Commercial Item Acquisition, the Truth in Negotiations Act, and introduction of the Federal Acquisition Computer Network (FACNET).

Sections 2101 and 2151 of the Federal Acquisition Streamlining Act of 1994 change the contract value threshold for assessment of penalties on unallowable costs from \$100,000 to \$500,000 and expand the coverage from the Department of Defense to all executive agencies. This final rule makes the required changes. With the exception of the threshold value, the penalty

provisions in the new law are the same as those implemented in the current Defense Federal Acquisition Regulation Supplement.

### B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because most contracts awarded to small businesses are awarded competitively on a firm-fixed-price basis and, therefore, are not subject to the FAR cost principles.

### C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose recordkeeping or information collection requirements, or collections of information from offerors, contractors, or members of the public which require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

### D. Public Comments

Twelve public comments were received in response to the proposed rule published in the **Federal Register** on December 19, 1994 (59 FR 65460). The comments were considered in the formulation of this final rule.

### List of Subjects in 48 CFR Parts 31, 42, and 52

Government procurement.

Dated: August 7, 1995.

#### Edward C. Loeb,

*Deputy Project Manager for the Implementation of the Federal Acquisition Streamlining Act of 1994.*

Therefore, 48 CFR Parts 31, 42, and 52 are amended as set forth below:

1. The authority citation for 48 CFR Parts 31, 42, and 52 continues to read as follows:

**Authority:** 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

### PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES

2. Section 31.110 is added to read as follows:

#### 31.110 Indirect cost rate certification and penalties on unallowable costs.

(a) Certain contracts require certification of the indirect cost rates proposed for progress, billing, or final payment purposes. See 42.703-2 for administrative procedures regarding the

certification provisions and the related contract clause prescription.

(b) If unallowable costs are included in final indirect cost settlement proposals, penalties may be assessed. See 42.709 for administrative procedures regarding the penalty assessment provisions and the related contract clause prescription.

### PART 42—CONTRACT ADMINISTRATION

3. Sections 42.709 thru 42.709-6 are added to read as follows:

Sec.

42.709 Scope.

42.709-1 General.

42.709-2 Responsibilities.

42.709-3 Assessing the penalty.

42.709-4 Computing interest.

42.709-5 Waiver of the penalty.

42.709-6 Contract clause.

#### 42.709 Scope.

(a) This section implements 10 U.S.C. 2324 (a) through (d) and 41 U.S.C. 256 (a) through (d). It covers the assessment of penalties against contractors which include unallowable indirect costs in—

(1) Final indirect cost rate proposals; or

(2) The final statement of costs incurred or estimated to be incurred under a fixed-price incentive contract.

(b) This section applies to all contracts in excess of \$500,000, except fixed-price contracts without cost incentives or any firm-fixed-price contracts for the purchase of commercial items.

#### 42.709-1 General.

(a) The following penalties apply to contracts covered by this section:

(1) If the indirect cost is expressly unallowable under a cost principle in the FAR, or an executive agency supplement to the FAR, that defines the allowability of specific selected costs, the penalty is equal to—

(i) The amount of the disallowed costs allocated to contracts that are subject to this section for which an indirect cost proposal has been submitted; plus

(ii) Interest on the paid portion, if any, of the disallowance.

(2) If the indirect cost was determined to be unallowable for that contractor before proposal submission, the penalty is two times the amount in paragraph (a)(1)(i) of this section.

(b) These penalties are in addition to other administrative, civil, and criminal penalties provided by law.

(c) It is not necessary for unallowable costs to have been paid to the contractor in order to assess a penalty.

#### 42.709-2 Responsibilities.

(a) The cognizant contracting officer is responsible for—

(1) Determining whether the penalties in 42.709-1(a) should be assessed;

(2) Determining whether such penalties should be waived pursuant to 42.709-5; and

(3) Referring the matter to the appropriate criminal investigative organization for review and for appropriate coordination of remedies, if there is evidence that the contractor knowingly submitted unallowable costs.

(b) The contract auditor, in the review and/or the determination of final indirect cost proposals for contracts subject to this section, is responsible for—

(1) Recommending to the contracting officer which costs may be unallowable and subject to the penalties in 42.709-1(a);

(2) Providing rationale and supporting documentation for any recommendation; and

(3) Referring the matter to the appropriate criminal investigative organization for review and for appropriate coordination of remedies, if there is evidence that the contractor knowingly submitted unallowable costs.

#### 42.709-3 Assessing the penalty.

Unless a waiver is granted pursuant to 42.709-5, the cognizant contracting officer shall—

(a) Assess the penalty in 42.709-1(a)(1), when the submitted cost is expressly unallowable under a cost principle in the FAR or an executive agency supplement that defines the allowability of specific selected costs; or

(b) Assess the penalty in 42.709-1(a)(2), when the submitted cost was determined to be unallowable for that contractor prior to submission of the proposal. Prior determinations of unallowability may be evidenced by—

(1) A DCAA Form 1, Notice of Contract Costs Suspended and/or Disapproved (see 48 CFR 242.705-2), or any similar notice which the contractor elected not to appeal and was not withdrawn by the cognizant Government agency;

(2) A contracting officer final decision which was not appealed;

(3) A prior executive agency Board of Contract Appeals or court decision involving the contractor, which upheld the cost disallowance; or

(4) A determination or agreement of unallowability under 31.201-6.

(c) Issue a final decision (see 33.211) which includes a demand for payment of any penalty assessed under paragraph (a) or (b) of this section. The letter shall state that the determination is a final

decision under the Disputes clause of the contract. (Demanding payment of the penalty is separate from demanding repayment of any paid portion of the disallowed cost.)

**42.709-4 Computing interest.**

For 42.709-1(a)(1)(ii), compute interest on any paid portion of the disallowed cost as follows:

(a) Consider the overpayment to have occurred, and interest to have begun accumulating, from the midpoint of the contractor's fiscal year. Use an alternate equitable method if the cost was not paid evenly over the fiscal year.

(b) Use the interest rate specified by the Secretary of the Treasury pursuant to Pub. L. 92-41 (85 Stat. 97).

(c) Compute interest from the date of overpayment to the date of the demand letter for payment of the penalty.

(d) Determine the paid portion of the disallowed costs in consultation with the contract auditor.

**42.709-5 Waiver of the penalty.**

The cognizant contracting officer shall waive the penalties at 42.709-1(a) when—

(a) The contractor withdraws the proposal before the Government formally initiates an audit of the proposal and the contractor submits a revised proposal (an audit will be deemed to be formally initiated when the Government provides the contractor with written notice, or holds an entrance conference, indicating that audit work on a specific final indirect cost proposal has begun);

(b) The amount of the unallowable costs under the proposal which are subject to the penalty is \$10,000 or less (*i.e.*, if the amount of expressly or previously determined unallowable costs which would be allocated to the contracts specified in 42.709(b) is \$10,000 or less); or

(c) The contractor demonstrates, to the cognizant contracting officer's satisfaction, that—

(1) It has established policies and personnel training and an internal control and review system that provide assurance that unallowable costs subject to penalties are precluded from being included in the contractor's final indirect cost rate proposals (*e.g.*, the types of controls required for satisfactory participation in the Department of Defense sponsored self-governance programs, specific accounting controls over indirect costs, compliance tests which demonstrate that the controls are effective, and Government audits which have not disclosed recurring instances of expressly unallowable costs); and

(2) The unallowable costs subject to the penalty were inadvertently incorporated into the proposal; *i.e.*, their inclusion resulted from an unintentional error, notwithstanding the exercise of due care.

**42.709-6 Contract clause.**

Use the clause at 52.242-3, Penalties for Unallowable Costs, in all solicitations and contracts over \$500,000 except fixed-price contracts without cost incentives or any firm-fixed-price contract for the purchase of commercial items. Generally, covered contracts are those which contain one of the clauses at 52.216-7, 52.216-13, 52.216-16, or 52.216-17, or a similar clause from an executive agency's supplement to the FAR.

**PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

5. Section 52.242-3 is added to read as follows:

**52.242-3 Penalties for Unallowable Costs.**

As prescribed in 42.709-6, use the following clause:

**Penalties for Unallowable Costs (Oct 1995)**

(a) *Definition. Proposal*, as used in this clause, means either—

(1) A final indirect cost rate proposal submitted by the Contractor after the expiration of its fiscal year which—

(i) Relates to any payment made on the basis of billing rates; or

(ii) Will be used in negotiating the final contract price; or

(2) The final statement of costs incurred and estimated to be incurred under the Incentive Price Revision clause (if applicable), which is used to establish the final contract price.

(b) Contractors which include unallowable indirect costs in a proposal may be subject to penalties. The penalties are prescribed in 10 U.S.C. 2324 or 41 U.S.C. 256, as applicable, which is implemented in Section 42.709 of the Federal Acquisition Regulation (FAR).

(c) The Contractor shall not include in any proposal any cost which is unallowable, as defined in Part 31 of the FAR, or an executive agency supplement to Part 31 of the FAR.

(d) If the Contracting Officer determines that a cost submitted by the Contractor in its proposal is expressly unallowable under a cost principle in the FAR, or an executive agency supplement to the FAR, that defines the allowability of specific selected costs, the Contractor shall be assessed a penalty equal to—

(1) The amount of the disallowed cost allocated to this contract; plus

(2) Simple interest, to be computed—

(i) On the amount the Contractor was paid (whether as a progress or billing payment) in excess of the amount to which the Contractor was entitled; and

(ii) Using the applicable rate effective for each six-month interval prescribed by the

Secretary of the Treasury pursuant to Pub. L. 92-41 (85 Stat. 97).

(e) If the Contracting Officer determines that a cost submitted by the Contractor in its proposal includes a cost previously determined to be unallowable for that Contractor, then the Contractor will be assessed a penalty in an amount equal to two times the amount of the disallowed cost allocated to this contract.

(f) Determinations under paragraphs (d) and (e) of this clause are final decisions within the meaning of the Contract Disputes Act of 1978 (41 U.S.C. 601, *et seq.*).

(g) Pursuant to the criteria in FAR 42.709-5, the Contracting Officer may waive the penalties in paragraph (d) or (e) of this clause.

(h) Payment by the Contractor of any penalty assessed under this clause does not constitute repayment to the Government of any unallowable cost which has been paid by the Government to the Contractor.

(End of clause)

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**48 CFR Parts 31, 37, 42 and 52**

[FAC 90-31; FAR Case 94-754; Item IV]

RIN 9000-AG21

**Federal Acquisition Regulation; Implementation of Various Cost Principle Provisions**

**AGENCIES:** Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Final rule.

**SUMMARY:** The Federal Acquisition Regulatory Council is amending the Federal Acquisition Regulation (FAR) to implement Section 2101 of the Federal Acquisition Streamlining Act of 1994. Section 2101 adds the costs of lobbying the legislative body of a political subdivision of a state to the list of unallowable costs; adds the cost of "conventions" to the list of costs to be clarified in the cost principles; and expands the coverage to the Coast Guard and NASA. The provisions are made generally applicable to all other executive agencies. This regulatory action was subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

**EFFECTIVE DATE:** October 1, 1995.

**FOR FURTHER INFORMATION CONTACT:** Mr. Clarence Belton, Cost Principles Team Leader, at (703)602-2357, in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, DC 20405 (202) 501-4755.