

HISTORICAL AND REVISION NOTES—CONTINUED

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
4301(4)	41:256(m)(2).	

Editorial Notes

AMENDMENTS

2018—Par. (2). Pub. L. 115-232 substituted “commercial products or commercial services” for “commercial items”.

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 2018 AMENDMENT

Amendment by Pub. L. 115-232 effective Jan. 1, 2020, subject to a savings provision, see section 836(h) of Pub. L. 115-232, set out as an Effective Date of 2018 Amendment; Savings Provision note under section 453b of Title 6, Domestic Security.

§ 4302. Adjustment of threshold amount of covered contract

Effective on October 1 of each year that is divisible by 5, the amount set forth in section 4301(2) of this title shall be adjusted to the equivalent amount in constant fiscal year 1994 dollars. An adjusted amount that is not evenly divisible by \$50,000 shall be rounded to the nearest multiple of \$50,000. If an amount 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.

(Pub. L. 111-350, § 3, Jan. 4, 2011, 124 Stat. 3784.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
4302	41:256(l)(2).	June 30, 1949, ch. 288, title III, §306(l)(2), as added Pub. L. 100-700, §8(a)(1), Nov. 19, 1988, 102 Stat. 4634; Pub. L. 103-355, title II, §2151, Oct. 13, 1994, 108 Stat. 3315.

§ 4303. Effect of submission of unallowable costs

(a) INDIRECT COST THAT VIOLATES FEDERAL ACQUISITION REGULATION COST PRINCIPLE.—An executive agency shall require that a covered contract provide that if the contractor submits to the executive agency a proposal for settlement of indirect costs incurred by the contractor for any period after those costs have been accrued and if that proposal includes the submission of a cost that is unallowable because the cost violates a cost principle in the Federal Acquisition Regulation or an executive agency supplement to the Federal Acquisition Regulation, the cost shall be disallowed.

(b) PENALTY FOR VIOLATION OF COST PRINCIPLE.—

(1) UNALLOWABLE COST IN PROPOSAL.—If the executive 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 executive 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 Federal Government for the use of the amount which a contractor has been paid in excess of the amount to which the contractor was entitled.

(2) COST DETERMINED TO BE UNALLOWABLE BEFORE PROPOSAL SUBMITTED.—If the executive 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 that contractor before the submission of that proposal, the executive agency shall assess a penalty against the contractor in an amount equal to 2 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 re-submits 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.—An action of an executive agency under subsection (a) or (b)—

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

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

(Pub. L. 111-350, § 3, Jan. 4, 2011, 124 Stat. 3784.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
4303(a)	41:256(a).	June 30, 1949, ch. 288, title III, §306(a)–(d), as added Pub. L. 100-700, §8(a)(1), Nov. 19, 1988, 102 Stat. 4634; Pub. L. 103-355, title II, §2151, Oct. 13, 1994, 108 Stat. 3309.
4303(b)	41:256(b).	
4303(c)	41:256(c).	
4303(d)	41:256(d).	

In subsection (a), the words “(referred to in section 421(c)(1) of this title)” are omitted as unnecessary.

§ 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 service¹ 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)² 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 executive agency 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 executive agency has continued access to needed skills and capabilities.

(16)² 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.

(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 gen-

¹ So in original. Probably should be "services".

² So in original. Two pars. (16) have been enacted.

erally 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.

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3785; Pub. L. 113-66, div. A, title VIII, §811(b), Dec. 26, 2013, 127 Stat. 806; Pub. L. 113-67, div. A, title VII, §702(a)(1), Dec. 26, 2013, 127 Stat. 1189; Pub. L. 114-261, §1(b)(2)(B), Dec. 14, 2016, 130 Stat. 1363.)

HISTORICAL AND REVISION NOTES

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
4304	41:256(e).	June 30, 1949, ch. 288, title III, §306(e), as added Pub. L. 100-700, §8(a)(1), Nov. 19, 1988, 102 Stat. 4634; Pub. L. 103-355, title II, §2151, Oct. 13, 1994, 108 Stat. 3310; Pub. L. 105-85, title VIII, §808(b)(1), Nov. 18, 1997, 111 Stat. 1836.

Editorial Notes

AMENDMENTS

2016—Subsec. (a)(15). Pub. L. 114-261 inserted “or subcontractor, or personal service contractor” after “contractor”.

2013—Subsec. (a)(16). Pub. L. 113-66 and Pub. L. 113-67 amended par. (16) generally. Prior to amendment, par. (16) read as follows: “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 compensation amount determined applicable for the fiscal year by the Administrator under section 1127 of this title.” See Effective Date of 2013 Amendment notes below.

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 2013 AMENDMENT

Pub. L. 113-67, div. A, title VII, §702(c), Dec. 26, 2013, 127 Stat. 1189, provided that: “This section [amending this section and former section 2324 of Title 10, Armed Forces, repealing section 1127 of this title, and enacting provisions set out as a note under this section] and the amendments made by this section shall apply only with respect to costs of compensation incurred under contracts entered into on or after the date that is 180 days after the date of the enactment of this Act [Dec. 26, 2013].”

Pub. L. 113-66, div. A, title VIII, §811(d), Dec. 26, 2013, 127 Stat. 806, provided that: “The amendments made by this section [amending this section and former section 2324 of Title 10, Armed Forces, and repealing section 1127 of this title] shall apply with respect to costs of compensation incurred under contracts entered into on or after the date that is 180 days after the date of the enactment of this Act [Dec. 26, 2013].”

REPORTS

Pub. L. 113-67, div. A, title VII, §702(d), Dec. 26, 2013, 127 Stat. 1189, provided that:

“(1) IN GENERAL.—Not later than 60 days after the end of each fiscal year, the Director of the Office of Management and Budget shall submit a report on contractor compensation to—

“(A) the Committee on Armed Services of the Senate;

“(B) the Committee on Armed Services of the House of Representatives;

“(C) the Committee on Homeland Security and Governmental Affairs of the Senate;

“(D) the Committee on Oversight and Government Reform [now Committee on Oversight and Reform] of the House of Representatives;

“(E) the Committee on Appropriations of the Senate; and

“(F) the Committee on Appropriations of the House of Representatives.

“(2) ELEMENTS.—The report required under paragraph (1) shall include—

“(A) the total number of contractor employees, by executive agency, in the narrowly targeted exception positions described under subsection (a) during the preceding fiscal year;

“(B) the taxpayer-funded compensation amounts received by each contractor employee in a narrowly targeted exception position during such fiscal year; and

“(C) the duties and services performed by contractor employees in the narrowly targeted exception positions during such fiscal year.”

REVISION OF COST PRINCIPLE RELATING TO ENTERTAINMENT, GIFT, AND RECREATION COSTS FOR CONTRACTOR EMPLOYEES

Pub. L. 103-355, title II, §2192, Oct. 13, 1994, 108 Stat. 3315, provided that:

“(a) COSTS NOT ALLOWABLE.—(1) The costs of gifts or recreation for employees of a contractor or members of their families that are provided by the contractor to improve employee morale or performance or for any other purpose are not allowable under a covered contract unless, within 120 days after the date of the enactment of this Act [Oct. 13, 1994], the Federal Acquisition Regulatory Council prescribes amendments to the Federal Acquisition Regulation specifying circumstances under which such costs are allowable under a covered contract.

“(2) Not later than 90 days after the date of the enactment of this Act, the Federal Acquisition Regulatory Council shall amend the cost principle in the Federal Acquisition Regulation that is set out in section 31.205-14 of title 48, Code of Federal Regulations, relating to unallowability of entertainment costs—

“(A) by inserting in the cost principle a statement that costs made specifically unallowable under that

cost principle are not allowable under any other cost principle; and

“(B) by striking out ‘(but see 31.205-1 and 31.205-13)’.”

“(b) DEFINITIONS.—In this section:

“(1) The term ‘employee’ includes officers and directors of a contractor.

“(2) The term ‘covered contract’ has the meaning given such term in section 2324(l) of title 10, United States Code (as amended by section 2101(c) [2101(d)]), and section 306(l) of the Federal Property and Administrative Services Act of 1949 (as added by section 2151) [see 41 U.S.C. 4301(2)].

“(c) EFFECTIVE DATE.—Any amendments to the Federal Acquisition Regulation made pursuant to subsection (a) shall apply with respect to costs incurred after the date on which the amendments made by section 2101 apply (as provided in section 10001 [set out as an Effective Date of 1994 Amendment note under section 2302 of Title 10, Armed Forces]) or the date on which the amendments made by section 2151 apply (as provided in section 10001), whichever is later.”

Executive Documents

EX. ORD. NO. 13494. ECONOMY IN GOVERNMENT CONTRACTING

Ex. Ord. No. 13494, Jan. 30, 2009, 74 F.R. 6101, as amended by Ex. Ord. No. 13517, §2, Oct. 30, 2009, 74 F.R. 57239, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 101 *et seq.*, it is hereby ordered that:

SECTION 1. To promote economy and efficiency in Government contracting, certain costs that are not directly related to the contractors’ provision of goods and services to the Government shall be unallowable for payment, thereby directly reducing Government expenditures. This order is also consistent with the policy of the United States to remain impartial concerning any labor-management dispute involving Government contractors. This order does not restrict the manner in which recipients of Federal funds may expend those funds.

SEC. 2. It is the policy of the executive branch in procuring goods and services that, to ensure the economical and efficient administration of Government contracts, contracting departments and agencies, when they enter into, receive proposals for, or make disbursements pursuant to a contract as to which certain costs are treated as unallowable, shall treat as unallowable the costs of any activities undertaken to persuade employees—whether employees of the recipient of the Federal disbursements or of any other entity—to exercise or not to exercise, or concerning the manner of exercising, the right to organize and bargain collectively through representatives of the employees’ own choosing. Such unallowable costs shall be excluded from any billing, claim, proposal, or disbursement applicable to any such Federal Government contract.

SEC. 3. Contracting departments and agencies shall treat as allowable costs incurred in maintaining satisfactory relations between the contractor and its employees (other than the costs of any activities undertaken to persuade employees to exercise or not to exercise, or concerning the manner of exercising, the right to organize and bargain collectively), including costs of labor management committees, employee publications, and other related activities. See 48 C.F.R. 31.205-21.

SEC. 4. Examples of costs unallowable under section 2 of this order include the costs of the following activities, when they are undertaken to persuade employees to exercise or not to exercise, or concern the manner of exercising, rights to organize and bargain collectively:

- (a) preparing and distributing materials;
- (b) hiring or consulting legal counsel or consultants;
- (c) holding meetings (including paying the salaries of the attendees at meetings held for this purpose); and

(d) planning or conducting activities by managers, supervisors, or union representatives during work hours.

SEC. 5. Within 150 days of the effective date of this order, the Federal Acquisition Regulatory Council (FAR Council) shall adopt such rules and regulations and issue such orders as are deemed necessary and appropriate to carry out this order. Such rules, regulations, and orders shall minimize the costs of compliance for contractors and shall not interfere with the ability of contractors to engage in advocacy through activities for which they do not claim reimbursement.

SEC. 6. Each contracting department or agency shall cooperate with the FAR Council and provide such information and assistance as the FAR Council may require in the performance of its functions under this order.

SEC. 7. (a) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(b) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

SEC. 8. This order shall become effective immediately, and shall apply to contracts resulting from solicitations issued on or after the effective date of the action taken by the FAR Council under section 5 of this order.

BARACK OBAMA.

§ 4305. Required regulations

(a) IN GENERAL.—The Federal Acquisition Regulation shall contain provisions on the allowability of contractor costs. Those provisions shall define in detail and in specific terms the costs that are unallowable, in whole or in part, under covered contracts.

(b) SPECIFIC ITEMS.—The regulations shall, at a minimum, clarify the cost principles applicable to contractor costs of the following:

- (1) Air shows.
- (2) Membership in civic, community, and professional organizations.
- (3) Recruitment.
- (4) Employee morale and welfare.
- (5) 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).
- (6) Community relations.
- (7) Dining facilities.
- (8) Professional and consulting services, including legal services.
- (9) Compensation.
- (10) Selling and marketing.
- (11) Travel.
- (12) Public relations.
- (13) Hotel and meal expenses.
- (14) Expense of corporate aircraft.
- (15) Company-furnished automobiles.
- (16) Advertising.
- (17) Conventions.

(c) ADDITIONAL REQUIREMENTS.—

(1) WHEN QUESTIONED COSTS MAY BE RESOLVED.—The Federal Acquisition Regulation shall require that a contracting officer not resolve any questioned costs until the contracting officer has obtained—

(A) adequate documentation of those costs; and

(B) the opinion of the contract auditor on the allowability of those costs.