

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 15, 31, and 42****[FAR Case 2001–018]****RIN: 9000–AJ77****Federal Acquisition Regulation;
Applicability of the Cost Principles and
Penalties for Unallowable Costs**

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

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are proposing to amend the Federal Acquisition Regulation (FAR) to remove the requirement to apply cost principles and procedures when pricing a contract if cost or pricing data are not obtained, and to increase the contract dollar threshold for assessing a penalty if the contractor includes expressly unallowable costs in its claim for reimbursement.

DATES: Interested parties should submit comments in writing on or before January 27, 2004 to be considered in the formulation of a final rule.

ADDRESSES: Submit written comments to—General Services Administration, FAR Secretariat (MVA), 1800 F Street, NW., Room 4035, ATTN: Laurie Duarte, Washington, DC 20405.

Submit electronic comments via the Internet to—farcase.2001-018@gsa.gov. Please submit comments only and cite FAR case 2001–018 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat at (202) 501–4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Edward Loeb, Policy Adviser, at (202) 501–0650. Please cite FAR case 2001–018.

SUPPLEMENTARY INFORMATION:**A. Background**

The proposed rule—

- Narrows the scope of FAR part 31. The rule would amend the FAR to indicate that the cost principles and procedures of FAR part 31 do not apply to the pricing of fixed-price contracts if cost or pricing data are not obtained. Currently, the cost principles and

procedures of FAR part 31 apply whenever cost analysis is performed, regardless of whether cost or pricing data are obtained.

- This change is consistent with statute. 10 U.S.C. 2324 lists a number of costs that are unallowable on “covered contracts,” and 41 U.S.C. 256 extends the statutory unallowable costs to civilian agencies. 10 U.S.C. 2324(1)(1)(A) defines a “covered contract” as “a contract for an amount in excess of \$500,000 that is entered into by the head of an agency, except that such term does not include a fixed-price contract without cost incentives or any firm fixed-price contract for the purchase of commercial items.” part 31 cost principles continue to apply to covered contracts.

- This change is consistent with a goal of the Councils to reduce government-unique regulations when the risk to the Government is low.

- Adds a definition to FAR 31.001 for fixed-price contracts, subcontracts and modifications. The Councils are particularly interested in obtaining comments regarding this proposed definition. We are also asking for public input regarding the following alternative definition, which has been considered by the Councils, and which was published on July 3, 2003 (68 FR 40104) as part of a proposed rule for FAR case 1999–025, Cost Accounting Standards Administration: The public comment period on that case is closed.

Fixed-price contracts and subcontracts means—

- (1) Fixed-price contracts and subcontracts described at 16.202, 16.203, and 16.207;
- (2) Fixed-price incentive contracts and subcontracts where the price is not adjusted based on actual costs incurred (Subpart 16.4);
- (3) Orders issued under indefinite-delivery contracts and subcontracts where final payment is not based on actual costs incurred (Subpart 16.5); and
- (4) The fixed hourly rate portion of the time-and-materials and labor-hours contracts and subcontracts (Subpart 16.6).

- Raises the dollar threshold for including the contract clause at FAR 52.242–3, Penalties for Unallowable Costs, in solicitations and contracts. The clause covers the assessment of penalties against a contractor that includes unallowable indirect costs in its final indirect cost rate proposal or in its final statement of costs incurred or estimated to be incurred under a fixed-price incentive contract. Currently, the contracting officer must include the contract clause in certain solicitations and contracts over \$500,000. The rule would increase the dollar threshold from \$500,000 to \$550,000.

- 10 U.S.C. 2324(b) requires the head of the agency to assess a penalty against the contractor if the contractor submits a cost in its proposal for settlement that is expressly unallowable under a “covered contract.” As indicated above, a “covered contract” is a contract that is greater than \$500,000. FAR 42.709 uses this threshold to implement the statutory penalty provisions for claiming expressly unallowable costs.

- 10 U.S.C. 2324(1)(1)(B) provides for adjusting the dollar threshold of a “covered contract” to account for inflation. This adjustment from \$500,000 to \$550,000 is consistent with the adjustment of the Truth in Negotiations Act threshold recently implemented in Item II of Federal Acquisition Circular 97–20; and

- Makes several editorial changes, including deleting the phrase “or any firm-fixed-price contract for the purchase of commercial items” at FAR 42.709(b) and FAR 42.709–6, since this type of contract is included in the class of contracts (fixed-price contracts without cost incentives) already addressed at these FAR sites.

B. Regulatory Planning and Review

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

C. Regulatory Flexibility Act

The Councils do not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because most contracts awarded to small entities use simplified acquisition procedures or are awarded on a competitive, fixed-price basis, and do not require application of the cost principles and procedures discussed in this rule. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. We invite comments from small businesses and other interested parties. The Councils will consider comments from small entities concerning the affected FAR Parts 15, 31, and 42 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAR case 2001–018), in correspondence.

D. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed changes to the FAR do not impose information collection requirements that require the

approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 15, 31, and 42

Government procurement.

Dated: November 21, 2003.

Laura Auletta,

Director, Acquisition Policy Division.

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 15, 31, and 42 as set forth below:

1. The authority citation for 48 CFR parts 15, 31, and 42 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 15—CONTRACTING BY NEGOTIATION

2. Amend section 15.404–1 by revising paragraph (c)(2)(iv) to read as follows:

15.404–1 Proposal analysis techniques.

* * * * *

(c) * * *

(2) * * *

(iv) When applicable, verification that the offeror's cost submissions are in accordance with the contract cost principles and procedures in part 31 and the requirements and procedures in 48 CFR Chapter 99 (Appendix to the FAR looseleaf edition), Cost Accounting Standards.

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PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES

3. Amend section 31.000 by revising paragraph (a) to read as follows:

31.000 Scope of part.

* * * * *

(a) The pricing of contracts, subcontracts, and modifications to contracts and subcontracts whenever cost analysis is performed (*see* 15.404–1(c)), except contracts, subcontracts, and modifications issued on a fixed-price basis where cost or pricing data is not obtained; and

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4. Amend section 31.001 by adding, in alphabetical order, the definition “Fixed-price contracts, subcontracts, and modifications” to read as follows:

31.001 Definitions.

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Fixed-price contracts, subcontracts, and modifications means—

(1) Fixed-price contracts, subcontracts, and modifications described at 16.202, 16.203 (except 16.203–1(b)) and 16.207;

(2) Fixed-price incentive contracts, subcontracts, and modifications where the price is not adjusted based on actual costs incurred (Subpart 16.4);

(3) The fixed hourly rate portion of time-and-materials and labor-hour contracts, subcontracts, and modifications where the rate is not adjusted based on actual costs incurred (Subpart 16.6); and

(4) Orders issued under indefinite-delivery contracts (Subpart 16.5) using one of the contract types in paragraphs (1) through (3) of this definition.

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5. Revise section 31.102 to read as follows:

31.102 Fixed-price contracts.

(a) The applicable subparts of part 31 shall be used in the pricing of fixed-price contracts, subcontracts, and modifications to contracts and subcontracts when—

(1) Cost analysis is performed, except contracts, subcontracts, and modifications issued on a fixed-price basis where cost or pricing data is not obtained; or

(2) A fixed-price contract clause requires the determination or negotiation of costs.

(b) Application of cost principles to fixed-price contracts and subcontracts must not be construed as a requirement to negotiate agreements on individual elements of cost in arriving at agreement on the total price. The final price accepted by the parties reflects agreement only on the total price.

(c) Further, notwithstanding the mandatory use of cost principles, the objective will continue to be to negotiate prices that are fair and reasonable, cost and other factors considered.

6. Amend section 31.103 by revising paragraph (a) to read as follows:

31.103 Contracts with commercial organizations.

* * * * *

(a) The cost principles and procedures in Subpart 31.2 and agency supplements shall be used in pricing negotiated supply, service, experimental, developmental, and research contracts, subcontracts, and contract modifications with commercial organizations whenever cost analysis is performed (*see* 15.404–1(c)), except contracts, subcontracts, and modifications issued

on a fixed-price basis where cost or pricing data is not obtained.

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7. Amend section 31.105 by revising paragraph (b) to read as follows:

31.105 Construction and architect-engineer contracts.

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(b) Except as otherwise provided in paragraph (d) of this section, the cost principles and procedures in Subpart 31.2 shall be used in the pricing of contracts, subcontracts, and contract modifications in this category if cost analysis is performed (*see* 15.404–1(c)), except contracts, subcontracts, and modifications issued on a fixed-price basis where cost or pricing data is not obtained.

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8. Amend section 31.106–1 by revising the third sentence of the introductory paragraph to read as follows:

31.106–1 Applicable cost principles.

* * * * * Whichever cost principles are appropriate will be used in the pricing of facilities contracts, subcontracts, and contract modifications in this category if cost analysis is performed (*see* 15.404–1(c)), except contracts, subcontracts, and modifications issued on a fixed-price basis where cost or pricing data is not obtained. * * *

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PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

9. Amend section 42.709 by revising paragraph (b) to read as follows:

42.709 Scope.

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(b) This section applies to contracts in excess of \$550,000, except fixed-price contracts without cost incentives.

10. Amend section 42.709–6 by revising the first sentence to read as follows:

42.709–6 Contract clause.

Insert the clause at 52.242–3, Penalties for Unallowable Costs, in solicitations and contracts over \$550,000, except fixed-price contracts without cost incentives. * * *

[FR Doc. 03–29640 Filed 11–26–03; 8:45 am]

BILLING CODE 6820–EP–P