DEPARTMENT OF DEFENSE
GENERAL SERVICES ADMINISTRATION
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION
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SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule in the Federal Register at 81 FR 8031 on February 17, 2016, soliciting public comments on implementing section 857 of the Carl Levin and Howard P. ‘Buck’ McKeon National Defense Authorization Act for Fiscal Year 2015. This section provides additional requirements relative to the allowability of costs incurred by a contractor in connection with a Congressional investigation or inquiry. The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule:

A. Summary of Significant Changes

Several editorial changes are made to the rule as a result of the comments received; these were aimed at simplifying sentence structure for clarification purposes. There were no comments on the Initial Regulatory Flexibility Analysis.

B. Analysis of Public Comments

1. Unfair Withholding of Costs

Comment: One respondent stressed that contractors should not be penalized until guilt is determined by a court of law. Contractors should be reimbursed for their costs, as incurred, at the time of their participation in a Congressional investigation or inquiry. While affirming that it only makes sense that a contractor found guilty of defrauding or cheating the Government in association with their work should forfeit their reimbursement, the respondent maintained that, until guilt is determined by a court of law, the contractor should be reimbursed for its costs. Then, if the contractor is found guilty of defrauding or cheating the Government, it should pay those costs back to the Government.

Response: The Councils appreciate this concern, but note that it extends beyond the scope of this case.

2. Use of Congressional Investigations

Comment: One respondent suggested fixing “the real problem” by writing regulations to penalize politicians who use Congressional investigations to promote their personal or their affiliated party’s agenda. The respondent noted that, in many cases, small businesses incur hundreds of thousands of dollars in costs associated with the inquiry, despite the fact that the only thing they did wrong was work for a Government entity that was targeted by a political party.

Response: The Councils appreciate this concern, but note that it extends beyond the scope of this case.

3. Clarify Relationship Among the FAR 31.205–47 Paragraphs

Comment: One respondent questioned whether FAR 31.205–47(c) or (d) would impact the allowability of the cost of a Congressional investigation or inquiry. Specifically, the respondent asked if the cost of a Congressional investigation or inquiry related to an issue that is the subject matter of a FAR 31.205–47(b) proceeding, whose result is described in FAR 31.205–47(b)(1) through (5), would be unallowable if one of the circumstances described in FAR 31.205–47(c) or (d) existed.

Response: The cost of a Congressional investigation or inquiry cannot be treated the same as the cost of a proceeding under FAR 31.205–47(c) or (d). Although the section 857 language ties the cost of the Congressional investigation or inquiry to an issue that is the subject matter of a proceeding resulting in a disposition as described in 10 U.S.C. 2324(k)(2), Congress did not enact parallel treatment. 10 U.S.C. 2324(e)(1)(O) disallows “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),” which includes the exceptions in paragraphs (k)(3) and (k)(4), covered in the FAR at 31.205–47(c) and (d). Section 857, as implemented in 10 U.S.C. 2324(e)(1)(Q), references only paragraph (k)(2) and does not reference paragraph (k)(2)(2), which references subsection (k),” which includes the exceptions in paragraphs (k)(3) and (k)(4) specifically.

Therefore, the statute requires that the costs incurred in connection with a Congressional investigation or inquiry be treated differently than the costs incurred in connection with other accounting systems of Federal contractors, it was decided to apply the section’s requirements to all agencies subject to the FAR.

Additionally, conforming language on unallowable costs is added to FAR 31.603–16 and 31.603–15 (to update language associated with whistleblower complaints).

Two respondents submitted public comments.
criminal, civil, or administrative proceedings in which costs may be allowable under certain circumstances.

Comment: The same respondent questioned whether the limitations at FAR 31.205–47(e) would be applicable to the costs incurred in connection with a Congressional investigation or inquiry. Specifically, the respondent asked if the costs of a Congressional investigation or inquiry into a subject matter of a FAR 31.205–47(b) proceeding, whose result is not one described in FAR 31.205–47(b)(1) through (5), would be subject to the limitations in FAR 31.205–47(e).

Response: FAR 31.205–47(e) relates to costs not made unallowable by paragraph (b), while the new paragraph (f)(9) relates to costs made unallowable by paragraphs (b)(1) through (5), which describe the outcomes that would deem the costs unallowable. Because there is no overlap between the two concepts, there is no need to clarify that relationship in the FAR text.

Comment: The same respondent questioned where requirements in FAR 31.205–47(g), regarding costs that may be unallowable under FAR 31.205–47(b), would be applicable to costs that may be unallowable under FAR 31.205–47(f)(9).

Response: FAR 31.205–47(g) pertains to all unallowable costs under 31.205–47.

4. Clarify the Relationship Between FAR 31.205–47(g) and FAR 31.603(b)(15) and FAR 31.603(b)(16)

Comment: One respondent questioned whether the FAR 31.205–47(g) segregation of cost requirements are to be imposed regarding costs that may be made unallowable based on FAR 31.603(b)(15) or (16). Since the proposed rule does not address this issue, there was a question as to whether FAR 31.205–47(g) is applicable to costs that may be made unallowable based on FAR 31.603(b)(15) or (16). For costs that may be made unallowable under FAR 31.205–47, the respondent argued that it would be in the Government’s best interest for: (1) State, local, and federally recognized Indian tribal governments to segregate and account separately for costs that may be made unallowable under FAR 31.603(b)(15) and FAR 31.603(b)(16) during the pendency of a related proceeding, and (2) the contracting officer to normally withhold payment of such costs. Accordingly, the respondent recommended that FAR 31.603(b)(15) and (16) be revised to incorporate requirements similar to those in FAR 31.205–47(g).

Response: The Councils appreciate this concern, but note that adding this as a requirement would require a separate FAR case. Although segregation of potentially unallowable costs (as described at FAR 31.205–47(g)) is a prudent business practice for State, local, and federally recognized Indian tribal governments, section 857 of the NDAA for FY 2016 did not extend this requirement to such entities.


Comment: One respondent focused a question upon Congressional inquiry or investigation activities that predate the existence of the proceeding, noting that the proposed version of FAR 31.205–47(f)(9) makes unallowable costs incurred in connection with a Congressional investigation or inquiry into an issue that is the subject matter of a proceeding resulting in a disposition as described in FAR 31.205–47(b)(1) through (5). The respondent interpreted this to mean that, in order for the costs of the Congressional investigation or inquiry to be unallowable, a proceeding would have to be in process. Therefore, it would follow that costs incurred in connection with a Congressional investigation or inquiry that predate the existence of a proceeding are allowable. Specifically, even if the issue becomes the subject matter of a FAR 31.205–47 proceeding at a later date, there is no intention under the proposed rule to retroactively make costs incurred in connection with a Congressional investigation or inquiry that is the subject matter of the proceeding unallowable. If that understanding is incorrect and the rule’s intent is to make the costs incurred in connection with a Congressional investigation or inquiry that pre-date the existence of a proceeding unallowable, then the proposed rule should be revised to state that requirement in the cost principle.

Response: The statutory language states: “... congressional investigation or inquiry into an issue that is emphasized as the subject matter of a proceeding.” Therefore, the proceeding must be a known event, whether it has already commenced or is known to be commencing on a future date. Preparation (i.e., segregation of costs) for a potential disallowance begins when it is known that a proceeding will ensue.

Comment: The same respondent asked about Government Accountability Office (GAO) investigations, noting that the proposed version of FAR 31.205–47(f)(9) makes unallowable the costs incurred in connection with a Congressional investigation or inquiry into an issue that is the subject matter of a proceeding resulting in a disposition described in FAR paragraphs 31.205–47(b)(1) through (5). The respondent stated that no specifics are provided in the proposed rule concerning what is considered a Congressional investigation or inquiry into an issue that is the subject matter of a proceeding, cautioning that this could lead to different interpretations concerning costs incurred to facilitate or respond to a GAO audit or request, in the event that the project was suggested or specifically required by a Congressional committee or subcommittee. The respondent posited that some might conclude that the proposed rule makes such costs unallowable, and requested confirmation that there is, in fact, no intent to make such costs unallowable.

Response: The Councils believe that Congress intended 10 U.S.C. 2324(e)(1)(Q) to apply only to investigations and inquiries conducted by Congress, per se. Therefore, under FAR 31.205–47(f)(9), the potential disallowance and requisite segregation of costs would not be triggered by the GAO’s efforts, but rather by an actual investigation or inquiry conducted by Congress. Further, the language is clear in its applicability to a Congressional investigation or inquiry into an issue—one that is the subject matter of a proceeding, a known event.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This has been deemed a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act 5 U.S.C. 601, et seq. The FRFA is summarized as follows:

DoD, GSA, and NASA do not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act,
PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES

1. The authority citation for 48 CFR part 31 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

2. Amend section 31.205–47 by—

a. In paragraph (a):

i. In the definition of “Fraud”, removing “Fraud means” and adding “Fraud means” in its place;

ii. In the definition of “Penalty”, removing the comma after the word “Penalty”;

iii. In the definition of “Proceeding”, removing the comma after the word “Proceeding”;

b. Revising paragraph (b) introductory text; and
c. Adding paragraph (f)(9).

The addition reads as follows:

31.205–47 Costs related to legal and other proceedings.

* * * * *

(b) Costs incurred in connection with any proceeding brought by: A Federal, State, local, or foreign government for a violation of, or failure to comply with, law or regulation by the contractor (including its agents or employees) (41 U.S.C. 4310 and 10 U.S.C. 2324(k)); a contractor or subcontractor employee submitting a whistleblower complaint of reprisal in accordance with 41 U.S.C. 4712 or 10 U.S.C. 2409; or a third party in the name of the United States under the False Claims Act, 31 U.S.C. 3730. For any such proceeding that does not result in a disposition described at 31.205–47(b)(1) through (5), or to which 31.205–47(c) exceptions apply, the cost of that proceeding shall be subject to the limitations in 31.205–47(e).

(16) Costs incurred in connection with a Congressional investigation or inquiry into an issue that is the subject matter of a proceeding resulting in a disposition as described at 31.205–47(b)(1) through (5).

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DEPARTMENT OF DEFENSE
GENERAL SERVICES ADMINISTRATION
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1
[Docket No. FAR 2016–0051, Sequence No. 9]

Federal Acquisition Regulation; Federal Acquisition Circular 2005–95; Small Entity Compliance Guide

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

ACTION: Small Entity Compliance Guide.

SUMMARY: This document is issued under the joint authority of DoD, GSA, and NASA. This Small Entity Compliance Guide has been prepared in accordance with section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of the rules appearing in Federal Acquisition Circular (FAC) 2005–95, which amends the Federal Acquisition Regulation (FAR). An asterisk (*) next to a rule indicates that a regulatory flexibility analysis has been prepared. Interested parties may obtain further information regarding these rules by referring to FAC 2005–95, which precedes this document. These