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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 31

[FAC 2005-54; FAR Case 2009-006; Item IX; Docket 2010-0084, Sequence 1]

RIN 9000-AL39

Federal Acquisition Regulation; Labor Relations Costs

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

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement the Executive Order (E.O.) on Economy in Government Contracting, issued on January 30, 2009, and amended on October 30, 2009. This E.O. treats as unallowable the costs of any activities undertaken to persuade employees, whether employees of the recipient of 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 employee's own choosing.

DATES: Effective Date: [INSERT DATE 30 DAYS AFTER

PUBLICATION IN THE FEDERAL REGISTER.]

FOR FURTHER INFORMATION CONTACT: Mr. Edward N. Chambers, Procurement Analyst, at (202) 501-3221, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755. Please cite FAC 2005-54, FAR Case 2009-006.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule in the Federal Register at 75 FR 19345 on April 14, 2010, to implement E.O. 13494, Economy in Government Contracting, dated January 30, 2009, published in the Federal Register at 74 FR 6101 on February 4, 2009, as amended on October 30, 2009 (published in the Federal Register at 74 FR 57239 on November 5, 2009). This E.O. promotes economy and efficiency in Government contracting by providing that certain costs that are not directly related to the contractor's provision of goods and services to the Government shall be unallowable for payment, thereby directly reducing Government expenditures and reinforcing the fiscally responsible handling of taxpayer funds. Specifically, this E.O. states that the costs of the activities of preparing and distributing materials, hiring or consulting legal counsel or consultants, holding meetings (including paying the salaries of the attendees at meetings held for this purpose), and planning or conducting

activities by managers, supervisors, or union representatives during work hours, 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 are unallowable costs.

In order to implement E.O. 13494, DoD, GSA, and NASA have amended FAR 31.205-21, the cost principle addressing labor relations costs. Currently, this cost principle states that costs incurred in maintaining satisfactory relations between the contractor and its employees, including costs of shop stewards, labor management committees, employee publications, and other related activities, are allowable. To implement the requirements of the E.O., DoD, GSA, and NASA issued a proposed rule that would amend this cost principle by adding a new paragraph addressing the handling of persuader activities—that is, activity involving the persuading of employees to exercise or not exercise their rights to organize and bargain collectively. By doing so, the proposed rule differentiated the handling of costs incurred through persuader activities, which are unallowable, from those incurred in maintaining satisfactory labor relations, which remain allowable. Specifically, the proposed rule stated that the costs of any activities undertaken to persuade employees, of any 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 are unallowable. The proposed rule also identified examples of activities the costs of which are unallowable when performed in connection with persuader activities: (1) preparing and distributing materials, (2) hiring or consulting legal counsel or consultants, (3) meetings (including paying the salaries of the attendees at meetings held for this purpose), and (4) planning or conducting activities by managers, supervisors, or union representatives during work hours. Based on a careful review of public comments, discussed below, DoD, GSA, and NASA have concluded that the proposed rule should be finalized with just one minor editorial change. Consistent with section 8 of the E.O. and standard FAR conventions (see FAR 1.108(d)), this rule shall apply to contracts resulting from solicitations issued on or after the rule's effective date.

II. Discussion and Analysis of the Public Comments

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule. Fourteen respondents submitted comments on the proposed rule. These responses included a total of 28 comments on 12 issues. Several respondents strongly supported the rule, with one respondent urging the proposed rule be finalized as

soon as possible. Other respondents raised concerns which are addressed below.

A. Favors unions

Comment: Two respondents asserted that the rule favors unions and penalizes contractors.

Response: Under this rule, the Government will treat as unallowable the costs of specified "persuader" activities that are not directly related to the contractor's provision of goods and services to the Government, in order to promote economy and efficiency in Government contracting. Moreover, certain costs undertaken by contractors that are incurred in maintaining satisfactory relations between the contractor and its employees continue to be allowable, whether or not the contractor's employees are represented by a union. In addition, certain activities undertaken with the union that are not otherwise unlawful, including costs associated with negotiating or administering collective bargaining agreements, are allowable under section 3 of E.O. 13494 and paragraph (a) of FAR 31.205-21 because they involve the maintenance of satisfactory labor relations between the contractor and its employees. Costs related to the development, implementation, and enforcement of neutrality agreements would also be allowable provided that none of the costs attributed to the agreements include unreasonable costs or costs of unallowable persuader activities or

activities that are otherwise unlawful. (See comment "F" for additional discussion of neutrality agreements.) No change to the rule has been made in response to this comment.

B. Prohibits certain protected contractor activities

Comment: A number of respondents interpreted the rule to prohibit certain protected contractor activities, such as an employers' right to engage in speech that does not violate the National Labor Relations Act (NLRA). See 29 U.S.C. 158(c). As such, these respondents argued that E.O. 13494 is preempted by the NLRA, particularly in light of Chamber of Commerce v. Brown, 554 U.S. 60 (2008), in which the United States Supreme Court held that a State statute was preempted by the NLRA because it attempted regulation of speech about union-related activity that was within the zone of conduct intended by Congress to be left to market forces.

Response: This rule does not prohibit or otherwise regulate persuader activities; it only disallows the reimbursement of the costs of these activities under Federal contracts. The purpose of the rule is to promote economy and efficiency in Government contracting by excluding certain costs from reimbursement by the Government that are not directly related to the contractors' provision of goods and services to the Government. By doing so, the rule promotes the fiscally responsible handling of taxpayer

funds. The State law at issue in Brown was rooted in "California's policy judgment that partisan employer speech necessarily interferes with an employee's choice about whether to join or to be represented by a union." 554 U.S. at 69 (internal quotation omitted). By contrast here, neither the E.O. nor the rule in any way restrict the manner in which recipients of Federal funds may expend funds they receive from the Government or any other of their own funds, including funds a recipient received as a Government contractor for providing goods and services under Federal contracts. Instead, this rule preserves a contractor's freedom to spend its own funds however it wishes, whereas the State statute in Brown made it exceedingly difficult for employers to demonstrate that they had not used State funds for non-reimbursable purposes. (554 U.S. at 71-73). Moreover, unlike the State statute in Brown, this rule does not contain a "formidable enforcement scheme" involving "compliance costs and litigation risks... calculated to make union-related advocacy prohibitively expensive for employers." Id. at 63, 71. To the contrary, the E.O. and this rule merely identify types of costs that are not allowed for reimbursement under the well-established Federal procurement scheme, which already contains mechanisms for submission to and review of contract costs by Federal agencies designed to avoid unnecessary Government

expenditures. No additional enforcement burden or employer liability is established by the E.O. or this rule. As a result, this rule is consistent with the Court's holding in Brown, and does not run afoul of the NLRA.

C. Unclear language

Comment: Several respondents stated that the proposed rule contained confusing or conflicting language or that the rule was unclear as to what costs are disallowed.

Response: The language added to the labor relations cost principle does not conflict with the existing language. As explained in section II.A. of this preamble, the existing language, now identified as FAR 31.205-21(a), identifies when costs are allowable. The language addressing the E.O., added at a new FAR paragraph 31.205-21(b), addresses costs incurred through persuader activities, which are unallowable.

D. Imposes significant compliance burdens

Comment: A number of respondents contended that the rule imposes significant compliance burdens and accounting costs, including those incurred in distinguishing between allowable and unallowable costs.

Response: FAR 31.201-6 requires contractors to have an accounting system to segregate unallowable costs. The incremental costs of implementing and tracking an additional

unallowable cost element will be minimal. No changes in the rule have been made in response to this comment.

E. Conflicts with 29 U.S.C. 433

Comment: One respondent believed that the proposed rule was in conflict with 29 U.S.C. 433, which requires that employers file reports with the Secretary of Labor if they engage in certain "persuader activities" defined in that section. The respondent stated that section 433 defines these activities differently and more narrowly than E.O. 13494.

Response: The policies codified in the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. 401 et seq., and the E.O. are not in conflict. Nothing in the E.O. or the rule affects the scope of employer reporting obligations for purposes of section 203 of the LMRDA, 29 U.S.C. 433. As discussed above, the E.O. is designed to promote the policies of economy and efficiency in Federal Government contracting established in the Federal Property and Administrative Services Act, by excluding certain costs that are not directly related to the contractor's provision of goods and services to the Government, and to do so in a neutral manner that is consistent with that reflected in 29 U.S.C. 433.

F. Unreimbursable costs

Comment: A respondent stated that unreimbursable costs, as addressed in the proposed rule, are too broad and ignore the realities that employers frequently reimburse employees for time spent in collective bargaining and further ignore the rise and prevalence of neutrality pacts between employers and unions, used by the parties to minimize labor disputes. The respondent further stated that employers and unions frequently cooperate to encourage employees to ratify a collective bargaining agreement reached by the employer and the employees' bargaining representative. The respondent suggested that the list of reimbursable expenses in FAR 31.205-21(a) be amended by adding immediately after the words "employee publications" the following: "the costs of preparing for and conducting collective bargaining and the cost attributable to the ratification of collective bargaining agreements."

Response: Inclusion of this suggested language in the rule is unnecessary. Under the final rule, the costs of collective bargaining that are not persuader activity under FAR 31.205-21(b) are covered by FAR 31.205-21(a), and would be allowable to the extent that the costs were reasonable, allocable, and not unallowable under another cost principle, and are otherwise lawful. (See response to comment in section II.A.) Neutrality agreements would be handled in similar fashion. These agreements are entered into by

contractors and labor organizations and have often been used to establish mutually agreed-to restraints for reducing disputes associated with union representation. Therefore, costs associated with the development, negotiation, and enforcement of neutrality agreements would not normally be expected to involve any persuader activity. So long as that is the case, under the rule, costs associated with agreements of this kind would generally be allowable as part of the maintenance of satisfactory labor relations, provided that they do not represent persuader activity under FAR 31.205-21(b), are reasonable, allocable, not unallowable under another cost principle, and are otherwise lawful.

G. Contractors' indirect litigation costs

Comment: A respondent stated that it is important to clarify that this rule applies to a contractor's indirect litigation costs which are directly associated with the activities described in FAR 31.205-21(b) and suggested that this clarification could be accomplished by adding a fifth example of unallowable costs to the four listed in the proposed rule, which states "Costs of litigation or other legal proceedings arising on account of any activities described in paragraph (b) where it is determined by National Labor Relations Board, the National Mediation Board, a similar State or local administrative agency or a court of law that such activities were in violation of law

or undertaken to persuade employees regarding their exercise of collective bargaining rights.”

Response: This suggested clarification is not necessary since FAR 31.201-6 already disallows costs that are directly associated with unallowable costs, including associated litigation costs under FAR 31.205-47.

H. Additional examples

Comment: A respondent suggested that two additional examples of unallowable costs be added to the list of examples contained in the proposed rule. The first example would state that the costs of surveillance by video, email, or other means of employee organizing activities are unallowable costs. The second example would state that “informal polling of employees as to their preferences for or against unionization is unlawful under the NLRA as a means of dissuading employees with respect to union activities, see, e.g., Smithfield Foods, 347 N.L.R.B. 1225 (2006), and therefore, time spent by supervisors and others conducting informal polls during the pendency of a union organizing campaign is unrelated to contract performance and should be listed as an example of unallowable costs under the Executive Order.”

Response: Inclusion of these examples is not necessary. The examples in the rule are not exhaustive, but adequately cover the allowability of costs for a full range

of lawful activities. Furthermore, the costs of activities that are unlawful, including unlawful activities under the NLRA, are not allowed under the FAR. FAR 31.201-3(b)(2) makes clear that costs incurred for unlawful activities shall not be reimbursed.

I. Contract administration activities

Comment: A respondent suggested that various contract administration activities be addressed in this rule, including that the contractors be required to update their accounting systems to account for the costs made unallowable by this rule; that contractors demonstrate to contracting officers that their accounting systems can effectively account for these unallowable costs; that contracting officers, upon issuance of the final rule, undertake supplemental reviews of the adequacy of the contractors' accounting systems to account properly for unallowable union persuasion costs; that contracting officers undertake an additional review of cost reimbursement claims to ensure that this new rule is being followed and the Government is not overcharged; that contractors certify on each bill or claim whether they have undertaken any activities to persuade employees concerning the manner of exercising their right to organize or bargain collectively and whether those costs have been accounted for and excluded from the reimbursement sought from the Federal Government; and that

contracting officer's representatives include in their regular reports whether they know of any union persuasion activities the contractors may have undertaken during the reporting period.

Response: The FAR already contains coverage addressing the negotiation and administration of contracts that would cover these types of activities.

J. Role of Inspector General

Comment: A respondent stated that each agency should designate a member of the agency Inspector General's staff to collect information related to potentially unallowable union persuasion activities from employees or members of the public, some of whom may wish to remain anonymous, and refer that information to the contracting officer to facilitate billing reviews and audits as well as require that the Inspector General from each agency perform a review of the implementation of this rule within one year after the final rule goes into effect.

Response: This recommendation is outside the scope of this case, which was limited to the implementation of E.O. 13494 in the FAR. The FAR does not prescribe activities for Inspectors General.

K. Investigation of reports of employer persuader activities

Comment: A respondent stated that the final rule should make clear that contracting officers are to receive and investigate instances of employer persuader activities reported by workers or labor union representatives and that FAR 3.903 protects the right of the contractor's employees to report such activities. The respondent believed that the final rule should establish a process by which employees of Federal contractors or others with knowledge of employer persuasion costs can disclose that information to designated officials anonymously. Finally, the respondent believed that the final rule should state that FAR 33.209 applies to any Federal contractor who submits for reimbursement any costs made unallowable by this rule.

Response: These recommendations are outside the scope of this case, which was limited to the implementation of E.O. 13494. To the extent that FAR 3.903 and 33.209 are applicable, there is already adequate FAR coverage. Further, FAR subpart 3.10 also addresses contractor business ethics.

L. Regulatory Flexibility Act

Comment: Two respondents stated that the rule fails to comply with the Regulatory Flexibility Act. Both requested the basis for the stated conclusions and one requested the Councils to conduct an Initial Regulatory Flexibility Analysis.

Response: DoD, GSA, and NASA have certified that the rule will not have a significant economic impact on a substantial number of small entities. The Regulatory Flexibility Act certification is based upon an analysis of the data in the Federal Procurement Data System (FPDS). (See additional discussion in section IV, Regulatory Flexibility Act.) That certification states that most contracts awarded to small entities use simplified acquisition procedures or are awarded on a competitive fixed-price basis, and thus do not require application of the cost principle contained in this rule. This is supported by the most recent data available from the FPDS. For Fiscal Year 2010, a search of FPDS revealed 1,822,515 awards to small businesses. Of these, 1,814,282 were fixed price (99.5 percent), and 1,220,154 (67 percent) were below the simplified acquisition threshold.

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 is 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

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 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 contained in this rule.

V. Paperwork Reduction Act

The final rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Part 31

Government procurement.

Dated: October 21, 2011.

/s/

Laura Auletta,
Acting Director,
Office of Governmentwide
Acquisition Policy,
Office of Acquisition Policy,
Office of Governmentwide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR part 31 as set forth below:

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 42 U.S.C. 2473(c).

2. Revise section 31.205-21 to read as follows:

31.205-21 Labor relations costs.

(a) Costs incurred in maintaining satisfactory relations between the contractor and its employees (other than those made unallowable in paragraph (b) of this section), including costs of shop stewards, labor management committees, employee publications, and other related activities, are allowable.

(b) As required by Executive Order 13494, Economy in Government Contracting, costs of any activities undertaken to persuade employees, of any 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 are unallowable. Examples of unallowable costs under this paragraph include, but are not limited to, the costs of-

- (1) Preparing and distributing materials;

(2) Hiring or consulting legal counsel or consultants;

(3) Meetings (including paying the salaries of the attendees at meetings held for this purpose); and

(4) Planning or conducting activities by managers, supervisors, or union representatives during work hours.

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