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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 231

RIN 0750-AH76

Defense Federal Acquisition Regulation Supplement;

Unallowable Fringe Benefit Costs (DFARS Case 2012-D038)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD)

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to explicitly state that fringe benefit costs incurred or estimated that are contrary to law, employer-employee agreement, or an established policy of the contractor are unallowable.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before **[Insert date 60 days after date of publication in the *FEDERAL REGISTER*]**, to be considered in the formation of the final rule.

ADDRESSES: You may submit comments, identified by DFARS Case 2012-D038, using any of the following methods:

Regulations.gov: <http://www.regulations.gov>.

Submit comments via the Federal eRulemaking portal by inserting "DFARS Case 2012-D038" under the heading "Enter keyword or ID"

and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2012-D038." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2012-D038" on your attached document. Follow the instructions for submitting comments.

E-mail: dfars@osd.mil. Include DFARS Case 2012-D038 in the subject line of the message.

Fax: 571-372-6094.

Mail: Defense Acquisition Regulations System, Attn: Ms. Amy Williams, OUSD(AT&L)DPAP(DARS), Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check www.regulations.gov approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Amy Williams, telephone 571-372-6106.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to revise the DFARS at 231.205-6 to implement the Director of Defense Pricing policy memo "Unallowable Costs

for Ineligible Dependent Health Care Benefits, dated February 17, 2012. The rule adds paragraph 231.205-6(m)(1) to explicitly state that fringe benefit costs incurred or estimated that are contrary to law, employer-employee agreement, or an established policy of the contractor are unallowable.

FAR 42.709, which implements 10 U.S.C. 2324(a) through (d) and 41 U.S.C. 4303, covers the assessment of penalties against contractors that include unallowable indirect costs in final indirect cost rate proposals or the final statement of costs incurred or estimated to be incurred under a fixed-price incentive contract. The section applies to all contracts in excess of \$700,000, except fixed-price contracts without cost incentives or firm-fixed-price contracts for the purchase of commercial items. FAR 42.709-1(a) provides penalties that apply if the indirect cost is expressly unallowable under a cost principle in the FAR, or an executive agency supplement to the FAR.

FAR 31.205-6(m) states that the costs of fringe benefits (which include employee health care benefits) are allowable to the extent that they are reasonable and are required by law, employer-employee agreement, or an established policy of the contractor. Although fringe benefit costs that do not meet these criteria are not allowable, the FAR does not make them expressly unallowable. Specifying these fringe benefit costs as

expressly unallowable in the DFARS makes it clear that the penalties at FAR 42.709-1 are applicable if a contractor includes such unallowable fringe benefit costs in a final indirect cost rate proposal or in the final statement of costs incurred or estimated to be incurred under a fixed-price incentive contract.

II. 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. The Office of Information and Regulatory Affairs has determined that this is not a significant regulatory action and, therefore, was not 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.

III. Regulatory Flexibility Act

DoD has prepared an initial regulatory flexibility analysis consistent with 5 U.S.C. 603. A copy of the analysis may be

obtained from the point of contact specified herein. The analysis is summarized as follows:

DoD does 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 this rule will only impact entities that are submitting covered proposals containing unallowable indirect fringe benefit costs. FAR 31.205-6(m) already states what fringe benefit costs are allowable. This rule provides explicit clarification that fringe benefit costs incurred or estimated that are contrary to law, employer-employee agreement, or an established policy of the contractor are unallowable. If this rule takes effect, the penalties at FAR 42.709-1 will apply to any entity that includes such unallowable indirect charges in a final indirect cost rate proposal or the final statement of costs incurred or estimated to be incurred under a fixed-price incentive contract for a contract that exceeds \$700,000.

At this time, DoD is unable to estimate the number of small entities to which this rule will apply. According to FPDS data for FY 2012, there were approximately 3000 contract awards exceeding \$700,000 to small entities, excluding fixed-price contracts without cost incentives or any firm-fixed-price contract for the purchase of commercial items. We estimate that a very small percentage of the entities receiving these awards

would be submitting covered proposals containing unallowable fringe benefit costs. DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2012-D038) in correspondence.

IV. Paperwork Reduction Act

The 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 231.

Government procurement.

Manuel Quinones,

Editor, Defense Acquisition Regulations System

Therefore, DoD proposes to amend 48 CFR parts 231 as follows:

PART 231 - CONTRACT COST PRINCIPLES AND PROCEDURES

1. The authority citation for 48 CFR part 231 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

2. Section 231.205-6 is amended by adding paragraph (m)(1) to read as follows:

231.205-6 Compensation for personal services.

* * * * *

(m)(1) Fringe benefit costs incurred or estimated that are contrary to law, employer-employee agreement, or an established policy of the contractor are unallowable.

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