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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 31

[FAC 2005-70; FAR Case 2013-017; Item II; Docket 2013-0017, Sequence 1]

RIN 9000-AM64

Federal Acquisition Regulation; Allowability of Legal Costs for Whistleblower Proceedings

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

ACTION: Interim rule.

SUMMARY: DoD, GSA, and NASA are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to implement a section of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013 that addresses the allowability of legal costs incurred by a contractor or subcontractor related to a whistleblower proceeding commenced by the submission of a complaint of reprisal by the contractor or subcontractor employee.

DATES: Effective: [INSERT DATE OF PUBLICATION IN THE **FEDERAL REGISTER.**]

Comment Date: Interested parties should submit written comments to the Regulatory Secretariat on or before

[INSERT DATE 60 DAYS AFTER FEDERAL REGISTER PUBLICATION DATE] to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005-70, FAR Case 2013-017, by any of the following methods:

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

Submit comments via the Federal eRulemaking portal by searching for "FAR Case 2013-017" Select the link "Submit a Comment" that corresponds with "FAR Case 2013-017." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "FAR Case 2013-017" on your attached document.

- Fax: 202-501-4067.
- Mail: General Services Administration, Regulatory Secretariat (MVCB), ATTN: Ms. Flowers, 1800 F Street, NW., 2nd floor, Washington, DC 20405.

Instructions: Please submit comments only and cite FAC 2005-70, FAR Case 2013-017, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

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 2005-70, FAR Case 2013-017.

SUPPLEMENTARY INFORMATION:

I. Background

This interim rule revises the cost principle at FAR 31.205-47 to implement sections 827 paragraph (g) and 828 paragraph (d) of the NDAA for FY 2013 (Pub. L. 112-239). Section 827 paragraph (g) amends 10 U.S.C. 2324(k), Allowable costs under defense contracts, and section 828 paragraph (d) similarly amends 41 U.S.C. 4310, Proceeding costs not allowable, to address the allowability of legal costs incurred by a contractor or subcontractor in connection with a whistleblower proceeding commenced by a contractor or subcontractor employee submitting a complaint of reprisal under the applicable whistleblower statute (10 U.S.C. 2409, Contractor employees: protection from reprisal for disclosure of certain information, or 41 U.S.C. 4712, Pilot program for enhancement of contractor [employee] protection from reprisal for disclosure of certain information, respectively).

The NDAA for FY 2013 (Pub. L. 112-239, enacted January 2, 2013) enacted enhanced whistleblower protections for contractor and subcontractor employees in separate, but parallel, sections of the NDAA for titles 10 and 41 agencies, respectively. Title 10 agencies are required by

the terms of section 827 paragraph (i)(2) to revise their respective FAR supplements. These enhanced whistleblower protections and the associated cost principle changes are being implemented by two Defense Federal Acquisition Regulation Supplement (DFARS) cases (for DoD only) and two FAR cases (for title 41 agencies), which are independent, but parallel, rulemakings because of some minor differences in the operations of the underlying statutes and because the title 41 statute is only a four-year pilot program.

Sections 827 and 828, in addition to the paragraphs relating to the allowability of the legal costs for whistleblower proceedings, also enhance the whistleblower protections for contractor and subcontractor employees at 10 U.S.C. 2409 (applicable to DoD, NASA, and the Coast Guard) and create a new pilot program for enhancement of contractor and subcontractor employee whistleblower protections at 41 U.S.C. 4712, applicable to all other civilian agencies (see FAR case 2013-015).

The NDAA for FY 2013 was enacted on January 2, 2013. Section 827 (amending 10 U.S.C. 2409 and 10 U.S.C. 2324) takes effect 180 days after enactment (July 1, 2013) and requires implementation in the DFARS no later than that date. Section 828 paragraph (a), which established 41 U.S.C. 4712, took effect 180 days after enactment. The pilot program is effective through January 1, 2017. During

the time period that 41 U.S.C. 4712 (the pilot program) is in effect, the effectiveness of the prior statute that covered whistleblower protections under 41 U.S.C. 4705 is suspended.

The changes to 41 U.S.C. 4310 (required by section 828 paragraph (d)) were effective upon enactment and specifically referenced 41 U.S.C. 4712, with no specified applicability to contracts, orders, or contract modifications. Although the change to the text of 41 U.S.C. 4310 is permanent, the change only covers actions under 41 U.S.C. 4712, which expires January 1, 2017. Therefore, the new portion of the statute addressing proceeding costs that references 41 U.S.C. 4712, unless the pilot program is extended, will cease to be effective after January 1, 2017.

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. This is a significant regulatory action and, therefore, was 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.

III. Regulatory Flexibility Act

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, 5 U.S.C. 601, et seq., because most contracts awarded to small entities are awarded on a competitive fixed-price basis, and do not require application of the cost principles contained in this rule. However, an Initial Regulatory Flexibility Analysis (IRFA) has been prepared and is summarized as follows:

The objective of this rule is to address the allowability of legal costs incurred by a contractor in connection with a proceeding commenced by an employee submitting a complaint under 10 U.S.C. 2409 or 41 U.S.C. 4712. The statutory authority is 10 U.S.C. 2324(k) and 41 U.S.C. 4310.

Most contracts awarded on a fixed-price competitive basis do not require application of the cost principles. Most contracts valued at or below the simplified acquisition threshold are awarded on a fixed price competitive basis. Requiring submission of certified cost or pricing data for acquisitions that do not exceed the simplified acquisition threshold is prohibited (FAR 15.403-4(a)(2)). According to Federal Procurement Data System (FPDS) data for FY 2012, there were 73,014 Federal new contract awards over the simplified acquisition threshold in FY 2012. Of those contracts, only 11,279 awards were to small businesses on other than a competitive fixed-price basis. Within that number of awards, this rule would only affect a contractor if a contractor employee commenced a proceeding by submitting a complaint under 10 U.S.C. 2409 or 41 U.S.C. 4712, and if that proceeding resulted in imposition of a monetary penalty or an order to take corrective action under 10 U.S.C. 2409 or 41 U.S.C. 4712. We do not have data on the percentage of contracts that involve submission of a whistleblower complaint and result in monetary penalty or an order to take corrective action.

There are no reporting, recordkeeping, or other compliance requirements in this rule. The rule does not duplicate, overlap, or conflict with any other Federal rules. DoD, GSA, and NASA were unable to identify any alternatives to the rule which would reduce the impact on small entities and still meet the requirements of the statute.

The Regulatory Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA 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 (FAC 2005-70, FAR Case 2013-017) in correspondence.

IV. Paperwork Reduction Act

The interim 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).

V. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National

Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. By operation of law, the new statute for the whistleblower protection pilot program became effective on July 1, 2013, i.e., Congress included language in section 828 paragraph (b) specifically addressing the effective date of 41 U.S.C. 4712. Section 828 paragraph (d), which is implemented through this rulemaking, revised 41 U.S.C. 4310, effective upon enactment. 41 U.S.C. 4310 addresses the contractor's legal fees arising from an employee's complaint of reprisal and makes these fees expressly unallowable costs when there is contractor culpability. The most effective and efficient way to ensure awareness and compliance by agencies and their contractors with section 828 paragraph (d) is through the issuance of an interim rule. This regulation requires nothing beyond that which is set forth clearly in the statute. However, pursuant to 41 U.S.C. 1707 and FAR 1.501-

3(b), DoD, GSA, and NASA will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Part 31

Government procurement.

Dated: September 24, 2013.

William Clark,
Acting Director,
Office of Government-wide
Acquisition Policy,
Office of Acquisition Policy,
Office of Government-wide 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 51 U.S.C. 20113.

2. Amend section 31.205-47 by revising the introductory text of paragraph (b), and paragraph (b)(2) to read as follows:

31.205-47 Costs related to legal and other proceedings.

* * * * *

(b) In accordance with 41 U.S.C. 4310 and 10 U.S.C. 2324(k), costs incurred in connection with any proceeding brought by a Federal, State, local, or foreign government, or by 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, for violation of, or a failure to comply with, law or regulation by the contractor (including its agents or employees), or costs incurred in connection with any proceeding brought by a third party in the name of the United States under the False Claims Act, 31 U.S.C. 3730, are unallowable if the result is—

* * * * *

(2) In a civil or administrative proceeding, either a finding of contractor liability where the proceeding involves an allegation of fraud or similar misconduct; or imposition of a monetary penalty, or an order issued by the agency head to the contractor or subcontractor to take corrective action under 41 U.S.C. 4712 or 10 U.S.C. 2409, where the proceeding does not involve an allegation of fraud or similar misconduct;

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[BILLING CODE 6820-EP]

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