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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 31

[FAC 2005-95; FAR Case 2015-016; Item V; Docket No. 2015-0016;
Sequence No. 1]

RIN 9000-AM97

**Federal Acquisition Regulation; Prohibition on Reimbursement for
Congressional Investigations and Inquiries**

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 to amend the Federal Acquisition Regulation (FAR) to implement 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.

DATES: Effective: [Insert date of publication in the **FEDERAL REGISTER**].

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Ms. Zenaida Delgado, Procurement Analyst, at 202-969-7207. For information pertaining to status or

publication schedules, contact the Regulatory Secretariat at 202-501-4755. Please cite FAC 2005-95, FAR Case 2015-016.

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 (NDAA) for Fiscal Year (FY) 2015 (Pub. L. 113-291).

This statute amended 10 U.S.C. 2324(e)(1) to disallow costs incurred by a contractor 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 10 U.S.C. 2324(k)(2).

While section 857 only applies to contracts with DoD, NASA, and the Coast Guard, for the purpose of promoting consistency in the 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.

II. Discussion and Analysis

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 disallowance of costs in accordance with 10 U.S.C. 2324(e)(1)(Q) (i.e., any costs incurred by a contractor in connection with a Congressional investigation or inquiry into an issue that is the subject matter of a proceeding resulting in a disposition that meets conditions at FAR 31.205-47(b)(1) through (5)) does not constitute a penalty. The regulation clearly states that costs are unallowable if incurred in connection with a Congressional investigation or inquiry into an issue that is the subject matter of a proceeding that results in a specified disposition. Absent a specified disposition, no disallowance of costs would exist.

Comment: The same respondent stated that the "guilty verdict" must come from an impartial court, and must be associated with the inquiry.

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) in its entirety; nor does it reference paragraphs (k) (3) or (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 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 whether 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.

5. Clarification of regulatory intent of FAR 31.205-47(f) (9).

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 [emphasis added] 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, 5 U.S.C. 601, et seq., because the rule will be manifested as a cost principle to which only select small businesses are subject. Pursuant to FAR 31.000, the cost principles are applicable to contracts, subcontracts, and modifications whenever cost analysis is performed, or when a contract clause requires the determination or negotiation of costs. An analysis of contracts awarded during Fiscal Year 2014, the most recent full year for which information was available, revealed that fewer than 200 small businesses were performing contracts subject to FAR 31.

Again, the rule merely disallows costs incurred in the extremely rare instances when a contractor incurs costs in connection with a Congressional investigation or inquiry into an issue resulting in a disposition (e.g., conviction, liability, corrective action, etc.), as described in 10 U.S.C. 2324(k)(2). Accordingly, given the miniscule segment of the small business population that could potentially be impacted by the rule, and the low likelihood of the conditions being met, the impact on small businesses is insignificant.

There were no significant issues raised by the public in response to the Initial Regulatory Flexibility Analysis provided in the proposed rule. The final rule applies to all entities, both small and other than small, performing as contractors or subcontractors on U.S. Government contracts, and who are required to abide by the Cost

Principles at FAR part 31. However, the rule is not expected to have a significant impact.

There are no reporting, recordkeeping, or other information collection requirements of the rule.

DoD, GSA, and NASA did not identify any significant alternatives that would reduce the impact on small entities and still meet the objectives of the statute.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat. The Regulatory Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

V. Paperwork Reduction Act

This 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: December 21, 2016.

William F. Clark,
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—

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, are unallowable if the result is-

* * * * *

(f) * * *

(9) A Congressional investigation or inquiry into an issue that is the subject matter of a proceeding resulting in a disposition as described in paragraphs (b) (1) through (5) of this section (see 10 U.S.C. 2324(e) (1) (Q)).

* * * * *

3. Amend section 31.603 by-

- a. Revising paragraphs (b) introductory text and (b) (15); and
- b. Adding paragraph (b) (16).

The revisions and addition reads as follows:

31.603 Requirements.

* * * * *

(b) Agencies are not expected to place additional restrictions on individual items of cost. However, under

10 U.S.C. 2324, 41 U.S.C. 4304, 31 U.S.C. 3730, and 41 U.S.C. 4310, the following costs are unallowable:

* * * * *

(15) Unless any of the exceptions at 31.205-47(c) or (d) apply, costs incurred by a contractor in connection with any criminal, civil, or administrative proceedings that result in dispositions described at 31.205-47(b) (1) through (5) commenced 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); 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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