

and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to clarify the allowability of costs incurred for qui tam suits in which the Government does not intervene. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993. This is not a major rule under 5 U.S.C. 804.

EFFECTIVE DATE: December 29, 1998.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, (202) 501-4755, for information pertaining to status or publication schedules. For clarification of content, contact Ms. Linda Nelson, Procurement Analyst, at (202) 501-1900. Please cite FAC 97-09, FAR case 95-020.

SUPPLEMENTARY INFORMATION:

A. Background

A proposed rule was published in the **Federal Register** on June 20, 1996 (61 FR 31790). Seven sources submitted public comments. All comments were considered in developing the final rule.

This final rule clarifies the cost principle at FAR 31.205-47 as it relates to qui tam suits not joined in by the Government. The final rule also clarifies, at FAR 31.205-47(e)(3), that the maximum reimbursement contractors may receive for legal costs in connection with agreements reached under FAR 31.205-47(c) is 80 percent of otherwise allowable and allocable incurred costs.

Industry has commented that this coverage should be effective prospectively. After consideration of these comments, it is concluded that this coverage is properly characterized as a clarification. Nevertheless, it is recognized that certain Government contracting personnel and contractors may have had common misinterpretations of the regulatory coverage. Indeed, those inconsistencies are the catalyst behind this clarification. On August 24, 1995, the Defense Contract Audit Agency issued audit guidance that clarified audit treatment for qui tam legal fees. For qui tam legal fees incurred before August 24, 1995, if the Government contracting personnel and the contractor shared a common misinterpretation of the regulatory coverage, the contracting officer, in consultation with his or her legal

advisors, should determine the appropriate treatment of those costs on a case-by-case basis.

B. 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 principle contained in this rule.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose recordkeeping or information collection requirements, or collections of information from offerors, contractors, or members of the public which require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Part 31

Government procurement.

Dated: October 22, 1998.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Therefore, 48 CFR Part 31 is amended 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. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

2. Section 31.205-47 is amended by revising the introductory text of paragraph (b); by redesignating (c) as (c)(1) and adding (c)(2); and by revising paragraph (e)(3) to read 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 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—

* * * * *

(c) * * *

(2) In the event of a settlement of any proceeding brought by a third party under the False Claims Act in which the United States did not intervene, reasonable costs incurred by the contractor in connection with such a proceeding, that are not otherwise unallowable by regulation or by separate agreement with the United States, may be allowed if the contracting officer, in consultation with his or her legal advisor, determines that there was very little likelihood that the third party would have been successful on the merits.

* * * * *

(e) * * *

(3) The percentage of costs allowed does not exceed the percentage determined to be appropriate considering the complexity of procurement litigation, generally accepted principles governing the award of legal fees in civil actions involving the United States as a party, and such other factors as may be appropriate. Such percentage shall not exceed 80 percent. Agreements reached under paragraph (c) of this subsection shall be subject to this limitation. If, however, an agreement described in paragraph (c)(1) of this subsection explicitly states the amount of otherwise allowable incurred legal fees and limits the allowable recovery to 80 percent or less of the stated legal fees, no additional limitation need be applied. The amount of reimbursement allowed for legal costs in connection with any proceeding described in paragraph (c)(2) of this subsection shall be determined by the cognizant contracting officer, but shall not exceed 80 percent of otherwise allowable legal costs incurred.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 32 and 37

[FAC 97-09; FAR Case 97-302; Item VIII]

RIN 9000-AI09

Federal Acquisition Regulation; Service Contracts

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

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to expand the authority of the Department of Defense and the Coast Guard to enter into contracts that cross fiscal years.

This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993, and is not a major rule under 5 U.S.C. 804.

EFFECTIVE DATE: December 29, 1998.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, (202) 501-4755, for information pertaining to status or publication schedules. For clarification of content, contact Mr. Jeremy F. Olson at (202) 501-0692. Please cite FAC 97-09, FAR case 97-302.

SUPPLEMENTARY INFORMATION:

A. Background

Section 801 of the National Defense Authorization Act for Fiscal Year 1998 (Pub. L. 105-85) amends 10 U.S.C. 2410a to authorize the Secretary of Defense, the Secretary of a military department, or the Secretary of Transportation with regard to the Coast Guard when not operating as a service in the Navy, to enter into a contract for procurement of severable services for a period that begins in one fiscal year and ends in the next fiscal year.

B. Regulatory Flexibility Act

The final rule does not constitute a significant FAR revision within the meaning of FAR 1.501 and Public Law 98-577, and publication for public comments is not required. However, comments from small entities concerning the affected FAR subparts will be considered in accordance with 5 U.S.C. 610. Such comments must be submitted separately and should cite 5 U.S.C. 601, *et seq.* (FAC 97-09, FAR case 97-302), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose recordkeeping or information collection requirements, or collections of information from offerors, contractors, or members of the public which require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 32 and 37

Government procurement.

Dated: October 22, 1998.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Therefore, 48 CFR Parts 32 and 37 are amended as set forth below:

1. The authority citation for 48 CFR Parts 32 and 37 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 32—CONTRACT FINANCING

2. Section 32.703-3 is revised to read as follows:

32.703-3 Contracts crossing fiscal years.

(a) A contract that is funded by annual appropriations may not cross fiscal years, except in accordance with statutory authorization (e.g., 41 U.S.C. 11a, 31 U.S.C. 1308, 42 U.S.C. 2459a, 42 U.S.C. 3515, and paragraph (b) of this subsection), or when the contract calls for an end product that cannot feasibly be subdivided for separate performance in each fiscal year (e.g., contracts for expert or consultant services).

(b) The head of an executive agency, except NASA, may enter into a contract, exercise an option, or place an order under a contract for severable services for a period that begins in one fiscal year and ends in the next fiscal year if the period of the contract awarded, option exercised, or order placed does not exceed one year (10 U.S.C. 2410a and 41 U.S.C. 253l). Funds made available for a fiscal year may be obligated for the total amount of an action entered into under this authority.

PART 37—SERVICE CONTRACTING

3. Section 37.106 is amended by revising paragraph (b) to read as follows:

37.106 Funding and term of service contracts.

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(b) The head of an executive agency, except NASA, may enter into a contract, exercise an option, or place an order under a contract for severable services for a period that begins in one fiscal year and ends in the next fiscal year if the period of the contract awarded, option exercised, or order placed does not exceed one year (10 U.S.C. 2410a and 41 U.S.C. 253l). Funds made available for a fiscal year may be obligated for the total amount of an action entered into under this authority.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 32

[FAC 97-09; FAR Case 97-609; Item IX]

RIN 9000-A111

Federal Acquisition Regulation; Payment Due Dates

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

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to clarify that agencies may authorize amendment of the FAR payment clauses to specify a period shorter than 30 days for making contract invoice payments, provided such period is not less than 7 days. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993, and is not a major rule under 5 U.S.C. 804.

EFFECTIVE DATE: December 29, 1998.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, 1800 F Street, NW, Washington, DC 20405, (202) 501-4755, for information pertaining to status or publication schedules. For clarification of content, contact Mr. Jeremy Olson at (202) 501-0692. Please cite FAC 97-09, FAR case 97-609.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule amends FAR Subpart 32.9 to clarify that agencies may amend the clauses at FAR 52.232-25, Prompt Payment, and 52.232-26, Prompt Payment for Fixed-Price Architect-Engineer Contracts, to specify a period shorter than 30 days (but not less than 7 days) for making contract invoice payments.

B. Regulatory Flexibility Act

The final rule does not constitute a significant FAR revision within the meaning of FAR 1.501 and Public Law 98-577, and publication for public comments is not required. However, comments from small entities concerning the affected FAR subpart will be considered in accordance with 5