

or oil for the purpose of generating power for distribution in commerce).

(v) Industry code 4953 (limited to facilities regulated under the Resource Conservation and Recovery Act, Subtitle C (42 U.S.C. 6921, *et seq.*)), 5169, 5171, or 7389 (limited to facilities primarily engaged in solvent recovery services on a contract or fee basis); or

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 31

[FAC 2001-15; FAR Case 2001-024; Item VI]

RIN 9000-AJ42

Federal Acquisition Regulation; Selling Cost Principle

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 (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) "selling costs" cost principle by restructuring the paragraphs and removing unnecessary and duplicative language to increase clarity.

DATES: *Effective Date:* August 25, 2003.

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. Edward Loeb at (202) 501-0650. Please cite FAC 2001-15, FAR case 2001-024.

SUPPLEMENTARY INFORMATION:

A. Background

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 67 FR 55682, August 29, 2002, with request for comments. One respondent submitted comments; a discussion of the comments is provided below. Differences between the proposed rule and final rule are discussed in paragraph B.2. below.

B. Public Comments

Clarity of the Cost Principle

1. *Comment:* *Revise proposed FAR 31.205-38(a).* The cost principle's readability and clarity can be improved by changing the second sentence of the proposed paragraph (a) from "The cost of any selling efforts other than those addressed in this cost principle are unallowable" to "The costs of selling efforts are allowable unless expressly identified as unallowable in this or any other cost principle." The proposed wording will be difficult to apply in the field. The respondent is unaware of any selling costs that are not already included in the cost principle.

Councils' response: Nonconcur. The sentence in question was simply moved from the current paragraph (d) to the beginning of the cost principle. The sentence is not new; it was originally included to comply with the provisions of section 911 of the Defense Procurement Improvement Act of 1985 (codified at 10 U.S.C. 2324 (f)(1)(J)), which required that the allowability of selling and marketing costs be clarified. At that time, Congress and the General Accounting Office (GAO) were concerned about potential negotiation of 50/50 splits of the costs in this area due to unclear wording of the cost principle. The intent was to ensure that any gray areas of selling costs would be disallowed, particularly the costs of broadly targeted selling and marketing. The current wording continues this intent.

Cost Principle Consistency

2. *Comment:* *Delete portion of proposed FAR 31.205-38(a).* The last sentence in the proposed paragraph (a) is not needed as it reiterates what is already included in 31.204(c) (Application of principles and procedures).

Councils' response: Partially concur. Do not agree that the intent of the sentence in question is adequately covered by 31.204(c). However, the Councils concluded that the objective of this sentence is already adequately achieved by the operation of the proposed paragraph (b) which directs the reader to other specific cost principles governing the allowability of the identified categories of costs, and the second sentence of the proposed paragraph (a) which makes any selling efforts other than those addressed in the cost principle unallowable. Therefore, the last sentence of paragraph (a) is deleted.

Cost Principle Elimination

3. *Comment:* *Delete proposed FAR 31.205-38.* With the exception of its last paragraph, the proposed cost principle defines selling costs and expressly states they are allowable or refers the reader to other cost principles for the determination of allowability of related costs. Therefore, consideration should be given to completely eliminating the cost principle, after moving the proposed paragraph (c) to another cost principle, possibly 31.205-33(f) (Professional and consultant service costs).

Councils' response: Nonconcur. This cost principle has disallowed and should continue to disallow all selling costs not made specifically allowable by it or the other cited cost principles. In addition, this cost principle clarifying the allowability of selling and marketing costs is statutorily required by 10 U.S.C. 2324(f)(1)(J) and 41 U.S.C. 256(f)(1)(J).

General Reformatting of FAR Part 31.205

4. *Comment:* The respondent also recommended that the Councils consider a general reformatting of FAR Part 31, Contract Cost Principles and Procedures. Specifically, consideration should be given to establishing a uniform structure for the selected costs detailed in FAR Subpart 31.205, which the respondent believes will increase the clarity and understanding of the cost principles and thereby reduce misinterpretation.

Councils' response: Nonconcur. The Councils are unaware of any significant clarity problems with the current FAR cost principles and see no benefit in this recommendation. While it is true that the cost principles do not all share an identical format, it does not follow that this makes them difficult to understand. Moreover, such a comprehensive revision of the cost principles could actually increase disputes by substituting new wording for longstanding, court-tested language.

Of the 48 current FAR cost principles, 16 are only one paragraph long, and 11 more are only two or three paragraphs long. The Councils question the need to "force-fit" such short cost principles into a uniform format, particularly in the absence of any significant clarity problems. Not only would the recommended general reformatting of the cost principles be difficult to accomplish, but it would also offer no obvious benefit to either industry or the Government.

The Councils recommend instead that industry continue to identify those individual cost principles which it

views as problematic and to provide specific proposals for appropriate revisions. It should be noted that the continuing Defense Procurement and Acquisition Policy initiative to reduce accounting and administrative burdens in the cost principles, without jeopardizing the Government's interests, has resulted in significant changes or deletions involving more than 20 different cost principles to date, including the recent major revisions to the relocation cost principle (FAR 31.205-35) that made employee "tax gross-ups" and spouse employment assistance payments allowable for the first time, as well as increased the maximum allowable lump-sum amount for miscellaneous expenses from \$1,000 to \$5,000. In addition, cost principle streamlining cases are currently in process regarding compensation (FAR 31.205-6), training and education (FAR 31.205-44), depreciation (FAR 31.205-11), expanded relocation lump-sum (FAR 31.205-35), and travel (FAR 31.205-46) costs. The Councils continue to believe that such a case-by-case cooperative effort with industry offers the best opportunity for meaningful change in this often controversial area.

This is not a significant regulatory action and, therefore, was not 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.

C. 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 discussed in this rule.

D. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that 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: July 16, 2003.

Laura Auletta,

Director, Acquisition Policy Division.

■ 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 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

31.205-1 [Amended]

■ 2. Amend section 31.205-1 in paragraph (f)(1) by removing from the parenthetical "31.205-38(c)" and adding "31.205-38(b)(5)" in its place.

31.205-12 [Amended]

■ 3. Amend section 31.205-12 in paragraph (a) by removing the word "generalized" and adding "general" in its place.

■ 4. Amend section 31.205-33 by revising the first sentence of the introductory text of paragraph (f); and removing the parenthetical sentence. The revised text reads as follows:

31.205-33 Professional and consultant service costs.

* * * * *

(f) Fees for services rendered are allowable only when supported by evidence of the nature and scope of the service furnished (see also 31.205-38(c)). * * *

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■ 5. Revise section 31.205-38 to read as follows:

31.205-38 Selling costs.

(a) "Selling" is a generic term encompassing all efforts to market the contractor's products or services, some of which are covered specifically in other subsections of 31.205. The costs of any selling efforts other than those addressed in this cost principle are unallowable.

(b) Selling activity includes the following broad categories:

(1) *Advertising.* Advertising is defined at 31.205-1(b), and advertising costs are subject to the allowability provisions of 31.205-1(d) and (f).

(2) *Corporate image enhancement.* Corporate image enhancement activities, including broadly targeted sales efforts, other than advertising, are included within the definition of public relations at 31.205-1(a), and the costs of such efforts are subject to the allowability provisions at 31.205-1(e) and (f).

(3) *Bid and proposal costs.* Bid and proposal costs are defined at 31.205-18

and are subject to the allowability provisions of that subsection.

(4) *Market planning.* Market planning involves market research and analysis and general management planning concerned with development of the contractor's business. Long-range market planning costs are subject to the allowability provisions of 31.205-12. Other market planning costs are allowable.

(5) *Direct selling.* Direct selling efforts are those acts or actions to induce particular customers to purchase particular products or services of the contractor. Direct selling is characterized by person-to-person contact and includes such efforts as familiarizing a potential customer with the contractor's products or services, conditions of sale, service capabilities, etc. It also includes negotiation, liaison between customer and contractor personnel, technical and consulting efforts, individual demonstrations, and any other efforts having as their purpose the application or adaptation of the contractor's products or services for a particular customer's use. The cost of direct selling efforts is allowable.

(c) Notwithstanding any other provision of this subsection, sellers' or agents' compensation, fees, commissions, percentages, retainer or brokerage fees, whether or not contingent upon the award of contracts, are allowable only when paid to bona fide employees or established commercial or selling agencies maintained by the contractor for the purpose of securing business.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 39

[FAC 2001-15; FAR Case 2002-012; Item VII]

RIN 9000-AJ53

Federal Acquisition Regulation; Section 508 Micropurchase Exception Sunset Provision

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

ACTION: Final rule.