

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