

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 15, 31, and 42****[FAR Case 2001–018]****RIN: 9000–AJ77****Federal Acquisition Regulation;
Applicability of the Cost Principles and
Penalties for Unallowable Costs**

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

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are proposing to amend the Federal Acquisition Regulation (FAR) to remove the requirement to apply cost principles and procedures when pricing a contract if cost or pricing data are not obtained, and to increase the contract dollar threshold for assessing a penalty if the contractor includes expressly unallowable costs in its claim for reimbursement.

DATES: Interested parties should submit comments in writing on or before January 27, 2004 to be considered in the formulation of a final rule.

ADDRESSES: Submit written comments to—General Services Administration, FAR Secretariat (MVA), 1800 F Street, NW., Room 4035, ATTN: Laurie Duarte, Washington, DC 20405.

Submit electronic comments via the Internet to—farcase.2001-018@gsa.gov. Please submit comments only and cite FAR case 2001–018 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat at (202) 501–4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Edward Loeb, Policy Adviser, at (202) 501–0650. Please cite FAR case 2001–018.

SUPPLEMENTARY INFORMATION:**A. Background**

The proposed rule—

- Narrows the scope of FAR part 31. The rule would amend the FAR to indicate that the cost principles and procedures of FAR part 31 do not apply to the pricing of fixed-price contracts if cost or pricing data are not obtained. Currently, the cost principles and

procedures of FAR part 31 apply whenever cost analysis is performed, regardless of whether cost or pricing data are obtained.

- This change is consistent with statute. 10 U.S.C. 2324 lists a number of costs that are unallowable on “covered contracts,” and 41 U.S.C. 256 extends the statutory unallowable costs to civilian agencies. 10 U.S.C. 2324(1)(1)(A) defines a “covered contract” as “a contract for an amount in excess of \$500,000 that is entered into by the head of an agency, except that such term does not include a fixed-price contract without cost incentives or any firm fixed-price contract for the purchase of commercial items.” part 31 cost principles continue to apply to covered contracts.

- This change is consistent with a goal of the Councils to reduce government-unique regulations when the risk to the Government is low.

- Adds a definition to FAR 31.001 for fixed-price contracts, subcontracts and modifications. The Councils are particularly interested in obtaining comments regarding this proposed definition. We are also asking for public input regarding the following alternative definition, which has been considered by the Councils, and which was published on July 3, 2003 (68 FR 40104) as part of a proposed rule for FAR case 1999–025, Cost Accounting Standards Administration: The public comment period on that case is closed.

Fixed-price contracts and subcontracts means—

- (1) Fixed-price contracts and subcontracts described at 16.202, 16.203, and 16.207;
- (2) Fixed-price incentive contracts and subcontracts where the price is not adjusted based on actual costs incurred (Subpart 16.4);
- (3) Orders issued under indefinite-delivery contracts and subcontracts where final payment is not based on actual costs incurred (Subpart 16.5); and
- (4) The fixed hourly rate portion of the time-and-materials and labor-hours contracts and subcontracts (Subpart 16.6).

- Raises the dollar threshold for including the contract clause at FAR 52.242–3, Penalties for Unallowable Costs, in solicitations and contracts. The clause covers the assessment of penalties against a contractor that includes unallowable indirect costs in its final indirect cost rate proposal or in its final statement of costs incurred or estimated to be incurred under a fixed-price incentive contract. Currently, the contracting officer must include the contract clause in certain solicitations and contracts over \$500,000. The rule would increase the dollar threshold from \$500,000 to \$550,000.

- 10 U.S.C. 2324(b) requires the head of the agency to assess a penalty against the contractor if the contractor submits a cost in its proposal for settlement that is expressly unallowable under a “covered contract.” As indicated above, a “covered contract” is a contract that is greater than \$500,000. FAR 42.709 uses this threshold to implement the statutory penalty provisions for claiming expressly unallowable costs.

- 10 U.S.C. 2324(1)(1)(B) provides for adjusting the dollar threshold of a “covered contract” to account for inflation. This adjustment from \$500,000 to \$550,000 is consistent with the adjustment of the Truth in Negotiations Act threshold recently implemented in Item II of Federal Acquisition Circular 97–20; and

- Makes several editorial changes, including deleting the phrase “or any firm-fixed-price contract for the purchase of commercial items” at FAR 42.709(b) and FAR 42.709–6, since this type of contract is included in the class of contracts (fixed-price contracts without cost incentives) already addressed at these FAR sites.

B. Regulatory Planning and Review

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 Councils do not expect this proposed 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 use simplified acquisition procedures or are awarded on a competitive, fixed-price basis, and do not require application of the cost principles and procedures discussed in this rule. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. We invite comments from small businesses and other interested parties. The Councils will consider comments from small entities concerning the affected FAR Parts 15, 31, and 42 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAR case 2001–018), in correspondence.

D. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed changes to the FAR do not impose information collection requirements that require the