

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Part 31**

[FAC 90-25, FAR Case 94-750]

RIN 9000-AG33

**Federal Acquisition Regulation;
Entertainment, Gift, and Recreation
Costs for Contractor Employees**

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

ACTION: Interim rule with request for comment.

SUMMARY: This interim rule amends the Federal Acquisition Regulation to revise the cost principles governing entertainment, gift and recreation costs for contractor employees. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

DATES: Effective Date: January 13, 1995.

Comment Date: Comments should be submitted to the FAR Secretariat at the address shown below on or before March 14, 1995 to be considered in the formulation of a final rule.

ADDRESSES: All interested parties should submit written comments to: General Services Administration, FAR Secretariat (VRS), 18th & F Streets, NW, Room 4035, Attn: Ms. Beverly Fayson, Washington, DC 20405.

Please cite FAC 90-25, FAR case 94-750 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: Mr. Clarence M. Belton, Team Leader, Cost Principles Team, at (703) 602-2357, in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAC 90-25, FAR case 94-750.

SUPPLEMENTARY INFORMATION:**A. Background**

The Federal Acquisition Streamlining Act of 1994, Pub. L. 103-355, provides authorities that streamline the acquisition process and minimize burdensome government-unique requirements. Major changes that can be expected in the acquisition process as a result of the Act's implementation

include changes in the areas of Commercial Item Acquisition, Simplified Acquisition Procedures, the Truth in Negotiations Act, and introduction of the Federal Acquisition Computer Network.

This notice announces Federal Acquisition Regulation (FAR) revisions developed under FAR case 94-750 to implement Section 2192 of the Act. This interim rule revises the cost principles at FAR 31.205-13 and 31.205-14.

To comply with the requirements of paragraph (a)(1) of Section 2192 of the Act, the interim rule provides that the costs of gifts are expressly unallowable and that the costs of recreation are expressly unallowable, except for the costs of employee sports teams. The allowability of costs for employee sports teams is further limited to off-duty activities and to a nominal cost per participating employee. "Recreation" is removed from the examples of allowable costs at 31.205-13, and "wellness/fitness centers" are added to that listing to differentiate them from recreation costs. The entire listing of allowable costs for morale, health, welfare, food service, and dormitory costs is further limited in allowability to reasonable amounts per employee.

To comply with the requirements of paragraph (a)(2) of Section 2192 of the Act, the interim rule revises the cost principle at 31.205-14 to incorporate the statutory wording relating to unallowability of entertainment costs under any other cost principle.

These revisions specifically disallow gift, recreation, and entertainment costs which some may have previously considered allowable.

Paragraph (c) of Section 2192 of the Act states that "[a]ny amendments to the FAR made pursuant to subsection (a) shall apply with respect to costs incurred after the date on which the amendments made by Section 2101 apply (as provided in Section 10001) or the date on which the amendments made by Section 2151 apply (as provided in Section 10001), whichever is later." Therefore, this interim rule is being published now in order to meet the statutory deadlines imposed by paragraph (a) of Section 2192 and is effective immediately. However, the revised cost principles will apply only to costs incurred after all of the proposed rules implementing requirements of Sections 2101 and 2151 become effective. The proposed rules at issue are being processed under FAR cases 94-751, 94-752, and 94-754.

The FAR Council is interested in an exchange of ideas and opinions with respect to the regulatory implementation of the Act. For that

reason, the FAR Council is conducting a series of public meetings. However, the FAR Council has not scheduled a public meeting on this rule (FAR case 94-750). If the public believes such a meeting is needed with respect to this rule, a letter requesting a public meeting and outlining the nature of the requested meeting shall be submitted to and received by the FAR Secretariat (see **ADDRESSES** caption) on or before February 13, 1995. The FAR Council will consider such requests in determining whether a public meeting on this rule should be scheduled.

B. Regulatory Flexibility Act

The interim rule is not expected 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 businesses are awarded through sealed bidding on a firm fixed price basis. The cost principles apply only where contracts are based on cost or pricing data. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. Comments from small entities concerning the affected FAR subpart will be considered in accordance with 5 U.S.C. 610. Such comments must be submitted separately and cite 5 U.S.C. 601, *et seq.* (FAR Case 94-750), 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 collection of information from offerors, contractors, or members of the public which require the approval of OMB under 44 U.S.C. 3501, *et seq.*

D. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DOD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because Section 2192 of the Federal Acquisition Streamlining Act of 1994 specifically requires that the cost principle at FAR 31.205-14 be amended not later than 90 days after enactment of the Act and that other FAR revisions addressing contractor costs of gifts or recreation to improve employee morale or welfare be made within 120 days of enactment of the Act. Public Law 103-355 was enacted October 13, 1994.

List of Subjects in 48 CFR Part 31

Government procurement.

Dated: January 9, 1995.

Edward Loeb,

Deputy Project Manager for the Implementation of the Federal Acquisition Streamlining Act of 1994.

Federal Acquisition Circular

Number 90-25

Federal Acquisition Circular (FAC) 90-25 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 90-25 is effective January 13, 1995.

Dated: January 4, 1995.

Thomas S. Luedtke,

Deputy Associate Administrator for Procurement, NASA.

Dated: January 9, 1995.

Ida M. Ustad,

Associate Administrator, Office of Acquisition Policy.

Dated: January 8, 1995.

Eleanor R. Spector,

Director, Defense Procurement.

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 31.205-13 is revised to read as follows:

31.205-13 Employee morale, health, welfare, food service, and dormitory costs and credits.

(a) This paragraph (a) applies to costs incurred before the effective date of implementation in FAR of sections 2101 and 2151 of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355).

(1) Aggregate costs incurred on activities designed to improve working conditions, employer-employee relations, employee morale, and employee performance (less income generated by these activities) are allowable, except as limited by paragraph (a)(2) of this section, and to the extent that the net amount is reasonable. Some examples are house publications, health clinics, recreation, employee counseling services, and food and dormitory services, which include

operating or furnishing facilities for cafeterias, dining rooms, canteens, lunch wagons, vending machines, living accommodations, or similar types of services for the contractor's employees at or near the contractor's facilities.

(2) Losses from operating food and dormitory services may be included as costs only if the contractor's objective is to operate such services on a break-even basis. Losses sustained because food services or lodging accommodations are furnished without charge or at prices or rates which obviously would not be conducive to the accomplishment of the above objective are not allowable. A loss may be allowed, however, to the extent that the contractor can demonstrate that unusual circumstances exist (e.g., (i) where the contractor must provide food or dormitory services at remote locations where adequate commercial facilities are not reasonably available, or (ii) where charged but unproductive labor costs would be excessive but for the services provided or where cessation or reduction of food or dormitory operations will not otherwise yield net cost savings) such that even with efficient management, operating the services on a break-even basis would require charging inordinately high prices, or prices or rates higher than those charged by commercial establishments offering the same services in the same geographical areas. Costs of food and dormitory services shall include an allocable share of indirect expenses pertaining to these activities.

(3) When the contractor has an arrangement authorizing an employee association to provide or operate a service, such as vending machines in the contractor's plant and retain the profits, such profits shall be treated in the same manner as if the contractor were providing the service (but see paragraph (a)(4) of this section).

(4) Contributions by the contractor to an employee organization, including funds from vending machine receipts or similar sources, may be included as costs incurred under paragraph (a)(1) of this section only to the extent that the contractor demonstrates that an equivalent amount of the costs incurred by the employee organization would be allowable if directly incurred by the contractor.

(b) This paragraph (b) implements section 2192 of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355). It applies to costs incurred after the effective date of implementation in FAR of sections 2101 and 2151 of Pub. L. 103-355.

(1) Aggregate costs incurred on activities designed to improve working

conditions, employer-employee relations, employee morale, and employee performance (less income generated by these activities) are allowable, except as limited by paragraphs (b)(2), (3), and (4) of this section, and to the extent that the net amount per employee is reasonable. Some examples of allowable activities are house publications, health clinics, wellness/fitness centers, employee counseling services, and food and dormitory services, which include operating or furnishing facilities for cafeterias, dining rooms, canteens, lunch wagons, vending machines, living accommodations, or similar types of services for the contractor's employees at or near the contractor's facilities.

(2) Costs of gifts are unallowable.

(3) Costs of recreation are unallowable, except for the costs of contractor employees' participation in sports teams designed to improve company loyalty, team work, or employee physical fitness, conducted during off duty hours at a nominal cost per participating employee.

(4) Losses from operating food and dormitory services may be included as costs only if the contractor's objective is to operate such services on a break-even basis. Losses sustained because food services or lodging accommodations are furnished without charge or at prices or rates which obviously would not be conducive to the accomplishment of the above objective are not allowable. A loss may be allowed, however, to the extent that the contractor can demonstrate that unusual circumstances exist (e.g., (i) where the contractor must provide food or dormitory services at remote locations where adequate commercial facilities are not reasonably available, or (ii) where charged but unproductive labor costs would be excessive but for the services provided or where cessation or reduction of food or dormitory operations will not otherwise yield net cost savings) such that even with efficient management, operating the services on a break-even basis would require charging inordinately high prices, establishments offering the same services in the same geographical areas. Costs of food and dormitory services shall include an allocable share of indirect expenses pertaining to these activities.

(5) When the contractor has an arrangement authorizing an employee association to provide or operate a service, such as vending machines in the contractor's plant and retain the profits, such profits shall be treated in the same manner as if the contractor were providing the service (but see paragraph (b)(6) of this section).

(6) Contributions by the contractor to an employee organization, including funds from vending machine receipts or similar sources, may be included as costs incurred under paragraph (b)(1) of this section only to the extent that the contractor demonstrates that an equivalent amount of the costs incurred by the employee organization would be allowable if directly incurred by the contractor.

3. Section 31.205-14 is revised to read as follows:

31.205-14 Entertainment costs.

(a) This paragraph (a) applies to costs incurred before the effective date of implementation in FAR of sections 2101 and 2151 of the Federal Acquisition

Streamlining Act of 1994 (Pub. L. 103-355). Costs of amusement, diversion, social activities, and any directly associated costs such as tickets to shows or sports events, meals, lodging, rentals, transportation, and gratuities are unallowable (but see 31.205-1 and 31.205-13). Costs of membership in social, dining, or country clubs or other organizations having the same purposes are also unallowable, regardless of whether the cost is reported as taxable income to the employees.

(b) This paragraph (b) implements section 2192 of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355). It applies to costs incurred after the effective date of implementation in

FAR of sections 2101 and 2151 of Pub. L. 103-355. Costs of amusement, diversion, social activities, and any directly associated costs such as tickets to shows or sports events, meals, lodging, rentals, transportation, and gratuities are unallowable. Costs made specifically unallowable under this cost principle are not allowable under any other cost principle. Costs of membership in social, dining, or country clubs or other organizations having the same purposes are also unallowable, regardless of whether the cost is reported as taxable income to the employees.

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