

DEPARTMENT OF DEFENSE

**GENERAL SERVICES
ADMINISTRATION**

**NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION**

48 CFR Part 31

[FAR Case 93-10]

RIN 9000-AG65

**Federal Acquisition Regulation; Legal
Proceedings 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 are proposing changes to amend the Federal Acquisition Regulation (FAR) concerning costs related to legal and other proceedings to make the costs of pre- or post-award protests (except for costs incurred by an intervenor on the side of the Government) an unallowable cost. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

DATES: Comments should be submitted on or before December 26, 1995 to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (VRS), 18th and F Streets, NW, Room 4037, Washington, DC 20405.

Please cite FAR case 93-10 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: Mr. Jeremy Olson at (202) 501-3221 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 FAR case 93-10.

SUPPLEMENTARY INFORMATION:

A. Background

This proposed rule would add another category of unallowable costs to the list at 31.205-47(f) (except for costs incurred by an intervenor on the side of the Government) which should disallow most cost of pre- or post-award protests. This change is being proposed after the Defense Contract Audit Agency raised a concern that rulings by the Armed Services Board of Contract Appeals (ASBCA) would encourage contractors to protest Government awards (the appeal of Bos'n Towing and Salvage Company (ASBCA 1992) No. 41357, 92-2 BCA Paragraph 24,864 and the appeal of J.W. Cook & Sons, Inc., (ASBCA 1992) No. 39691, 92-3 BCA Paragraph 25,053). The ASBCA had ruled that FAR 31.205-47(f)(1) only applied to claims under the Contract Disputes Act and not to protests under the Competition in Contracting Act and that, therefore, protest costs were allowable as either a direct or indirect cost on Government contracts.

B. Regulatory Flexibility Act

This proposed 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 entities are awarded on a competitive, fixed-price basis and the cost principles do not apply. The cost principles apply only to contracts for which cost or pricing data has been submitted. 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 of the Act. Such comments must be submitted separately and should cite 5 U.S.C. 601 *et seq.* (FAR case 93-10), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed 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 18, 1995.

Edward C. Loeb,

Acting Director, Officer of Federal Acquisition Policy.

Therefore, it is proposed that 48 CFR Part 31 be 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 adding paragraph (f)(8) to read as follows:

31.205-47 Costs related to legal and other proceedings.

* * * * *

(f) * * *

(8) Protests of Federal Government solicitations or contract awards, unless the costs are incurred by interested parties to defend against such protests.

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