

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

[FAR Case 93-19]

RIN 9000-AG64

**Federal Acquisition Regulation;
Contingent Fees**

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 the Federal Acquisition Regulation (FAR) to limit the allowability of contingent fees. 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 & F Streets, NW, Room 4037, Washington, DC 20405.

Please cite FAR case 93-19 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 93-19.

SUPPLEMENTARY INFORMATION:**A. Background**

The Councils are proposing to revise the FAR guidance concerning

contingent fees because the Office of Federal Procurement Policy SWAT Team on Civilian Agency Contracting in its report of December 3, 1992, entitled "Improving Federal Contracts", expressed concern that contingent fee arrangements based on percentage of sales, revenue, cost incurred or reimbursed, are similar to a cost-plus-percentage-of-cost type of contracting. There is a blank check effect in that the agent's fee is unknown at the time of contract award and will grow through the life of the contract. Cost-plus-percentage-of-cost contracts are prohibited by statute (10 U.S.C. 2306(a) and 41 U.S.C. 254(b)). The SWAT Team report had recommended several changes to the FAR which were viewed to have Governmentwide benefit and which would make the FAR less general with respect to the allowability of certain costs.

The proposed FAR rule would revise the cost principle at FAR 31.205-38, Selling costs, to clarify that the costs of contingent fees are allowable only when stated as a sum certain or not-to-exceed amount agreed upon between the company and its agent (*i.e.*, employee or commercial/selling agency) in advance of the services being rendered.

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. This rule clarifies a condition of cost allowability for contractors who wish to be reimbursed under Government contracts subject to FAR Subpart 31.2. 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 93-19), 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 19, 1995.

Edward C. Loeb,

Acting Director, Office 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 31.205-38 is amended by revising paragraph (f) to read as follows:

31.205-38 Selling costs.

* * * * *

(f) 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—

(1) Paid to bona fide employees or established commercial or selling agencies maintained by the contractor for the purpose of securing business (see 3.408-2); and

(2) Such costs are stated as a sum certain or a not-to-exceed amount determined in advance of services rendered.

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