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Part III

**Department of
Defense**

**General Services
Administration**

**National Aeronautics
and Space
Administration**

48 CFR Part 31

**Federal Acquisition Regulation; Deferred
Research and Development Costs;
Proposed Rule**

**DEPARTMENT OF DEFENSE
GENERAL SERVICES
ADMINISTRATION
NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION**

48 CFR Part 31

[FAR Case 1999-013]

RIN 9000-AI62

**Federal Acquisition Regulation;
Deferred Research and Development
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 clarify and simplify the "Deferred research and development costs" cost principle.

DATES: Interested parties should submit comments in writing on or before March 27, 2000 to be considered in the formulation of a final rule.

ADDRESSES: Submit written comments to: General Services Administration, FAR Secretariat (MVRs), 1800 F Street, NW, Room 4035, ATTN: Laurie Duarte, Washington, DC 20405. Submit electronic comments via the Internet to: farcase.1999-013@gsa.gov Please submit comments only and cite FAR case 1999-013 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, at (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Ms. Linda Nelson, Procurement Analyst, at (202) 501-1900. Please cite FAR case 1999-013.

SUPPLEMENTARY INFORMATION:

A. Background

This proposed rule amends the cost principle at FAR 31.205-48, Deferred research and development costs, to clarify and simplify its contents. The Councils propose to—

(a) Delete the second sentence addressing precontract costs, as these types of costs are adequately addressed at FAR 31.205-32, Precontract costs;

(b) Revise the last sentence to more clearly indicate that incurred costs in excess of the contract price or grant amount for research and development

(R&D) effort are unallowable and accordingly, not reimbursable by the Government; and

(c) Make several editorial revisions.

The Councils initiated this rule to consider whether the cost principle was duplicative of FAR 31.205-32, Precontract costs, and FAR 31.205-23, Losses on other contracts, and therefore, should be deleted in its entirety from the FAR. They concluded that the second sentence could be deleted since precontract costs are already addressed in FAR 31.205-32. However, they also concluded that the last sentence, disallowing the reimbursement of R&D costs in excess of the contract price and grant amount, was not duplicative of FAR 31.205-23, and should be retained at FAR 31.205-48, Deferred research and development costs.

A historical review of certain court rulings has disclosed that the Court of Claims and the Armed Services Board of Contract Appeals (ASBCA) tend to regard the excess of costs incurred over the contract price in R&D contracts, not necessarily as a loss but as an amount that, under certain circumstances, may be capitalized and amortized over future benefitting contracts. This view was held in a decision of the Court of Claims (*Bell Aircraft v. U.S.* 120 Ct. Cl. 398 (1951)) and in ASBCA decisions in the cases of *Kellett Aircraft Corp.* ASBCA No. 5658, 60-1 BCA ¶2584, *Sperry Rand Corp., Ford Instrument Co.* Division ASBCA 8689, 66-1 BCA ¶5403, and *G.C. Dewey* ASBCA 13221, 69-1 BCA ¶7732. Since the courts had ruled that the excess costs did not represent a "loss," these types of costs were considered outside the purview of Armed Services Procurement Regulation (ASPR) 15-205.19, Losses on Other Contracts (currently known as FAR 31.205-23, Losses on other contracts.) Therefore, Defense Procurement Circular #95 dated 29 November 1971, added ASPR 15.205-49, Deferred Research and Development Costs, to the ASPR to explicitly make these types of deferred R&D costs unallowable. The third sentence of FAR 31.205-48 currently reflects this policy. Based on this historical review, the Councils concluded that elimination of this sentence could permit contractors to recover costs in excess of the contract price or grant amount for R&D effort under certain conditions in which the courts have ruled that the "excess" does not represent a "loss". Therefore, this cost principle should remain in the FAR.

This rule was not subject to Office of Management and Budget 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.

B. 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 principle contained in this rule. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. Comments are invited from small businesses and other interested parties. The Councils will consider comments from small entities concerning the affected FAR subpart 31 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 1999-013), in correspondence.

C. 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 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: January 19, 2000.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Therefore, DoD, GSA, and NASA propose 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. Revise section 31.205-48 to read as follows:

31.205-48 Deferred research and development costs.

Research and development, as used in this subsection, means the type of technical effort described in 31.205-18 but sponsored by a grant or required in the performance of a contract. When costs are incurred in excess of either the price of a contract or amount of a grant for research and development effort,

such excess is unallowable under any other Government contract.

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