

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

[FAR Case 2001-024]

RIN 9000-AJ42

**Federal Acquisition Regulation; Selling
Cost Principle**

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 revise the "selling costs" cost principle to increase clarity and to remove excessive wording and details.

DATES: Interested parties should submit comments in writing on or before October 28, 2002 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.2001-024@gsa.gov. Please submit comments only and cite FAR case 2001-024 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 Mr. Jeremy Olson, at (202) 501-3221. Please cite FAR case 2001-024.

SUPPLEMENTARY INFORMATION:**A. Background**

The proposed rule revises FAR 31.205-38, Selling costs, to increase clarity and to remove excessive wording and details. Among the changes are the following:

1. In a revised FAR 31.205-38(b), combining the list of selling activities from existing FAR 31.205-38(a) with the more detailed guidance about the allowability of these costs in existing FAR 31.205-38(b) and (c)(1).

2. Eliminating references to reasonableness currently found in FAR 31.205-38(b) and (c)(1) because this

general allowability standard is already addressed at FAR 31.201-2, Determining allowability, and FAR 31.201-3, Determining reasonableness.

3. Removing as unnecessary existing FAR 31.205-38(c)(2) and the cross-reference in existing FAR 31.205-38(b) to FAR 31.205-14, Entertainment costs. The Councils believe there is no longer a reason to distinguish between the allowability of foreign and domestic selling costs involving direct selling and other market planning efforts. This would eliminate the current requirement that in order to be allowable, these export sales costs must be related to products normally sold to the U.S. Government. However, the public policy reasons for distinguishing between foreign and domestic broadly targeted sales efforts are still valid. The allowability of these costs is adequately covered at FAR 31.205-1 and does not need to be restated in FAR 31.205-38.

4. Removing existing FAR 31.205-38(e) as it is duplicative of the guidance at FAR 31.201-6, Accounting for unallowable costs, and paragraph (c) of FAR 31.204, Application of principles and procedures.

5. Making related editorial changes. 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.

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 principles 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 Part 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 2001-024), 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: August 20, 2002.

Al Matera,

Director, Acquisition Policy Division.

Therefore, DoD, GSA, and NASA propose amending 48 CFR part 31 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. Amend section 31.205-1 in paragraph (f)(1) by removing from the parenthetical "31.205-38(c)" and adding "31.205-38(b)(5)" in its place.

31.205-12 [Amended]

3. Amend section 31.205-12 in paragraph (a) by removing the word "generalized" and adding "general" in its place.

4. Amend section 31.205-33 by revising the first sentence of the introductory text of paragraph (f); and removing the parenthetical sentence. The revised text reads as follows:

**31.205-33 Professional and consultant
service costs.**

* * * * *

(f) Fees for services rendered are allowable only when supported by evidence of the nature and scope of the service furnished (see also 31.205-38(c)). * * *

5. Revise section 31.205-38 to read as follows:

31.205-38 Selling costs.

(a) "Selling" is a generic term encompassing all efforts to market the contractor's products or services, some of which are covered specifically in other subsections of 31.205. The costs of any selling efforts other than those addressed in this cost principle are unallowable. Costs of activities that are correctly classified and disallowed under cost principles referenced in paragraph (b) are not to be reconsidered for reimbursement under any other provision of this subsection.

(b) Selling includes the following broad categories:

(1) *Advertising.* Advertising is defined at 31.205-1(b), and advertising costs are subject to the allowability provisions of 31.205-1(d) and (f).

(2) *Corporate image enhancements.* Corporate image enhancements

including broadly targeted sales efforts, other than advertising, are included within the definition of public relations at 31.205-1(a), and the costs of such efforts are subject to the allowability provisions at 31.205-1(e) and (f).

(3) *Bid and proposal costs.* Bid and proposal costs are defined at 31.205-18 and are subject to the allowability provisions of that subsection.

(4) *Market planning.* Market planning involves market research and analysis and general management planning concerned with development of the contractor's business. Long-range market planning costs are subject to the allowability provisions of 31.205-12.

Other market planning costs are allowable.

(5) *Direct selling.* Direct selling efforts are those acts or actions to induce particular customers to purchase particular products or services of the contractor. Direct selling is characterized by person-to-person contact and includes such efforts as familiarizing a potential customer with the contractor's products or services, conditions of sale, service capabilities, etc. It also includes negotiation, liaison between customer and contractor personnel, technical and consulting efforts, individual demonstrations, and any other efforts having as their purpose

the application or adaptation of the contractor's products or services for a particular customer's use. The cost of direct selling efforts is allowable.

(c) 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 paid to bona fide employees or established commercial or selling agencies maintained by the contractor for the purpose of securing business.

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