

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 2 and 31**

[FAC 2001-22; FAR Case 2001-034; Item II]

RIN 9000-AJ60

**Federal Acquisition Regulation;
General Provisions of the Cost
Principles**

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

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to revise certain general provisions of the cost principles pertaining to Composition of total cost; Determining allowability; Direct costs; and Indirect costs. The rule revises the cost principles by improving clarity and structure, and removing unnecessary and duplicative language. The revisions are intended to revise Contract Cost Principles and Procedures in light of the evolution of Generally Accepted Accounting Principles (GAAP), the advent of Acquisition Reform, and experience gained from implementation of FAR Contract Cost Principles and Procedures. The final rule also adds the definition of "direct cost" and revises the definition of "indirect cost" to be consistent with the terminology used in the cost accounting standards (CAS).

DATES: *Effective Date:* May 5, 2004.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat at (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Edward Loeb, Policy Advisor, at (202) 501-0650. Please cite FAC 2001-22, FAR case 2001-034.

SUPPLEMENTARY INFORMATION:**A. Background**

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 68 FR 5774, February 4, 2003, with request for comments. Four respondents submitted comments; a discussion of the comments is provided below. The Councils considered all comments and concluded that the proposed rule

should be converted to a final rule, with changes to the proposed rule. Differences between the proposed rule and final rule are discussed in paragraphs 4, 5, 6, 7, and 8 below.

Public Comments

FAR 2.101—Definition of "Indirect Cost"—Reference to CAS

1. *Comment:* A respondent recommends that if the FAR is going to include CAS definitions, these definitions should be referenced rather than restated to eliminate redundancy and any inadvertent differences of interpretation when CAS is not directly quoted.

Councils' Response: Nonconcur. The Councils believe it is better to include the definitions in the FAR rather than include a reference to another regulation to which a user may not have easy access. This is particularly important in this instance, since the term "indirect cost" is used in various parts of the FAR.

FAR 31 Cost Principles—Incorporating CAS Provisions

2. *Comment:* A respondent recommends that FAR 31 make CAS standards applicable to FAR contracts, and then exclude certain standards and/or certain classes of contracts from FAR Part 31 application.

Councils' Response: Nonconcur. The Councils believe it is not desirable to incorporate all of the CAS standards and then exclude certain ones. The Councils believe the current approach in FAR Part 31 that adopts certain standards in specific sections of the FAR provides easier application than the suggested revision.

3. *Comment:* A respondent asserts that the proposed rule incorporates substantial CAS provisions into the FAR cost principles. The respondent states that, by law, the CAS Board governs the measurement, assignment, and allocation of cost to cost objectives, and that FAR cost principles should be limited to matters of allowability. The respondent further states that if the FAR includes CAS concepts, the inclusion should be done using direct quotes or references.

Councils' Response: Nonconcur. The Councils considered this proposal but believe that eliminating all CAS from FAR would create significant problems.

It is the responsibility of the Councils, not the CAS Board, to promulgate rules for the measurement, assignment, and allocation of costs for non-CAS covered contracts. The CAS Board does not have jurisdiction over non-CAS covered contracts. For some costs, particularly

deferred compensation including pension costs (CAS 412, 413, and 415), cost of money (CAS 414/417), and self-insurance (CAS 416), the Councils have chosen to use the same requirements for non-CAS covered contracts as the CAS Board has chosen to use for CAS-covered contracts. Furthermore, the Councils have chosen to use some of the same definitions and concepts as used in CAS, including the definitions of direct and indirect costs. To eliminate all CAS from the FAR would require removal of these key FAR Part 31 provisions.

As for the incorporation of the CAS provisions into the FAR, the respondent did not specify any particular language that it believes has been paraphrased. Nevertheless, the Councils reviewed the proposed rule to see if any such paraphrasing existed, and found that the proposed rule does not paraphrase any CAS requirements.

FAR 31.106-2 and 31.203—Special Allocations

4. *Comment:* A respondent recommends that the special allocation language include an illustration similar to those that are included in the CAS. The respondent notes that CAS 410.60(g) makes a point that contract costs that are outside the contractor's normal productive activity should be excluded from the G&A base. The respondent also recommends that the language at 31.106-2(b)(3) be revised to read "Exclude the related allocation base data for the facilities contract from the base used to allocate the pool."

Three other respondents recommend that FAR 31.106-2 be eliminated in its entirety. One respondent asserts that this topic is adequately addressed in CAS. If this suggestion is not adopted, the three respondents recommend that the proposed language not be promulgated and the existing language remain unchanged. Two respondents assert that the proposed rule adds language prescribing the use of certain accounting methods for special allocations for "facilities contracts" that will lead to disagreements as to accounting decisions. This includes requiring the contracting officer to enter into an advance agreement. To correct this, they recommend replacing "shall" with "may" at 31.106-2(b).

Three respondents contend that the proposed rule "flips" the responsibility of accounting decisions from the contractor to the contracting officer by stating "The Cognizant Federal Agency

is responsible for determining whether the conditions necessitating a special allocation exist and negotiating the terms of an advance agreement." Two respondents assert that this language takes the accounting decisions out of the hands of contractors, which is clearly against public policy. One respondent further asserts that it is the contractor's responsibility to determine if the conditions necessitating a special allocation exist. Another respondent asks what is the remedy if a contractor does not agree to a special allocation. One respondent recommends that the language be removed and replaced with "Negotiate an advance agreement with the cognizant Federal agency in accordance with 31.109 criteria".

Two respondents note that the proposed language at 31.106-2(d) and (e) provides examples that are not all inclusive and could be misleading. One respondent believes that this will give rise to disputes because of differences in interpretation between the CAS and the FAR. The other respondent believes the conceptual framework for this language is already covered by 31.109 and thus it is not needed in this paragraph.

Councils' Response: Concur in part. After reviewing the public comments and the background underlying this revision, the Councils believe it is preferable to not include the concept of special allocations in FAR Part 31. The Councils believe the current language is adequate and necessary to address this issue, since that language provides the contracting parties with the necessary flexibility to address those unique circumstances when a particular contract requires special treatment. As a result, the Councils agreed that the proposed rule for FAR 31.106-2 not be published (the only proposed change to this provision was for the special allocation). The Councils also agreed to delete the proposed language on special allocations at FAR 31.203(f), and retain the current language at FAR 31.203(f) (renumbered as paragraph (h)).

FAR 31.201-1(a)—Standard Cost

5. *Comment:* Two respondents assert that the language at 31.201-1(a) on "standard cost" is duplicated at the beginning and end of this paragraph. They further assert that standard costs are fully defined and dealt with in CAS 407, Use of Standard Costs for Direct Material and Direct Labor, and there is no need to paraphrase CAS language or to eliminate the reference to the CAS requirements.

Councils' Response: Concur in part. The Councils agree that the phrase "including standard costs properly adjusted for applicable variances" is

repeated at the beginning and end of the paragraph at FAR 31.201-1(a), and, therefore, they agreed to delete it from the end of the paragraph. However, the Councils do not believe the paragraph should completely delete the reference to standard costs. The reference is intended to assure that standard costs are included as part of the composition of total costs, provided they are properly adjusted to reflect applicable variances. Without this language, the cost principles could be misinterpreted as excluding standard costs from the determination of total cost.

FAR 31.201-2(a)—Determining Allowability

6. *Comment:* Three respondents state that the proposed language constitutes a major change in determining allowability because it revises the language on determining allowability from "factors to be considered" to "A cost is allowable only when all of the following requirements are met." Two respondents recommend that this language be deleted.

Two respondents assert that the proposed language is overly prescriptive, limits contracting officer discretion, and violates the guiding principles at FAR 1.102. One respondent asserts that such language does not "encourage innovation, and local adaptation where uniformity is not essential," nor does it provide "the authority to the maximum extent practicable and consistent with the law, to determine the application of rules, regulations, and policies on a specific contract." The respondent also believes this language is contrary to FAR 1.102-4(e), which states "If a policy or procedure, or a particular strategy or practice, is in the best interest of the Government and is not specifically addressed in the FAR, nor prohibited by law (statutes or case law), Executive order or other regulation, Government members of the Team should not assume it is prohibited. Rather, absence of direction should be interpreted as permitting the Team to innovate and use sound business judgment that is otherwise consistent with the law and within the limits of their authority. Contracting Officers should take the lead in encouraging business process innovations and ensuring that business decisions are sound."

One respondent asserts that the proposed language would allow Government auditors to disregard CAS allocability requirements in seeking to prove that the Government was charged costs that were deemed unallocable on Government contracts. If this language is retained, the respondent recommends

that the allocability requirements in subparagraphs (2) and (3) be deleted. The respondent also notes that all five criteria are not necessarily present in all cases (such as when there are no specific reimbursement requirements in the terms of the contract) and thus the language is not appropriate.

Councils' Response: Nonconcur. The Councils believe the proposed language is consistent with established case law, *i.e.*, a cost must meet all five factors to be allowable. In *Celesco Industries* (ASBCA Case Number 22402, 80-1 BCA, 14721, dated 1/31/80), the court stated:

"Of course, appellant's methods of allocation of indirect costs are *required*, pursuant to DAR 15-201.2, to be in accord with the generally accepted accounting principles." (Emphasis added.)

In this case, the ASBCA clearly stated that application of Generally Accepted Accounting Principles is required under the cost principle (DAR 15-201.2 is the predecessor to the current 31.201-2 and included the same language).

The argument that these are just "considerations" also fails when viewed in light of the "factors" listed at FAR 31.201-2. Included in this list are the Cost Accounting Standards (CAS) and the terms of the contract. These are not items that can simply be "considered" but not necessarily followed. The CAS, when applicable to a particular contract, is a statutory requirement that cannot be disregarded at the discretion of the contracting parties. In addition, the terms of the contract cannot just be considered; they must be adhered to. Furthermore, certain parts of FAR 31 implement statutory provisions that preclude reimbursement of certain costs, and as such, cannot be subjectively applied.

It is also evident that the promulgators have, for many years, intended for these items to be requirements rather than just considerations. In particular, DFARS 2.402 states that the Director for Defense Procurement and Acquisition Policy is the approval authority for any individual or class deviation to FAR subpart 31.2. If the intention of 31.201-2 was to only consider the factors listed, the provision at DFARS 2.402 would not be necessary. The contracting officer would consider these factors (which includes the requirements of FAR subpart 31.2), and apply them at his/her discretion. Such an application would circumvent the requirement at DFARS 2.402. The specific approval authority for deviations at DFARS 2.402 exists because these are intended to be requirements, not just considerations.

As to FAR 1.102, this provision provides direction to the contracting officer and other acquisition team members to use when the regulations do not address a particular situation. It does not direct that the regulations should not provide for specific allowability criteria.

In those rare situations where a particular cost does not meet the requirements of the five factors but is the type that the contracting activity wants to allow, a deviation should be requested in accordance with the FAR requirements.

As for the argument that the five requirements may not always be present and therefore this provision is not appropriate, the Councils disagree. However, the Councils review of this comment disclosed that the proposed wording might have lead to some confusion. As a result, the proposed language at 31.201-2(a) has been revised.

FAR 31.203—Indirect Costs

7. *Comment:* A respondent asserts that the proposed language includes direct quotes from CAS 402, Consistency in Allocating Costs Incurred for the Same Purpose, and other CAS language that should be eliminated in the spirit of DFARS transformation. The respondent states that a simple word count shows the word “allocate” in various forms twenty times. The respondent also states that cost allocation is the responsibility of the CAS Board, and sees no valid reason to replicate CAS in FAR.

Councils’ Response: Concur in part. The proposed language is intended to apply to contractors that are not subject to the CAS allocation standards, *i.e.*, full CAS coverage. For contracts not subject to full CAS-coverage, the Councils believe that some basic requirements are needed for determining the allocation of indirect costs to Government cost-based contracts; the absence of such requirements would result in significant disagreements and potential misallocations of costs to cost-based Government contracts. Accordingly, to provide clarity, the Councils added paragraph (a) to FAR 31.203.

FAR 31.203(b)—Final Cost Objectives

8. *Comment:* A respondent recommends that FAR 31.203(a) (renumbered as paragraph (b)) be revised to add the words “two or more” before “final cost objectives.”

Councils’ Response: Concur. The Councils believe the revision will provide for increased consistency with the definition of indirect costs at 2.101.

FAR 31.203(d)—Revising FAR To Reflect Court Decisions

9. *Comment:* A respondent asserts that while the FAR revises the language at 31.203(c) (renumbered as paragraph (d)) to reflect the outcome in a recent court case where the Government position was sustained, there is no FAR revision to reflect the outcome of another court case on changes in cost accounting practice where the Government position was not sustained. The respondent believes the Councils should treat both situations alike and not attempt to sway contracting officers in one direction or another by selectively adding the outcome of certain court cases.

Councils’ Response: Nonconcur. The language at 31.203(d) is not being modified to reflect the outcome of any court case. This paragraph revises the term “distributing” to “allocating,” to be consistent with the terminology used throughout FAR Part 31. The Councils also note that the respondent’s referenced case on changes in cost accounting practice does not address any FAR requirements, *i.e.*, the provisions at issue were solely in the CAS.

FAR 31.203(g)—Base Period for Allocating Indirect Costs

10. *Comment:* A respondent recommends that CAS 406, Cost Accounting Period, be used in lieu of FAR 31.203(g). If FAR 31.203(g) is not replaced by CAS 406, the respondent recommends that the language at FAR 31.203(g) replace the term “base period” with “cost accounting periods”, to be consistent with the language in CAS 406.

Councils’ Response: Nonconcur. The Councils believe that the detailed requirements in CAS 406 are not necessary for non-CAS covered contracts. As for the “base period,” paragraph (g) defines the base period as “the cost accounting period during which * * *” Since the definition of a base period includes the cost accounting period, the Councils do not believe it is necessary to change the term “base period” to “cost accounting period.”

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 Department of Defense, the General Services Administration, and the National Aeronautics and Space

Administration certify that this final rule will not 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 discussed in this rule.

C. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 104-13) does not apply because the 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 Parts 2 and 31

Government procurement.

Dated: March 26, 2004.

Laura Auletta,
Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 2 and 31 as set forth below:

■ 1. The authority citation for 48 CFR parts 2 and 31 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 2—DEFINITIONS OF WORDS AND TERMS

■ 2. Amend section 2.101 in paragraph (b) by adding, in alphabetical order, the definition “Direct cost” and by revising the definition “Indirect cost” to read as follows:

2.101 Definitions.

* * * * *
(b) * * *
* * * * *

Direct cost means any cost that is identified specifically with a particular final cost objective. Direct costs are not limited to items that are incorporated in the end product as material or labor. Costs identified specifically with a contract are direct costs of that contract. All costs identified specifically with other final cost objectives of the contractor are direct costs of those cost objectives.

* * * * *

Indirect cost means any cost not directly identified with a single final cost objective, but identified with two or more final cost objectives or with at least one intermediate cost objective.

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PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES**31.109 [Amended]**

■ 3. Amend section 31.109(h)(13) by removing “31.203(f)” and adding “31.203(h)” in its place.

31.201–1 [Amended]

■ 4. Revise section 31.201–1 to read as follows:

31.201–1 Composition of total cost.

(a) The total cost, including standard costs properly adjusted for applicable variances, of a contract is the sum of the direct and indirect costs allocable to the contract, incurred or to be incurred, plus any allocable cost of money pursuant to 31.205–10, less any allocable credits. In ascertaining what constitutes a cost, any generally accepted method of determining or estimating costs that is equitable and is consistently applied may be used.

(b) While the total cost of a contract includes all costs properly allocable to the contract, the allowable costs to the Government are limited to those allocable costs which are allowable pursuant to Part 31 and applicable agency supplements.

■ 5. Amend section 31.201–2 by revising paragraphs (a), (c), and (d) to read as follows:

31.201–2 Determining allowability.

(a) A cost is allowable only when the cost complies with all of the following requirements:

(1) Reasonableness.

(2) Allocability.

(3) Standards promulgated by the CAS Board, if applicable, otherwise, generally accepted accounting principles and practices appropriate to the circumstances.

(4) Terms of the contract.

(5) Any limitations set forth in this subpart.

* * * * *

(c) When contractor accounting practices are inconsistent with this subpart 31.2, costs resulting from such inconsistent practices in excess of the amount that would have resulted from using practices consistent with this subpart are unallowable.

(d) A contractor is responsible for accounting for costs appropriately and for maintaining records, including supporting documentation, adequate to demonstrate that costs claimed have been incurred, are allocable to the contract, and comply with applicable cost principles in this subpart and agency supplements. The contracting officer may disallow all or part of a

claimed cost that is inadequately supported.

■ 6. Revise section 31.202 to read as follows:

31.202 Direct costs.

(a) No final cost objective shall have allocated to it as a direct cost any cost, if other costs incurred for the same purpose in like circumstances have been included in any indirect cost pool to be allocated to that or any other final cost objective. Direct costs of the contract shall be charged directly to the contract. All costs specifically identified with other final cost objectives of the contractor are direct costs of those cost objectives and are not to be charged to the contract directly or indirectly.

(b) For reasons of practicality, the contractor may treat any direct cost of a minor dollar amount as an indirect cost if the accounting treatment—

(1) Is consistently applied to all final cost objectives; and

(2) Produces substantially the same results as treating the cost as a direct cost.

■ 7. Revise section 31.203 to read as follows:

31.203 Indirect costs.

(a) For contracts subject to full CAS coverage, allocation of indirect costs shall be based on the applicable provisions. For all other contracts, the applicable CAS provisions in paragraphs (b) through (h) of this section apply.

(b) After direct costs have been determined and charged directly to the contract or other work, indirect costs are those remaining to be allocated to intermediate or two or more final cost objectives. No final cost objective shall have allocated to it as an indirect cost any cost, if other costs incurred for the same purpose, in like circumstances, have been included as a direct cost of that or any other final cost objective.

(c) The contractor shall accumulate indirect costs by logical cost groupings with due consideration of the reasons for incurring such costs. The contractor shall determine each grouping so as to permit use of an allocation base that is common to all cost objectives to which the grouping is to be allocated. The base selected shall allocate the grouping on the basis of the benefits accruing to intermediate and final cost objectives. When substantially the same results can be achieved through less precise methods, the number and composition of cost groupings should be governed by practical considerations and should not unduly complicate the allocation.

(d) Once an appropriate base for allocating indirect costs has been

accepted, the contractor shall not fragment the base by removing individual elements. All items properly includable in an indirect cost base shall bear a pro rata share of indirect costs irrespective of their acceptance as Government contract costs. For example, when a cost input base is used for the allocation of G&A costs, the contractor shall include in the base all items that would properly be part of the cost input base, whether allowable or unallowable, and these items shall bear their pro rata share of G&A costs.

(e) The method of allocating indirect costs may require revision when there is a significant change in the nature of the business, the extent of subcontracting, fixed-asset improvement programs, inventories, the volume of sales and production, manufacturing processes, the contractor's products, or other relevant circumstances.

(f) Separate cost groupings for costs allocable to offsite locations may be necessary to permit equitable distribution of costs on the basis of the benefits accruing to the several cost objectives.

(g) A base period for allocating indirect costs is the cost accounting period during which such costs are incurred and accumulated for allocation to work performed in that period.

(1) For contracts subject to full or modified CAS coverage, the contractor shall follow the criteria and guidance in 48 CFR 9904.406 for selecting the cost accounting periods to be used in allocating indirect costs.

(2) For contracts other than those subject to paragraph (g)(1) of this section, the base period for allocating indirect costs shall be the contractor's fiscal year used for financial reporting purposes in accordance with generally accepted accounting principles. The fiscal year will normally be 12 months, but a different period may be appropriate (e.g., when a change in fiscal year occurs due to a business combination or other circumstances).

(h) Special care should be exercised in applying the principles of paragraphs (c), (d), and (e) of this section when Government-owned contractor-operated (GOCO) plants are involved. The distribution of corporate, division or branch office G&A expenses to such plants operating with little or no dependence on corporate administrative activities may require more precise cost groupings, detailed accounts screening, and carefully developed distribution bases.

31.205–42 [Amended]

■ 8. Amend section 31.205–42 in the second sentence of paragraph (h) by

removing "31.203(c)" and adding "31.203(d)" in its place.

[FR Doc. 04-7406 Filed 4-2-04; 8:45 am]

BILLING CODE 6820-EP-P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 4

[FAC 2001-22; FAR Case 2002-025; Item III]

RIN 9000-AJ70

Federal Acquisition Regulation; Unique Contract and Order Identifier Numbers

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

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to convert the interim rule published at 68 FR 56679, October 1, 2003, to a final rule without change. The final rule requires that Federal agencies assign a unique identifier for every contract, purchase order, BOA, Basic Agreement, and BPA reported to the Federal Procurement Data System (FPDS).

DATES: *Effective Date:* April 5, 2004.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat at (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Gerald Zaffos, Procurement Analyst, at (202) 208-6091. Please cite FAC 2001-22, FAR case 2002-025.

SUPPLEMENTARY INFORMATION:

A. Background

DoD, GSA, and NASA published an interim rule implementing this requirement in the *Federal Register* at 68 FR 56679, October 1, 2003. The interim rule required agencies to be in compliance by October 1, 2003. The 30-day public comment period for the interim rule ended October 31, 2003. No comments were received in response to the interim rule.

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 Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, does not apply because the rule applies to the internal process of Federal agencies. An Initial Regulatory Flexibility Analysis has, therefore, not been prepared.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the 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 4

Government procurement.

Dated: March 26, 2004.

Laura Auletta,

Director, Acquisition Policy Division.

Interim Rule Adopted as Final Without Change

■ Accordingly, DoD, GSA, and NASA adopt the interim rule amending 48 CFR part 4, which was published in the *Federal Register* at 68 FR 56679, October 1, 2003, as a final rule without change.

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

[FR Doc. 04-7407 Filed 4-2-04; 8:45 am]

BILLING CODE 6820-EP-P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 15

[FAC 2001-22; FAR Case 2002-027; Item IV]

RIN 9000-AJ66

Federal Acquisition Regulation; Unsolicited Proposals

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

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council

(Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to implement Section 834 of the Homeland Security Act of 2002 (Public Law 107-296). Section 834 adds new considerations concerning the submission, receipt, evaluation, and acceptance or rejection of unsolicited proposals.

DATES: *Effective Date:* May 5, 2004.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat at (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Ms. Julia Wise, Procurement Analyst, at (202) 208-1168. Please cite FAC 2001-22, FAR case 2002-027.

SUPPLEMENTARY INFORMATION:

A. Background

This rule amends the FAR to implement section 834 of the Homeland Security Act of 2002 (Pub. L. 107-296). Section 834 adds new considerations concerning the submission, receipt, evaluation, and acceptance or rejection of unsolicited proposals. The rule will require that a valid unsolicited proposal not address a previously published agency requirement. It also requires that, before initiating a comprehensive evaluation, the agency must determine that the proposal contains sufficient cost-related or price-related information for evaluation, and that it has overall scientific, technical, or socioeconomic merit.

DOD, GSA, and NASA published a proposed rule in the *Federal Register* at 68 FR 33330, June 3, 2003. A comment was received from one respondent. The Councils considered the comment before agreeing to publish the proposed rule as final. A summary of the comment and the disposition follows:

Comment: The proposed language in FAR 15.606-1(a)(4), Receipt and initial review, should be revised to more closely mirror the wording in Section 834 as follows: "Contains sufficient technical and cost information including cost-related or price related factors for evaluation."

Response: The Councils do not concur. Proposals do not typically include cost-related or price-related factors. Such factors are developed by agencies in competitive acquisitions prior to soliciting proposals and are used to assess the offeror's proposal and the offeror's ability to perform the prospective contract successfully. This allows all proposals to be evaluated for award based on the identical factors. Inserting a requirement for proposals to contain factors would likely create confusion between the competitive