

EX. ORD. NO. 13494. ECONOMY IN GOVERNMENT
CONTRACTING

Ex. Ord. No. 13494, Jan. 30, 2009, 74 F.R. 6101, as amended by Ex. Ord. No. 13517, §2, Oct. 30, 2009, 74 F.R. 57239, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 101 *et seq.*, it is hereby ordered that:

SECTION 1. To promote economy and efficiency in Government contracting, certain costs that are not directly related to the contractors' provision of goods and services to the Government shall be unallowable for payment, thereby directly reducing Government expenditures. This order is also consistent with the policy of the United States to remain impartial concerning any labor-management dispute involving Government contractors. This order does not restrict the manner in which recipients of Federal funds may expend those funds.

SEC. 2. It is the policy of the executive branch in procuring goods and services that, to ensure the economical and efficient administration of Government contracts, contracting departments and agencies, when they enter into, receive proposals for, or make disbursements pursuant to a contract as to which certain costs are treated as unallowable, shall treat as unallowable the costs of any activities undertaken to persuade employees—whether employees of the recipient of the Federal disbursements or of any other entity—to exercise or not to exercise, or concerning the manner of exercising, the right to organize and bargain collectively through representatives of the employees' own choosing. Such unallowable costs shall be excluded from any billing, claim, proposal, or disbursement applicable to any such Federal Government contract.

SEC. 3. Contracting departments and agencies shall treat as allowable costs incurred in maintaining satisfactory relations between the contractor and its employees (other than the costs of any activities undertaken to persuade employees to exercise or not to exercise, or concerning the manner of exercising, the right to organize and bargain collectively), including costs of labor management committees, employee publications, and other related activities. See 48 C.F.R. 31.205–21.

SEC. 4. Examples of costs unallowable under section 2 of this order include the costs of the following activities, when they are undertaken to persuade employees to exercise or not to exercise, or concern the manner of exercising, rights to organize and bargain collectively:

- (a) preparing and distributing materials;
- (b) hiring or consulting legal counsel or consultants;
- (c) holding meetings (including paying the salaries of the attendees at meetings held for this purpose); and
- (d) planning or conducting activities by managers, supervisors, or union representatives during work hours.

SEC. 5. Within 150 days of the effective date of this order, the Federal Acquisition Regulatory Council (FAR Council) shall adopt such rules and regulations and issue such orders as are deemed necessary and appropriate to carry out this order. Such rules, regulations, and orders shall minimize the costs of compliance for contractors and shall not interfere with the ability of contractors to engage in advocacy through activities for which they do not claim reimbursement.

SEC. 6. Each contracting department or agency shall cooperate with the FAR Council and provide such information and assistance as the FAR Council may require in the performance of its functions under this order.

SEC. 7. (a) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(b) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

SEC. 8. This order shall become effective immediately, and shall apply to contracts resulting from solicitations issued on or after the effective date of the action taken by the FAR Council under section 5 of this order.

BARACK OBAMA.

§ 4305. Required regulations

(a) IN GENERAL.—The Federal Acquisition Regulation shall contain provisions on the allowability of contractor costs. Those provisions shall define in detail and in specific terms the costs that are unallowable, in whole or in part, under covered contracts.

(b) SPECIFIC ITEMS.—The regulations shall, at a minimum, clarify the cost principles applicable to contractor costs of the following:

- (1) Air shows.
- (2) Membership in civic, community, and professional organizations.
- (3) Recruitment.
- (4) Employee morale and welfare.
- (5) Actions to influence (directly or indirectly) executive branch action on regulatory and contract matters (other than costs incurred in regard to contract proposals pursuant to solicited or unsolicited bids).
- (6) Community relations.
- (7) Dining facilities.
- (8) Professional and consulting services, including legal services.
- (9) Compensation.
- (10) Selling and marketing.
- (11) Travel.
- (12) Public relations.
- (13) Hotel and meal expenses.
- (14) Expense of corporate aircraft.
- (15) Company-furnished automobiles.
- (16) Advertising.
- (17) Conventions.

(c) ADDITIONAL REQUIREMENTS.—

(1) WHEN QUESTIONED COSTS MAY BE RESOLVED.—The Federal Acquisition Regulation shall require that a contracting officer not resolve any questioned costs until the contracting officer has obtained—

(A) adequate documentation of those costs; and

(B) the opinion of the contract auditor on the allowability of those costs.

(2) PRESENCE OF CONTRACT AUDITOR.—The Federal Acquisition Regulation shall provide that, to the maximum extent practicable, a contract auditor be present at any negotiation or meeting with the contractor regarding a determination of the allowability of indirect costs of the contractor.

(3) SETTLEMENT TO REFLECT AMOUNT OF INDIVIDUAL QUESTIONED COSTS.—The Federal Acquisition Regulation shall require that all categories of costs designated in the report of a contract auditor as questioned with respect to a proposal for settlement be resolved in a manner so that the amount of the individual questioned costs that are paid will be reflected in the settlement.

(Pub. L. 111–350, §3, Jan. 4, 2011, 124 Stat. 3787.)

HISTORICAL AND REVISION NOTES

| Revised Section | Source (U.S. Code) | Source (Statutes at Large) |
|-----------------|-----------------------------------|---|
| 4305(a) | 41:256(f)(1) (1st, 2d sentences). | June 30, 1949, ch. 288, title III, §306(f), as added Pub. L. 100-700, §8(a)(1), Nov. 19, 1988, 102 Stat. 4634; Pub. L. 103-355, title II, §2151, Oct. 13, 1994, 108 Stat. 3312. |
| 4305(b) | 41:256(f)(1) (last sentence). | |
| 4305(c) | 41:256(f)(2)-(4). | |

§ 4306. Applicability of regulations to subcontractors

The regulations referred to in sections 4304 and 4305(a) and (b) of this title shall require prime contractors of a covered contract, to the maximum extent practicable, to apply the provisions of those regulations to all subcontractors of the covered contract.

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3788.)

HISTORICAL AND REVISION NOTES

| Revised Section | Source (U.S. Code) | Source (Statutes at Large) |
|-----------------|--------------------|---|
| 4306 | 41:256(g). | June 30, 1949, ch. 288, title III, §306(g), as added Pub. L. 100-700, §8(a)(1), Nov. 19, 1988, 102 Stat. 4634; Pub. L. 103-355, title II, §2151, Oct. 13, 1994, 108 Stat. 3313. |

§ 4307. Contractor certification

(a) **CONTENT AND FORM.**—A proposal for settlement of indirect costs applicable to a covered contract shall include a certification by an official of the contractor that, to the best of the certifying official’s knowledge and belief, all indirect costs included in the proposal are allowable. The certification shall be in a form prescribed in the Federal Acquisition Regulation.

(b) **WAIVER.**—An executive agency may, in an exceptional case, waive the requirement for certification under subsection (a) in the case of a contract if the agency—

- (1) determines that it would be in the interest of the Federal Government to waive the certification; and
- (2) states in writing the reasons for the determination and makes the determination available to the public.

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3788.)

HISTORICAL AND REVISION NOTES

| Revised Section | Source (U.S. Code) | Source (Statutes at Large) |
|-----------------|--------------------|---|
| 4307 | 41:256(h). | June 30, 1949, ch. 288, title III, §306(h), as added Pub. L. 100-700, §8(a)(1), Nov. 19, 1988, 102 Stat. 4634; Pub. L. 103-355, title II, §2151, Oct. 13, 1994, 108 Stat. 3313. |

§ 4308. Penalties for submission of cost known to be unallowable

The submission to an executive agency of a proposal for settlement of costs for any period after those costs have been accrued that includes a cost that is expressly specified by statute or regulation as being unallowable, with the

knowledge that the cost is unallowable, is subject to section 287 of title 18 and section 3729 of title 31.

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3788.)

HISTORICAL AND REVISION NOTES

| Revised Section | Source (U.S. Code) | Source (Statutes at Large) |
|-----------------|--------------------|---|
| 4308 | 41:256(i). | June 30, 1949, ch. 288, title III, §306(i), as added Pub. L. 100-700, §8(a)(1), Nov. 19, 1988, 102 Stat. 4634; Pub. L. 103-355, title II, §2151, Oct. 13, 1994, 108 Stat. 3313. |

§ 4309. Burden of proof on contractor

In a proceeding before a board of contract appeals, the United States Court of Federal Claims, or any other Federal court in which the reasonableness of indirect costs for which a contractor seeks reimbursement from the Federal Government is in issue, the burden of proof is on the contractor to establish that those costs are reasonable.

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3788.)

HISTORICAL AND REVISION NOTES

| Revised Section | Source (U.S. Code) | Source (Statutes at Large) |
|-----------------|--------------------|---|
| 4309 | 41:256(j). | June 30, 1949, ch. 288, title III, §306(j), as added Pub. L. 100-700, §8(a)(1), Nov. 19, 1988, 102 Stat. 4634; Pub. L. 103-355, title II, §2151, Oct. 13, 1994, 108 Stat. 3313. |

§ 4310. Proceeding costs not allowable

(a) **DEFINITIONS.**—In this section:

(1) **COSTS.**—The term “costs”, with respect to a proceeding, means all costs incurred by a contractor, subcontractor, or personal services contractor, whether before or after the commencement of the proceeding, including—

- (A) administrative and clerical expenses;
- (B) the cost of legal services, including legal services performed by an employee of the contractor, subcontractor, or personal services contractor;
- (C) the cost of the services of accountants and consultants retained by the contractor, subcontractor, or personal services contractor; and
- (D) the pay of directors, officers, and employees of the contractor, subcontractor, or personal services contractor for time devoted by those directors, officers, and employees to the proceeding.

(2) **PENALTY.**—The term “penalty” does not include restitution, reimbursement, or compensatory damages.

(3) **PROCEEDING.**—The term “proceeding” includes an investigation.

(b) **IN GENERAL.**—Except as otherwise provided in this section, costs incurred by a contractor, subcontractor, or personal services contractor in connection with a criminal, civil, or administrative proceeding commenced by the Federal Government, by a State, or by a contractor, subcontractor, or personal services contractor or