

Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

**III. Regulatory Flexibility Act**

DoD, GSA, and NASA do not expect this 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 are awarded on a competitive fixed-price basis, and do not require application of the cost principles contained in this rule. However, an Initial Regulatory Flexibility Analysis (IRFA) has been prepared and is summarized as follows:

The objective of this rule is to address the allowability of legal costs incurred by a contractor in connection with a proceeding commenced by an employee submitting a complaint under 10 U.S.C. 2409 or 41 U.S.C. 4712. The statutory authority is 10 U.S.C. 2324(k) and 41 U.S.C. 4310.

Most contracts awarded on a fixed-price competitive basis do not require application of the cost principles. Most contracts valued at or below the simplified acquisition threshold are awarded on a fixed price competitive basis. Requiring submission of certified cost or pricing data for acquisitions that do not exceed the simplified acquisition threshold is prohibited (FAR 15.403-4(a)(2)). According to Federal Procurement Data System (FPDS) data for FY 2012, there were 73,014 Federal new contract awards over the simplified acquisition threshold in FY 2012. Of those contracts, only 11,279 awards were to small businesses on other than a competitive fixed-price basis. Within that number of awards, this rule would only affect a contractor if a contractor employee commenced a proceeding by submitting a complaint under 10 U.S.C. 2409 or 41 U.S.C. 4712, and if that proceeding resulted in imposition of a monetary penalty or an order to take corrective action under 10 U.S.C. 2409 or 41 U.S.C. 4712. We do not have data on the percentage of contracts that involve submission of a whistleblower complaint and result in monetary penalty or an order to take corrective action.

There are no reporting, recordkeeping, or other compliance requirements in this rule. The rule does not duplicate, overlap, or conflict with any other Federal rules. DoD, GSA, and NASA were unable to identify any alternatives to the rule which would reduce the impact on small entities and still meet the requirements of the statute.

The Regulatory Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAC 2005-70, FAR Case 2013-017) in correspondence.

**IV. Paperwork Reduction Act**

The interim rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

**V. Determination To Issue an Interim Rule**

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. By operation of law, the new statute for the whistleblower protection pilot program became effective on July 1, 2013, *i.e.*, Congress included language in section 828 paragraph (b) specifically addressing the effective date of 41 U.S.C. 4712. Section 828 paragraph (d), which is implemented through this rulemaking, revised 41 U.S.C. 4310, effective upon enactment. 41 U.S.C. 4310 addresses the contractor's legal fees arising from an employee's complaint of reprisal and makes these fees expressly unallowable costs when there is contractor culpability. The most effective and efficient way to ensure awareness and compliance by agencies and their contractors with section 828 paragraph (d) is through the issuance of an interim rule. This regulation requires nothing beyond that which is set forth clearly in the statute. However, pursuant to 41 U.S.C. 1707 and FAR 1.501-3(b), DoD, GSA, and NASA will consider public comments received in response to this interim rule in the formation of the final rule.

**List of Subjects in 48 CFR Part 31**

Government procurement.

Dated: September 24, 2013.

**William Clark,**

*Acting Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.*

Therefore, DoD, GSA, and NASA amend 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. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

■ 2. Amend section 31.205-47 by revising the introductory text of paragraph (b), and paragraph (b)(2) to read as follows:

**31.205-47 Costs related to legal and other proceedings.**

\* \* \* \* \*

(b) In accordance with 41 U.S.C. 4310 and 10 U.S.C. 2324(k), costs incurred in connection with any proceeding brought by a Federal, State, local, or foreign government, or by a contractor or subcontractor employee submitting a whistleblower complaint of reprisal in accordance with 41 U.S.C. 4712 or 10 U.S.C. 2409, for violation of, or a failure to comply with, law or regulation by the contractor (including its agents or employees), or costs incurred in connection with any proceeding brought by a third party in the name of the United States under the False Claims Act, 31 U.S.C. 3730, are unallowable if the result is—

\* \* \* \* \*

(2) In a civil or administrative proceeding, either a finding of contractor liability where the proceeding involves an allegation of fraud or similar misconduct; or imposition of a monetary penalty, or an order issued by the agency head to the contractor or subcontractor to take corrective action under 41 U.S.C. 4712 or 10 U.S.C. 2409, where the proceeding does not involve an allegation of fraud or similar misconduct;

\* \* \* \* \*

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**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Chapter 1**

[Docket FAR 2013-0078, Sequence 6]

**Federal Acquisition Regulation; Federal Acquisition Circular 2005-70; Small Entity Compliance Guide**

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

**ACTION:** Small Entity Compliance Guide.

**SUMMARY:** This document is issued under the joint authority of DOD, GSA, and NASA. This *Small Entity Compliance Guide* has been prepared in accordance with section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of the rules appearing in Federal Acquisition Circular (FAC)

2005–70, which amends the Federal Acquisition Regulation (FAR). An asterisk (\*) next to a rule indicates that a regulatory flexibility analysis has been prepared. Interested parties may obtain further information regarding these rules by referring to FAC 2005–70, which precedes this document. These documents are also available via the Internet at <http://www.regulations.gov>.

**DATES:** September 30, 2013.

**FOR FURTHER INFORMATION CONTACT:** For clarification of content, contact the analyst whose name appears in the table below. Please cite FAC 2005–70 and the FAR case number. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202–501–4755.

**RULE LISTED IN FAC 2005–70**

Item	Subject	FAR Case	Analyst
I * .....	Pilot Program for Enhancement of Contractor Employee Whistleblower Protections (Interim) .....	2013–015	Corrigan.
II * .....	Allowability of Legal Costs for Whistleblower Proceedings (Interim) .....	2013–017	Chambers.

**SUPPLEMENTARY INFORMATION:**

Summaries for each FAR rule follow. For the actual revisions and/or amendments made by these FAR cases, refer to the specific item numbers and subjects set forth in the documents following these item summaries. FAC 2005–70 amends the FAR as specified below:

**Item I—Pilot Program for Enhancement of Contractor Employee Whistleblower Protections (FAR Case 2013–015)**

This interim rule amends the FAR to implement a four-year pilot program to enhance the existing whistleblower protections for contractor employees at subpart 3.9. In accordance with FAR 1.108(d)(3), contracting officers are encouraged to include the changes in these rules in major modifications to contracts and orders awarded prior to the effective date of this interim rule. The pilot program is mandated by section 828, entitled “Pilot Program for Enhancement of Contractor Employee Whistleblower Protections,” of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013 (Pub. L. 112–239, enacted January 2, 2013). This rule implements section 828 by

amending FAR 3.900, Scope of subpart, to make FAR 3.901 through 3.906 inapplicable to DoD, NASA, and the Coast Guard and to prohibit the use of these sections for new awards by all other agencies subject to the FAR (title 41 agencies) through January 1, 2017. This rule creates a new FAR section 3.908 to be used by title 41 agencies through January 1, 2017. Other exceptions: FAR 3.907, which addresses whistleblower protections under the American Recovery and Reinvestment Act of 2009, is unaffected by this rule. This rule does not provide any right not otherwise provided by law to disclose classified information, nor does it apply to any element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401(a)(4)). In addition, the interim rule applies to actions over the simplified acquisition threshold.

**Item II—Allowability of Legal Costs for Whistleblower Proceedings (FAR Case 2013–017)**

This interim rule amends the FAR by revising the cost principle at FAR 31.205–47 to implement sections 827(g) and 828(d) of the NDAA for FY 2013

(Pub. L. 112–239). There are two new whistleblower programs for contractor and subcontractor employees, at 10 U.S.C. 2409 and 41 U.S.C. 4712. The latter program is a pilot program, being addressed in FAR Case 2013–015, amending FAR subpart 3.9. The cost principle addresses the allowability of legal costs incurred by a contractor or subcontractor in connection with a whistleblower protection proceeding commenced by a contractor or subcontractor employee submitting a complaint of reprisal under the applicable whistleblower statute. Because most contracts awarded to small businesses use simplified acquisition procedures or are awarded on a competitive, fixed-price basis, thus limiting their exposure to the cost principles, the impact of this interim rule on small businesses will be minimal.

Dated: September 24, 2013.

**William Clark,**

*Acting Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.*

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