42.709-4 Assessing the penalty.

Unless a waiver is granted pursuant to 42.709-6, the cognizant *contracting officer shall*-

(a) Assess the penalty in 42.709-2(a)(1), when the submitted cost is expressly unallowable under a cost principle in the FAR or an *executive agency* supplement that defines the allowability of specific selected costs; or

(b) Assess the penalty in 42.709-2(a)(2), when the submitted cost was determined to be unallowable for that contractor prior to submission of the proposal. Prior determinations of unallowability *may* be evidenced by-

(1) A DCAA Form1, Notice of Contract Costs Suspended and/or Disapproved (see 48 CFR 242.705-2), or any similar notice which the contractor elected not to appeal and was not withdrawn by the cognizant Government agency;

(2) A *contracting officer* final decision which was not appealed;

(3) A prior *executive agency* Board of Contract Appeals or court decision involving the contractor, which upheld the cost disallowance; or

(4) A determination or agreement of unallowability under 31.201-6.

(c) Issue a final decision (see 33.211) which includes a demand for payment of any penalty assessed under paragraph (a) or (b) of this section. The letter *shall* state that the determination is a final decision under the Disputes clause of the contract. (Demanding payment of the penalty is separate from demanding repayment of any paid portion of the disallowed cost.)

Parent topic: 42.709 Penalties for Unallowable Costs.