Subpart 931.2—Contracts With Commercial Organizations

Parent topic: PART 931—CONTRACT COST PRINCIPLES AND PROCEDURES

931.205 Selected costs.

931.205-18 Independent research and development and bid and proposal costs.

(c)

(1) Independent research and development (IR&D) costs are recoverable under DOE contracts to the extent they are reasonable, allocable, not otherwise unallowable, and they have potential benefit or relationship to the DOE program. The term “DOE program” encompasses the DOE total mission and its objectives. Bid and proposal (B&P) costs are recoverable under DOE contracts to the extent they are reasonable, allocable, and not otherwise unallowable.

(2) [Reserved]

931.205-19 Insurance and indemnification.

(f) The contracting officer shall insert the clause at 952.231-71, Insurance-litigation and claims, instead of the clause at 48 CFR 52.228-7, in

(1) Non-management and operating cost reimbursement contracts exceeding $100,000,000, and

(2) Non-management and operating contracts exceeding $100,000,000 that include cost reimbursable elements exceeding $10,000,000 (e.g. contracts with both fixed-price and cost-reimbursable line items where the cost-reimbursable line items exceed $10,000,000 or time and materials contracts where the materials portions exceed $10,000,000.

931.205-32 Pre-contract costs.

(a) To the extent practical, known expenditures of pre-contract costs under DOE contracts should be governed by establishing advance understandings as contemplated by 48 CFR 31.109. Contracts that include authorized precontract costs shall include the “Date of Incurrence of Cost” clause specified at 952.231-70.

(b) The following limitations apply to establishment of advance understandings relative to pre-contract costs:

(1) Pre-contract cost authorizations shall not be used to cover a period in excess of 15 days, unless a

longer period is approved by the HCA based upon a written finding that such an allowance is reasonable, and shall not be extended or renewed. A copy of the findings shall be forwarded to the Senior Procurement Executive at the time of approval. If prolonged coverage is necessary, a letter contract shall be issued.

(2) All pre-contract cost authorizations shall be reviewed and approved at a management level above the contracting officer.

(3) Retroactive precontract cost authorization and the predating of contractual agreements shall not be used.

(4) Pre-contract cost authorizations shall not authorize the delivery or furnishing of any goods or services from a contractor until after the contract is executed.

931.205-33 Professional and consultant service costs.

(g) If the clause at 48 CFR 952.231-71 or the clause at 48 CFR 970.5228-1 is included in the contract, or the contract is a non-management and operating contract exceeding $100,000,000 that includes cost reimbursable elements exceeding $10,000,000 (for example, contracts with both fixed-price and cost-reimbursable line items where the cost-reimbursable line items exceed $10,000,000 or time and materials contracts where the materials portions exceed $10,000,000), litigation and other legal costs are only allowable if both: incurred in accordance with 10 CFR part 719, Contractor Legal Management Requirements; and not otherwise made unallowable by law, regulation, or the terms of the contract.

931.205-47 Costs related to legal and other proceedings.

(h) *Costs associated with whistleblower actions.*

(1) Definitions for purposes of this paragraph (h):

Covered contractors and subcontractors means those contractors and subcontractors with contracts exceeding $5,000,000.

Employee whistleblower action means any action filed by an employee in Federal or state court for redress of a retaliatory act by a contractor and any administrative procedure initiated by an employee under 29 CFR part 24, 48 CFR subpart 3.9, 10 CFR part 708 or 50 U.S.C. 2702.

Retaliatory act means a discharge, demotion, reduction in pay, coercion, restraint, threat, intimidation or other similar negative action taken against an employee by a contractor as a result of an employee's activity protected as a whistleblower activity by a Federal or state statute or regulation.

Settlement and award costs means defense costs and costs arising from judicial orders, negotiated agreements, arbitration, or an order from a Federal agency or board and includes compensatory damages, underpayment for work performed, and reimbursement for a complainant employee's legal counsel.

(2) For costs associated with employee whistleblower actions where a retaliatory act is alleged

against a covered contractor or subcontractor, the contracting officer—

(i) May authorize reimbursement of costs on a provisional basis, in appropriate cases;

(ii) Must consult with the Office of General Counsel whistleblower costs point of contact, who will consult with other Headquarters points of contact as appropriate, before making a final allowability determination; and

(iii) Must determine allowability of defense, settlement and award costs on a case-by-case basis after considering the terms of the contract, relevant cost regulations, and the relevant facts and circumstances, including federal law and policy prohibiting reprisal against whistleblowers, available at the conclusion of the employee whistleblower action.

(3) Covered contractors and subcontractors must segregate legal costs, including costs of in-house counsel, incurred in the defense of an employee whistleblower action so that the costs are separately identifiable.

(4) If a contracting officer provisionally disallows costs associated with an employee whistleblower action for a covered contractor or subcontractor, funds advanced by the Department may not be used to finance costs connected with the defense, settlement and award of an employee whistleblower action.

(5) Contractor defense, settlement and award costs incurred in connection with the defense of suits brought by employees under section 2 of the Major Fraud Act of 1988 are excluded from coverage of this section.