

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Part 31****[FAR Case 2001–021]****RIN 9000–AJ38****Federal Acquisition Regulation;
Training and Education Cost Principle**

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

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are proposing to amend the Federal Acquisition Regulation (FAR) “Training and education costs” cost principle.

DATES: Interested parties should submit comments in writing on or before March 29, 2004 to be considered in the formulation of a final rule.

ADDRESSES: Submit written comments to—General Services Administration, FAR Secretariat (MVA), 1800 F Street, NW., Room 4035, ATTN: Laurie Duarte, Washington, DC 20405.

Submit electronic comments via the Internet to—farcase.2001-021@gsa.gov. Please submit comments only and cite FAR case 2001–021 in all correspondence related to this case.

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 FAR case 2001–021.

SUPPLEMENTARY INFORMATION:**A. Background**

The proposed amendment to FAR 31.205–44, Training and education costs, is intended to increase the clarity of this cost principle and to make it consistent with recent statutory changes that cover payment of costs for Federal employee academic degree training. The proposed rule makes training and education costs generally allowable, except for training and education for the sole purpose of obtaining an academic degree or as a means of qualifying for a position that requires a degree, as well as six public policy exceptions that are retained from the current cost principle.

The reasonableness of specific contractor training and education costs that are not subject to one of the expressly unallowable cost exceptions can best be assessed by reference to FAR 31.201–3, Determining reasonableness.

A proposed rule was published in the **Federal Register** at 67 FR 34810, May 15, 2002. In response to the public comments received (see Section B, below), the Councils are proposing additional changes to FAR 31.205–44. Since the changes result in a rule that differs significantly from the first proposed rule, it is being published as a second proposed rule. It is noted that an amendment was published in the **Federal Register** at 67 FR 40136, June 11, 2002, to correct an error in the **SUPPLEMENTARY INFORMATION** section accompanying the first proposed rule. The major differences between the two proposed rules are summarized as follows:

1. The Councils eliminated the disparate treatment of full-time and part-time undergraduate education by deleting FAR 31.205–44(b)(1)(i). The cost of full-time undergraduate level education will be allowable. (See Public Comment 3, paragraph 3, below.)
2. The cost allowability provisions for full-time graduate level education at FAR 31.205–44(b)(2)(ii) are relocated to a separate new paragraph (d). (See Public Comment 3, paragraph 4, below.)
3. The cost of salaries for attending part-time and full-time undergraduate level classes and part-time graduate level classes during working hours are unallowable, subject to an exception “when unusual circumstances do not permit attendance at such classes outside of regular working hours.” FAR 31.205–44(b)(2) was deleted and coverage included in a new paragraph (c). (See Public Comment 3, paragraph 5, below.)

B. Public Comments

Six respondents submitted comments on the first proposed rule. A discussion of their comments is provided below.

Eliminate the Cost Principle

Comment 1: FAR 31.205–44 should be eliminated and the allowability of training and education costs should be governed by the general reasonableness provisions of FAR 31.201–3. The elimination of all thresholds and other allowability criteria can be accomplished without jeopardizing safeguards or increasing the risk to the Government.

Councils’ response: Nonconcur that the cost principle should be eliminated. The argument for eliminating the training and education cost principle in

its entirety is not compelling. There are several expressly unallowable costs in the current cost principle that are considered necessary for sound public policy reasons and are not covered elsewhere in the FAR. Concur that the reasonableness of specific contractor training and education costs can best be assessed by reference to FAR 31.201–3, Determining reasonableness.

Overtime Costs

Comment 2: Delete the proposed FAR 31.205–44(a), which makes overtime pay for training and education unallowable. The number of instances in which an employee is paid overtime for training and education do not justify the costs for tracking and treating overtime payments as unallowable costs.

Councils’ Response: Nonconcur. It would not be sound public policy to reimburse overtime pay for training and education.

Restrictive, Confusing, and Contradictory Conditions

Comment 3: The language in proposed FAR 31.205–44(b) regarding full-time, part-time, undergraduate, and graduate education costs is restrictive, confusing and contradictory. The differing allowability treatment of these types of education costs is confusing and inconsistent with each other and with the accepted concepts of upward mobility and job retraining. The proposed paragraph should be eliminated, or at a minimum, the language should only list items that are unallowable.

Councils’ Response: Concur that language in paragraph (b) of the first proposed rule is restrictive, confusing and contradictory; changes in this second proposed rule eliminate the confusion and some of the cost allowability limitations (as discussed below). Nonconcur that all of the cost allowability limitations should be removed; the cost allowability limitations that remain represent sound public policy. Concur that only unallowable items should be listed; the structure of the second proposed rule is to list only the specifically unallowable costs.

FAR 31.205–44(b)(1)(i) of the first proposed rule and the current FAR language disallow full-time undergraduate level education costs, but implicitly allow part-time undergraduate level education costs. The Councils believe that education costs should not become unallowable just because an employee elects to accelerate the learning process. Imposing restrictions that may cause

some employees to slow the learning process serves no purpose. Moreover, such a bifurcated approach to the allowability of contractor employee education costs is inconsistent with recent statutory changes that now broadly authorize Government payment of Federal employee degree costs (Section 1121 of Public Law 106–398, the FY01 Defense Authorization Act, and Section 1331 of Public Law 107–296, the Homeland Security Act). Therefore, the disparate treatment of full-time and part-time undergraduate education has been eliminated by deleting paragraph (b)(1)(i) of the first proposed rule.

To further simplify the cost principle, the Councils extracted the limitations regarding the unallowability of full-time graduate level education costs from paragraph (b)(1)(ii) of the first proposed rule and made them a separate new paragraph (c) in this second proposed rule.

Paragraph (b)(2) of the first proposed rule disallows the costs of salaries for attending undergraduate or graduate level classes on a part-time basis, except for attending such classes during working hours where circumstances do not permit attendance before or after regular work hours. Similarly, the current FAR coverage allows the salaries of employees for attending undergraduate or graduate level classes on a part-time basis only where circumstances do not permit the operation of classes or attendance at classes after regular working hours, but is also capped at 156 hours per year. The Councils believe that the cost of salaries for attending part-time and full-time undergraduate or part-time graduate level classes should remain unallowable, subject to an exception “when unusual circumstances do not permit attendance at such classes outside of regular working hours.” This policy is contained in a separate new paragraph (c) in this second proposed rule.

Advance Agreement

Comment 4: If the Councils still believe that FAR 31.205–44(b) is required, then the provisions at FAR 31.205–44(h), which allow and establish criteria for Advance Agreements, would have to be reinstated. Without this reinstatement, costs that have been allowable in the past could become unallowable.

Councils’ Response: Nonconcur. The Councils believe that in light of the changes made, the need for an advance agreement provision has been eliminated.

Administrative Costs of College Savings Plan

Comment 5: With the advent of “529 Plans” (College Savings Plans), companies are beginning to sponsor such plans for employees and their dependents, including paying the administrative costs. The Councils should make clear that the proposed language in FAR 31.205–44(e) does not make the administrative costs of college savings plans unallowable.

Councils’ Response: The cost principle does not address the administrative costs of such plans; therefore, the administrative costs are allowable, subject to the reasonableness criteria at FAR 31.201–3. However, any contributions to the plan by the company for employee dependents would be unallowable under the redesignated paragraph (g) in this second proposed rule.

Public Policy

Comment 6: If one agrees that training and educating employees is good public policy, then there is no need for the five “public policy exceptions” to cost allowability, and the cost principle is unnecessary.

Councils’ Response: The Councils support upward mobility, job retraining, and educational advancement. Training that is beneficial for the contractor, is also beneficial for the Government. But, while Government support for training and education is sound overall public policy, there are certain related costs the taxpayers should not reimburse. The Councils believe the six public policy exceptions in this second proposed rule are appropriate.

Job Relatedness

Comment 7: The job relatedness requirement should be eliminated in proposed FAR 31.205–44(b)(1)(ii). The original Background section accompanying the first proposed rule published in the **Federal Register** dated May 15, 2002, indicated that the Councils proposed the elimination of this requirement together with a supporting rationale. The commenter agrees with that rationale and recommends the requirement be deleted.

Councils’ Response: Nonconcur. The language contained in the Background section accompanying the first proposed rule was published in error. The Background section language was corrected in the **Federal Register** at 67 FR 40136, June 11, 2002. The current policy which requires a relationship between education and work for full-time graduate level education is retained.

Two-Year Maximum at Undergraduate Level

Comment 8: The proposed rule should be revised because FAR 31.205–44(b)(1)(ii) can reasonably be interpreted as establishing a maximum two (2) year completion requirement at both the undergraduate and postgraduate levels.

Councils’ Response: Nonconcur. The Councils believe it is clear in the new FAR 31.205–44(d) that the two-year limitation only applies to the full-time graduate level education.

Suitable Education

Comment 9: The proposed FAR 31.205–44(d) should be revised to define “suitable” public education and permit “suitable” private education where no “suitable” public education exists. The proposed rule is ambiguous and restrictive in scope due to the lack of a definition and the lack of an affirmative statement permitting private school education.

Councils’ Response: Nonconcur. A definition of the term “suitable” would limit flexibility. In addition, the proposed rule already allows the use of private education and therefore, an affirmative statement to this effect is not necessary.

Vocational Training and Specialized Programs

Comment 10: Recommend the reinsertion of the current FAR sections addressing vocational training, specialized programs and other expenses relating to maintenance and normal depreciation or fair rental on facilities owned or leased by contractors for training purposes. The deletion of these sections will place an undue financial burden on Government contractors and small businesses and will discourage the Government contractor workforce from pursuing non-traditional types of training and education.

Councils’ Response: Nonconcur. The allowability of these types of expenses did not change in the proposed rule. The structure of the proposed rule is to list only the specifically unallowable costs.

Format

In the past, the Councils have received several public comments suggesting a standardized format for cost principles contained in FAR part 31. While they believe that this second proposed rule conforms to the suggested format, the Councils are interested in comments in this regard. If additional standard format changes are deemed appropriate, interested parties are

required to submit a rewritten cost principle in the proposed format as part of their response to this proposed 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.

C. Regulatory Flexibility Act

The Councils do not expect this proposed 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 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. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. We invite comments from small businesses and other interested parties. The Councils will consider comments from small entities concerning the affected FAR Part 31 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAR case 2001–021), in correspondence.

D. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed 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 31

Government procurement.

Dated: January 23, 2004.

Ralph de Stefano,

Acting Director, Acquisition Policy Division.

Therefore, DoD, GSA, and NASA propose amending 48 CFR part 31 as set forth below:

PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES

1. The authority citation for 48 CFR part 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).

2. Revise section 31.205–44 to read as follows:

31.205–44 Training and education costs.

Training and education costs are allowable, except as follows:

(a) The costs of education and training for the sole purpose of providing an employee an opportunity to obtain an academic degree or to qualify for appointment to a particular position for which the academic degree is a basic requirement are unallowable.

(b) Overtime compensation for training and education is unallowable.

(c) The cost of salaries for attending undergraduate level classes or part-time

graduate level classes during working hours is unallowable, except when unusual circumstances do not permit attendance at such classes outside of regular working hours.

(d) Costs of tuition, fees, training materials and textbooks, subsistence, and salary and any other costs in connection with full-time graduate level education are unallowable, except where the course or degree pursued is related to the field in which the employee is working or may reasonably be expected to work and is limited to a total period not to exceed 2 school years or the length of the degree program, whichever is less, for each employee so trained.

(e) Grants to educational or training institutions, including the donation of facilities or other properties, scholarships, and fellowships, are unallowable.

(f) Training or education costs for other than bona fide employees are unallowable, except that the costs incurred for educating employee dependents (primary and secondary level studies) when the employee is working in a foreign country where suitable public education is not available may be included in overseas differential pay.

(g) Costs of university and college plans for employee dependents are unallowable.

[FR Doc. 04–1876 Filed 1–28–04; 8:45 am]

BILLING CODE 6820–EP–P