

Prohibition on Allowability of Legal Costs Extended to Congressional Investigation and Inquiries

January 13, 2017

WHAT: The FAR Council followed up on a previous Proposed Rule that would make unallowable costs associated with responding to certain Congressional investigations and inquiries. The Final Rule is applicable to all agencies subject to the FAR.

WHEN: The Final Rule, issued by DOD, GSA, and NASA, becomes effective on January 13, 2017.

WHAT DOES IT MEAN FOR INDUSTRY: Under FAR 31.205-47, contractors cannot be reimbursed for costs related to certain categories of proceedings if those proceedings result in one of several enumerated adverse outcomes. The Final Rule adds certain Congressional investigations and inquiries to the types of proceedings covered by FAR 31.205-47.

- **Types of Proceedings Covered:** The Final Rule makes the costs potentially unallowable if the investigation or inquiry pertains to an issue that is already the subject of a covered proceeding. Covered proceedings include: (1) a proceeding brought by a government against the contractor for the contractor's failure to comply with law or regulation; (2) a proceeding brought by an employee of the contractor or its subcontractor as a whistleblower; and (3) a proceeding brought by a third party in the name of the United States under the False Claims Act. FAR 31.205-47(b).
- **Adverse Outcomes Covered:** If the investigation or inquiry is covered, the costs will be unallowable if the proceeding results

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in either (1) a criminal conviction; (2) a civil finding of liability for fraud or similar misconduct, or if the proceeding does not involve an allegation of fraud, the imposition of a monetary penalty; or (3) contractual actions such as suspension or debarment of the contractor, or rescission or default termination of a contract. FAR 31.205-47(b)(1)-(3). The covered outcomes can also include disposition of the matter by "consent or compromise," FAR 31.205-47(b)(4), depending on a number of circumstances, including, at least for private litigation, the contractor's likelihood of success on the merits, FAR 31.205-47(c), (d).

- **Payment Withholding:** Because contractors are generally unable to determine whether costs associated with a covered proceeding will be allowable until the proceeding is resolved, FAR 31.205-47 (g) requires contractors to segregate the covered costs and account for them separately until the proceeding is concluded, unless otherwise agreed by the contracting officer.

As the Final Rule shows, the rules for determining whether a particular investigation or other type of legal proceeding is covered by FAR 31.205-47 and, if so, whether the associated costs, including the costs of settlement, may be allowable are complicated to maneuver, and the precise contours are often an area of significant dispute. Wiley Rein has significant experience with the allowability of legal costs and assisting our clients in navigating them.