

31.205-47 Costs related to legal and other proceedings.

(a) *Definitions.* As used in this subsection-

Costs include, but are not limited to, administrative and clerical expenses; the *costs* of legal services, whether performed by in-house or private counsel; the *costs* of the services of accountants, consultants, or others retained by the contractor or subcontractor to assist it; *costs* of employees, officers, and directors; and any similar *costs* incurred before, during, and after commencement of a judicial or administrative *proceeding* which bears a direct relationship to the *proceeding*.

Fraud means-

- (1) Acts of *fraud* or corruption or attempts to defraud the Government or to corrupt its agents;
- (2) Acts which constitute a cause for *debarment* or *suspension* under [9.406-2\(a\)](#) and [9.407-2\(a\)](#); and
- (3) Acts which violate the False *Claims Act*, [31 U.S.C., sections 3729-3731](#), or [41 U.S.C. chapter 87](#), Kickbacks.

Penalty does not include restitution, reimbursement, or compensatory damages.

Proceeding includes an investigation.

(b) *Costs* incurred in connection with any *proceeding* brought by: a Federal, State, local, or foreign government for a violation of, or failure to comply with, law or regulation by the contractor or subcontractor (including its agents or employees) ([41 U.S.C. 4310](#) and [10 U.S.C. 3750](#)); a contractor or subcontractor employee submitting a whistleblower complaint of reprisal in accordance with [41 U.S.C. 4712](#) or [10 U.S.C. 4701](#); or 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-

- (1) In a criminal *proceeding*, a *conviction*;
- (2) In a civil or administrative *proceeding*, either a finding of contractor or subcontractor 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. 4701](#), where the *proceeding* does not involve an allegation of *fraud* or similar misconduct;
- (3) A final decision by an appropriate official of an *executive agency* to-
 - (i) Debar or suspend the contractor or subcontractor;
 - (ii) Rescind or void a contract; or
 - (iii) Terminate a contract for default by reason of a violation or failure to comply with a law or regulation.
- (4) Disposition of the matter by consent or compromise if the *proceeding* could have led to any of the outcomes listed in paragraphs (b)(1) through (3) of this subsection (but see paragraphs (c) and (d) of

this subsection); or

(5) Not covered by paragraphs (b)(1) through (4) of this subsection, but where the underlying alleged contractor misconduct was the same as that which led to a different *proceeding* whose costs are unallowable by reason of paragraphs (b)(1) through (4) of this subsection.

(c)

(1) To the extent they are not otherwise unallowable, *costs* incurred in connection with any *proceeding* under paragraph (b) of this subsection commenced by the *United States* that is resolved by consent or compromise pursuant to an agreement entered into between the contractor or subcontractor and the *United States*, and which are unallowable solely because of paragraph (b) of this subsection, *may* be allowed to the extent specifically provided in such agreement

(2)

(i) In the event of a settlement of any *proceeding* brought by a third party under the False Claims Act in which the *United States* did not intervene, reasonable *costs* incurred by the contractor or subcontractor in connection with such a *proceeding* that are not otherwise unallowable by regulation or by separate agreement with the *United States may* be allowed if the *contracting officer*, in consultation with his or her legal advisor, determines that there was very little likelihood that the third party would have been successful on the merits.

(ii) In the event of disposition by consent or compromise of a *proceeding* brought by a whistleblower for alleged reprisal in accordance with [41 U.S.C. 4712](#) or [10 U.S.C. 4701](#), reasonable *costs* incurred by a contractor or subcontractor in connection with such a *proceeding* that are not otherwise unallowable by regulation or by agreement with the *United States may* be allowed if the *contracting officer*, in consultation with his or her legal advisor, determined that there was very little likelihood that the claimant would have been successful on the merits.

(d) To the extent that they are not otherwise unallowable, *costs* incurred in connection with any *proceeding* under paragraph (b) of this subsection commenced by a State, local, or foreign government *may* be allowable when the *contracting officer* (or other official specified in agency procedures) determines, that the *costs* were incurred either:

(1) As a direct result of a specific term or condition of a Federal contract or subcontract; or

(2) As a result of compliance with specific written direction of the cognizant *contracting officer*.

(e) *Costs* incurred in connection with *proceedings* described in paragraph (b) of this subsection, but which are not made unallowable by that paragraph, *may* be allowable to the extent that:

(1) The *costs* are reasonable in relation to the activities required to deal with the *proceeding* and the underlying cause of action;

(2) The *costs* are not otherwise recovered from the Federal Government or a third party, either directly as a result of the *proceeding* or otherwise; and

(3) The percentage of *costs* allowed does not exceed the percentage determined to be appropriate considering the complexity of *procurement* litigation, generally accepted principles governing the award of legal fees in civil actions involving the *United States* as a party, and such other factors as

may be appropriate. Such percentage *shall* not exceed 80 percent. Agreements reached under paragraph (c) of this subsection *shall* be subject to this limitation. If, however, an agreement described in paragraph (c)(1) of this subsection explicitly states the amount of otherwise allowable incurred legal fees and limits the allowable recovery to 80 percent or less of the stated legal fees, no additional limitation need be applied. The amount of reimbursement allowed for legal *costs* in connection with any *proceeding* described in paragraph (c)(2) of this subsection *shall* be determined by the cognizant *contracting officer*, but *shall* not exceed 80 percent of otherwise allowable legal *costs* incurred.

(f) *Costs* not covered elsewhere in this subsection are unallowable if incurred in connection with the following:

(1) Defense against Federal Government *claims* or appeals or the prosecution of *claims* or appeals against the Federal Government (see [2.101](#)).

(2) Organization, reorganization, (including mergers and *acquisitions*) or resisting mergers and *acquisitions* (see also [31.205-27](#)).

(3) Defense of antitrust suits.

(4) Defense of suits brought by employees or ex-employees of the contractor or subcontractor under section 2 of the Major *Fraud* Act of 1988 where the contractor or subcontractor was found liable or settled.

(5) *Costs* of legal, accounting, and consultant services and *directly associated costs* incurred in connection with the defense or prosecution of lawsuits or appeals between contractors or subcontractors arising from either—

(i) An agreement or contract concerning a teaming arrangement, a joint venture, or similar arrangement of shared interest; or

(ii) Dual sourcing, coproduction, or similar programs, are unallowable, except when—

(A) Incurred as a result of compliance with specific terms and conditions of the contract or subcontract or written instructions from the *contracting officer*; or

(B) When agreed to *in writing* by the *contracting officer*.

(6) Patent infringement litigation, unless otherwise provided for in the contract or subcontract.

(7) Representation of, or assistance to, individuals, groups, or legal entities which the contractor or subcontractor is not legally bound to provide, arising from an action where the participant was convicted of violation of a law or regulation or was found liable in a civil or administrative *proceeding*.

(8) Protests of Federal Government *solicitations* or contract awards, or the defense against protests of such *solicitations* or contract awards, unless the *costs* of defending against a protest are incurred pursuant to a written request from the cognizant *contracting officer*.

(9) A Congressional investigation or inquiry into an issue that is the subject matter of a *proceeding* resulting in a disposition as described in paragraphs (b)(1) through (5) of this section (see [10 U.S.C. 3744\(a\)\(17\)](#)).

(g) *Costs* which may be unallowable under 31.205-47, including *directly associated costs*, shall be segregated and accounted for by the contractor or subcontractor separately. During the pendency of any *proceeding* covered by paragraph (b) and paragraphs (f)(4) and (f)(7) of this subsection, the *contracting officer* shall generally withhold payment of such *costs*. However, if in the best interests of the Government, the *contracting officer* may provide for conditional payment upon provision of adequate security, or other adequate assurance, and agreement by the contractor or subcontractor to repay all *unallowable costs*, plus interest, if the *costs* are subsequently determined to be unallowable.

Parent topic: 31.205 Selected costs.