

ACQUISITION LETTER

This Acquisition Letter is issued under the authorities of the Senior Procurement Executives of DOE and NNSA. It is intended for use by procurement professionals of DOE and NNSA, primarily Contracting Officers, and other officials of DOE and NNSA that are involved in the acquisition process. Other parties are welcome to its information, but definitive interpretations of its effect on contracts, and related procedures if any, may only be made by DOE and NNSA Contracting Officers.

*This AL was previously issued with an incorrect number and has been renumbered appropriately.

Subject: Determining if an activity is a FAR 31.205-44 training and education activity (and consequently rendering the overtime costs caused by the activity specifically unallowable); and Managing all overtime costs

References:

FAR 31.205-44—Training and education costs
FAR 22.103—Overtime

When is this Acquisition Letter (AL) effective?

This AL is effective upon issuance.

When does this AL Expire?

This AL remains in effect until cancelled.

Who Is the Intended Audience For this AL?

Department of Energy (DOE) and National Nuclear Security Administration (NNSA) Contracting Officers are the audience for this AL.

Who is the Point of Contact for this AL?

DOE Contracting Officers may contact Michael Righi of the Contracts and Financial Assistance Policy Division, Office of Policy, Office of Acquisition and Project Management by phone at (202) 287-1337 or by email to Michael.Righi@hq.doe.gov. NNSA Contracting Officers may contact Kenneth G. West of the Non-M&O Policy and Oversight Branch by phone at (505) 845-4337.

Need More Information on ALs?

Visit the website at <http://energy.gov/management/office-management/operational-management/procurement-and-acquisition/guidance-procurement> for information on Acquisition Letters and other policy issues.

What is the Purpose of this AL?

This AL discusses and provides implementing guidance for prudently managing overtime costs for training and explicitly addresses overtime costs for training and education.

What Types of Contracts Are Affected by this AL?

This AL applies to all contracts.

What is the Background of this AL?

FAR Subpart 31.2 covers cost principles in contracts with commercial organizations. It stipulates a cost is allowable only when it complies with all of the five requirements listed in FAR 31.201-2, which are reasonableness, allocability, CAS/GAAP, contract terms, and all of the other limitations in FAR Subpart 31.2. The limitations include the restrictions in the “Selected costs” discussed in FAR 31.205.

The selected costs in FAR 31.205 deal primarily with the issue of when costs are specifically unallowable. When the language in a discussion in FAR 31.205 states the “cost is unallowable” it means the cost is always unallowable. The converse is not true. When language in a discussion in FAR 31.205 states the “cost is allowable” it only means the cost is not specifically unallowable per that portion of that selected cost section. It does not mean the cost has met all of the five requirements listed in FAR 31.201-2 or even all of the requirements of other portions of that selected cost, that is, it does not mean the cost is always allowable.

FAR 31.205 does not cover every element of cost. When it does not, it requires contracting officers to determine allowability based on the principles and standards of FAR Subpart 31.2 and how FAR 31.205 treats similar or related costs. In some instances, case law may provide guidance on allowability as well. FAR 31.109 encourages advance agreements on costs to avoid unnecessary disputes.

FAR 31.205-44 is one of the FAR 31.205 selected costs. Its paragraph (a) states that an overtime cost incurred during training or education related to the field in which the employee is working or may reasonably be expected to work is specifically unallowable. (In addition to the FAR 31.205-44’s absolute ban on overtime costs for training or education, FAR 22.103 makes it clear that overtime costs in general merit special scrutiny. Contractors should normally not incur them, and contracting officers may normally not specify delivery or performance schedules that require them. In negotiating contracts, contracting officers should, consistent with the Government’s needs, attempt to negotiate prices without overtime premiums or obtain the requirements from other sources. If overtime is required, FAR 22.103 provides procedures to follow and approvals to obtain.)

When overtime costs are incurred for purposes other than training or education, and some training or education occurs as a side effect, the overtime costs are not specifically unallowable per FAR 31.205-44. Any portion of the overtime costs incurred solely for the purpose of FAR 31.205-44 training or education, however, would be specifically unallowable per FAR 31.205-44. As an example, assume a contractor conducts a 48 hour continuity of operations exercise or force on force exercise that requires guard service personnel to participate after standard shift hours. During the exercise employees gain knowledge that is related to the field in which the employees are working or may reasonably be expected to work. Continuity of operations exercises and force on force exercises are not generally

training as that term is used in the cost principle. The exercises are usually conducted to test operational procedures, not for the purposes of training or education, and therefore overtime costs are usually not specifically unallowable. (Any portion of the overtime costs incurred solely for the purpose of FAR 31.205-44 training or education, however, would be specifically unallowable per FAR 31.205-44.) This does not mean the overtime costs meet all of the five requirements listed in FAR 31.201-2, that is, it does not mean the overtime costs are necessarily allowable. The contracting officer should always analyze why the exercise could not be conducted during the employees' normal working hours to determine if the overtime costs are reasonable.

As a counter example, assume a contractor Radiation Technician who is a non-exempt employee is required to take training to maintain professional certification and the training is related to the field in which the employee is working. The employee's training or education costs are allowable, but any associated overtime costs are unallowable per FAR 31.205-44.

The FAR 31.205-44 cost principle recognizes a broad range of training and education costs as allowable costs, but it explicitly prohibits any associated overtime costs. A consequence of the combination of that broad allowance and explicit prohibition is overtime costs associated in any way to activities related to training and education must be carefully scrutinized.

What Guidance is included in this AL?

A cost is allowable only when it complies with all of the five requirements listed in FAR 31.201-2.

Contracting officers must take into account the purpose of an activity in determining if it is for FAR 31.205-44 training. If it is, overtime costs are not allowable. If it is not, overtime costs might be allowable if they meet all of the five requirements listed in FAR 31.201-2.

If overtime costs are incurred for purposes that are not for training or education but some training or education occurs as a side effect, the overtime costs are not specifically unallowable per FAR 31.205-44. If some portion of the overtime costs were incurred for the purpose of FAR 31.205-44 training or education, however, that portion would be specifically unallowable per FAR 31.205-44.

In all cases where disputes are possible, advance agreements are appropriate. See Chapter 31.4 of the DOE Acquisition Guide for guidance on advance agreements. Note, however, that FAR 31.109 mandates that in no event may an advance agreement make allowable a cost otherwise specifically disallowed under the FAR or DEAR.

In addition to being particularly aware of the prohibition on reimbursing overtime costs for training or education, contracting officers should also keep in mind that management and oversight of all overtime costs are fundamental contract formation and contract administration functions. FAR 22.103 states, "Contractors shall perform all contracts, so far as practicable, without using overtime, particularly as a regular employment practice, except when lower overall costs to the Government will result or when it is necessary to meet urgent program needs. Any approved overtime, extra-pay shifts, and multi-shifts should be scheduled to achieve these objectives."

If before overtime costs for FAR 31.205-44 training or education are incurred a contractor believes that training on overtime would lower the overall costs to the Government or is necessary to meet urgent program needs, it should submit a detailed cost benefit analysis and appropriate rationale to make the business case for the contracting officer to seek deviation authority and await a deviation approval. The business case must include an analysis of alternative approaches that the contractor could take, including training on regular time, that might possibly meet contract objectives and avoid training on overtime. If the contractor demonstrates to the contracting officer's satisfaction that overtime cost incurrence would significantly reduce the overall cost to the Government or is necessary to meet urgent program needs, the contracting officer may, at his or her discretion, consider a contractor's request for a deviation. Absent clear documentation that use of overtime would save money or a driver that makes meeting program needs not possible without the use of overtime, the contracting officer must reject the request. If deemed appropriate, the contracting officer may forward a request for deviation to headquarters for approval. (FAR deviation processing is discussed in the DOE Acquisition Guide's Chapter 1.) If it is approved, before implementing it the contracting officer must enter into an advance agreement that clearly identifies the overtime costs for FAR 31.205-44 training or education that will not be specifically unallowable under the contract. In considering a contractor's request for a deviation, the contracting officer should consider the clear public policy that overtime costs for training or education are in almost all cases not in the public interest and that all overtime costs should generally be avoided. The contracting officer should reject any contractor's request that does not clearly and convincingly demonstrate that training on overtime would significantly reduce the overall cost to the Government or is necessary to meet program needs.

Questions and Answers:

Question 1: Does the AL address the allowability of cost incurred while on travel?

Answer 1: No, this AL does not address the allowability of costs incurred while on official travel. Their allowability is governed by the cost principles specifically applicable to travel and the five requirements listed in FAR 31.201-2 in general.

Question 2: What types of contracts are affected by this AL?

Answer 2: This AL applies to all contracts, for example, M&O contracts and non-M&O contracts, fixed-price type contracts (for recognition of costs in pricing) and cost-reimbursement type contracts (for allowing costs), etc.

Question 3: What if behind a door to a machinery room there is a piece of equipment that needs emergency repair and before entering the room the repair worker must read a plaque on the wall beside the door that lists 10 things not to do?

Answer 3: The short answer that would apply in almost all cases is the repair worker's reading the plaque is not "training or education related to the field in which the employee is working or may reasonably be expected to work." The plaque lists specific information related to the piece of equipment. The long answer that would apply in all cases is if the repair worker is already on legitimate overtime when the emergency occurred (that is, his or her overtime costs would have been allowable absent the emergency), the overtime costs incurred while reading the plaque will not be specifically unallowable—they will not be incurred for the purposes of training or education, so they will not be specifically unallowable per FAR 31.205-44. If the repair worker is not already on legitimate overtime when the emergency occurs and the emergency requires the repair worker to work overtime, once again reading the plaque will not be the "training or education related to the field in which the employee is working or may reasonably be expected to work" that the cost principle at FAR 31.205-44 precludes overtime costs for. So the overtime costs incurred while reading the plaque will not be specifically unallowable.

Question 4: If incurring overtime costs for FAR 31.205-44 training and education were clearly the most cost effective way to accomplish the contract work, would the costs still be unallowable?

Answer 4: Yes, even if incurring overtime costs for FAR 31.205-44 training and education were clearly the most cost effective way to accomplish the contract work, the costs would still be unallowable. The costs are specifically unallowable per FAR 31.205-44 and are treated exactly as are all of the other specifically unallowable costs per FAR 31.205 are treated. The costs of alcoholic beverages, bad debts, lobbying, contributions, fines, goodwill, and entertainment are some of the other specifically unallowable costs. If before overtime costs for FAR 31.205-44 training or education are incurred a contractor thinks that training and education on overtime would lower the overall costs to the Government or is necessary to meet urgent program needs, it should submit a detailed cost benefit analysis and appropriate rationale to make the business case for the contracting officer to seek deviation authority and await a deviation approval.

Question 5: Do contractor labor policies and compensation practices, including those in labor-management agreements, affect the allowability of overtime costs for FAR 31.205-44 training and education?

Answer 5: No, contractor labor policies and compensation practices, including those in labor-management agreements, do not affect the allowability of overtime costs for FAR 31.205-44 training and education. Per FAR 22.101-2, contractor labor policies and compensation practices are not acceptable bases for allowing costs in cost-reimbursement type contracts or for recognizing costs in pricing fixed-price type contracts. Per FAR 31.205-6 (b)(1), costs of compensation established under “arm’s length” labor-management agreements must be otherwise allowable to be reimbursed by the Government. Overtime costs for FAR 31.205-44 training and education are expressly unallowable.

Question 6:

If in order both to conduct necessary training and to maintain continual services under a contract (such as a contract requiring some Protective force officers always to be on post) the officers on post were required to work overtime while other officers attended training, could the overtime costs incurred by the officers on post be allowable?

Answer 6: Yes, the overtime costs incurred by those on post could be allowable. They are not expressly unallowable. Consequently, the overtime costs would be allowable if they met all of the five requirements for allowability listed at FAR 31.201-2.