Department of Energy **No. AL 2016-06**
Acquisition Regulation **August 04, 2016**

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.

Subject: **Provisional Reimbursement and Allowability of Costs Associated with Whistleblower Actions**

References:
FAR 3.908 (Pilot Program)
FAR Subpart 31.2 Contracts With Commercial Organizations
FAR 31.205-47 Costs Related to Legal and Other Proceedings
DEAR 931.205-47(h) Costs related to legal and other proceedings
DEAR 970.3102-05-47(h) Costs related to legal and other proceedings
Acquisition Guide Chapter 70.31A - Costs Associated with Whistleblower Activities

When Is this Acquisition Letter (AL) Effective?
This AL is effective immediately upon issuance.

When Does this AL Expire?
This AL remains in effect until superseded or canceled.

Who Is the Intended Audience For this AL?
Department of Energy (DOE) and National Nuclear Security Administration (NNSA) Contracting Officers who are responsible for determining the provisional reimbursement of and the allowability of Whistleblower proceeding costs (including judgement, settlement, and related costs) are the audience for this AL. Contracting Officers should coordinate the matters covered by this AL with cognizant Departmental Counsel (local counsel or, for matters subject to 10 C.F.R. 719, as defined in that Part).

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 Management at (202)287-1337, or at michael.righi@hq.doe.gov. NNSA Contracting Officers may contact Kenneth West, Acquisition Management Division at (505)845-4337, or at kenneth.west@nnsa.doe.gov. DOE counsel may contact Eric Mulch, GC-61, at (202)287-5746 or at eric.mulch@hq.doe.gov. NNSA counsel may contact Lisa Daley-Mangi at (202)586-2647, or at lisa.mangi@nnsa.doe.gov.

Need More Information on ALs?
Visit 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 provides guidance to Contracting Officers on applying FAR 31.205-47 and DEAR 931.205-47(h) to determine 1) the appropriateness of provisional reimbursement of whistleblower proceeding costs (including judgement, settlement, and related costs) and 2) the allowability of whistleblower proceeding costs. Note that DEAR 970.3102-05-47 Costs related to legal and other proceedings provides that the cost principle at DEAR 931.205-47(h) is applicable to M&O contracts.

What Types of Contracts Are Affected by this AL?
This AL affects all contracts, management and operating (M&O) contracts and non-M&O contracts. Specifically, it affects cost reimbursement contracts and any other contracts that provide for either reimbursement of contractor whistleblower proceeding costs or consideration of proposed whistleblower proceeding costs.

What is the Background?
There are multiple avenues by which DOE contractor employees may raise technical, safety, and other concerns. Associated with these avenues are various government-wide and DOE-specific whistleblower protection programs designed to protect contractor employees from reprisal for engaging in protected activity, such as raising safety concerns. Both the DEAR and FAR address varying contractor whistleblower proceeding costs. DEAR 931.205-47(h) addresses costs associated with most avenues available to DOE contractor employees. The types of employee whistleblower actions covered by the DEAR include the following:

- Action under 10 C.F.R. Part 708. The DOE Contractor Employee Protection Program at 10 C.F.R. Part 708 (Part 708) provides procedures for resolving complaints by employees of DOE contractors alleging retaliation by their employers for disclosure of information concerning danger to public or worker health or safety, substantial violations of law, or gross mismanagement; for participation in Congressional proceedings; or for refusal to participate in dangerous activities.
- Action under 42 U.S.C. §5851. The Energy Reorganization Act (ERA), 42 U.S.C. § 5851, titled Employee protection, provides another potential option by which a contractor employee alleging employer retaliation may raise certain concerns to the Secretary of Labor, who investigates the alleged violation.
- Actions under whistleblower provisions of several different environmental statutes, including the Safe Drinking Water Act, 42 U.S.C. §§ 300j–9(i), the Federal Water Pollution Control Act, 33 U.S.C. § 1367, the Toxic Substances Control Act, 15 U.S.C. § 2622, the Solid Waste Disposal Act, 42 U.S.C. §6971, the Clean Air Act, 42 U.S.C. § 7622 and Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §9610. Covered employees may raise certain concerns to the Secretary of Labor, who investigates the alleged violation.
- Action under Title 41 U.S.C. section 4705. This provides an avenue for contractor employees to report to the DOE Inspector General allegations of contractor reprisal for disclosure of

information relating to a substantial violation of law related to a contract to a Member of Congress, an authorized official of an executive agency or the Department of Justice.

- Any action filed by a contractor employee in Federal or state court for redress of a retaliatory act by the contractor employer.

For ease of reference, because the DEAR 931.205-47(h) addresses multiple types of whistleblower proceedings, this AL shall collectively refer to the above-listed whistleblower actions as "**whistleblower claims.**" Costs associated with whistleblower proceedings are addressed by DEAR 931.205-47(h). Again, note that DEAR 970.3102-05-47 Costs related to legal and other proceedings, provides that the cost principle at DEAR 931.205-47(h) is applicable to M&O contracts valued at over $5M and must be included in the contract's cost reimbursement subcontract valued at over $5M.

In addition to the whistleblower claims (see above), the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013 (Pub. L. 112-239, enacted January 2, 2013) mandates creation of a pilot program titled "Pilot Program for Enhancement of Contractor Employee Whistleblower Protections" (hereinafter "**Whistleblower Pilot Program**"). The Whistleblower Pilot Program allows DOE contractor employees to raise whistleblower claims to the DOE Office of the Inspector General. **Whistleblower Pilot Program claims are subject to different cost reimbursement rules than the whistleblower claims described above. The Whistleblower Pilot Program is implemented at FAR 3.908 and associated costs are addressed at FAR 31.205-47.** The FAR prescribes inclusion of the Whistleblower Pilot Program clause (FAR 52.203-17, Contractor Employee Whistleblower Rights and Requirement to Inform Employees of Whistleblower Rights) in all solicitations and contracts that exceed the simplified acquisition threshold.

What is the Guidance contained in this AL?
The following sections describe the applicable cost principles and additional Departmental guidance governing provisional allowability and cost allowability for whistleblower claims and Whistleblower Pilot Program claims. Contracting officers, in consultation with Department Counsel, must consider contractors' requests for provisional reimbursement of whistleblower proceeding costs and requests for allowability determinations on a case-by-case basis.

ALLOWABILITY

Costs related to whistleblower claims or Whistleblower Pilot Program claims are allowable when the costs comply with the specific requirements set forth in the FAR, the DEAR, and the costs are determined to be allowable under FAR 31.201-2, Determining Allowability. Allowability for particular costs are outlined below along with the authority.

Whistleblower Claims After an Adverse Decision
For whistleblower claims, contracting officers may not reimburse a contractor for "any legal fees or expenses incurred with respect to a complaint" after "an adverse determination on the merits" by the Director of DOE's Office of Hearings and Appeals (OHA) under Part 708,1 or by a Department of

1Pursuant to 10 C.F.R. § 708.30, after a hearing on the allegations, the OHA Administrative Judge issues an initial agency decision. Pursuant to 10 C.F.R. § 708.33, a party may appeal the initial agency decision to the OHA Director. If the OHA Director issues a final agency decision adverse to a DOE contractor or subcontractor, 42 U.S.C. § 5853(1) prohibits DOE

Labor Administrative Law Judge under the ERA.2 42 U.S.C. § 5853(1). Contracting officers may similarly not allow reimbursement of associated costs following "an adverse final judgment by any State or Federal court . . . for wrongful termination or retaliation" for whistleblowing protected by the ERA or comparable state law. 42 U.S.C. § 5853(2).

Whistleblower Pilot Program Claims After an Adverse Decision

For Whistleblower Pilot Program claims, contracting officers may not reimburse a contractor for costs incurred in connection with a Pilot Program proceeding where the contractor or subcontractor is required to pay a monetary penalty or take corrective action. FAR 31.205-47(b)(2).

Whistleblower Pilot Program Claims and Whistleblower Claims After Reversal of an Adverse Decision

For whistleblower claims and Whistleblower Pilot Program claims, if an adverse whistleblower decision is reversed on appeal, the contracting officer may conclude that the costs of the proceeding, including costs of appeal, are allowable. However, in making that determination, the contracting officer should review the materials from the administrative or judicial proceeding, especially the adverse decision and the decision reversing it. A reviewing tribunal may reverse a decision for any number of reasons, some but not all of which may involve the merits of the case. For example, an appellate court may decide that a plaintiff is barred from bringing suit because the statute of limitations has expired. That outcome does not necessarily cast doubt on the original finding of wrongful conduct. In such a case, the contracting officer may take account of, and place some weight on, the trial court's finding regarding the defendant's conduct. Contracting officers must consult with Department Counsel in considering costs associated with whistleblower proceeding appeal after the reversal of an adverse decision.

Whistleblower Claims After Disposition by Consent or Compromise ("settled")

For whistleblower claims, the Contracting Officers must determine allowability of costs only "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." DEAR 931.205-47(h)(2)(iii). One of the primary considerations in determining allowability in proceedings that are disposed of by consent or compromise, in other words "settled," is whether the contractor in fact retaliated against a whistleblower. The contracting officer must review the available evidence, stipulations in the settlement agreement and other relevant information, including contractor and employee submissions in the whistleblower action, and consult with Department Counsel in order to assess the likelihood that the contractor violated federal policy against whistleblower reprisals. If the contracting officer determines that the contractor more likely than not violated applicable law or policy, the costs associated with the related whistleblower proceeding may not be allowed. The contracting officer's decision must be in writing.

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contractor or subcontractor reimbursement for legal fees and expenses incurred after issuance of the OHA Director's decision.

2 Pursuant to DOL regulations, upon consideration of all relevant information collected during investigation of the ERA whistleblower claim, the DOL Assistant Secretary issues written findings regarding the retaliation allegation and, if appropriate, an order providing relief for the complainant. 29 C.F.R. § 24.105(a)(1). Appeal of the findings/order of the Assistant Secretary is made to a DOL Administrative Law Judge (ALJ). 29 C.F.R. § 24.105(a)(1). If a DOL ALJ issues a decision that is adverse to a DOE contractor or subcontractor, Title, 42 U.S.C. § 5853(1) prohibits reimbursement of legal fees and expenses incurred subsequent to the ALJ's decision on the ERA whistleblower claim.

As with all costs, the contractor is responsible for accounting for whistleblower proceeding costs appropriately and for maintaining records, including supporting documentation, adequate to demonstrate that costs claimed have been incurred, are allocable to the contract, and comply with applicable FAR and DEAR cost principles. FAR 31.201-2(d). In assessing costs, the contracting officer must also request a description of all claims and procedural actions at issue, as well as all filings in the proceeding and the executed or proposed settlement. The contracting officer must inform the contractor that failure to expeditiously provide the requested information may result in a contracting officer determining that costs are unallowable. The contracting officer should also consider contractor policies, practices and historical performance in addressing whistleblower issues in determining cost allowability.
The contracting officer should request additional information as necessary. The requests, if any, should not become a full-dress litigation on the merits of the whistleblower's claims and should not normally require a contractor to develop extensive additional evidence regarding the underlying events. The contracting officer will evaluate the likelihood that the contractor engaged in prohibited reprisals with an objective view of the facts.

Whistleblower Pilot Program Claims After Disposition by Consent or Compromise (Settled)
For Whistleblower Pilot Program claims, FAR 31.205-47(c)(2)(ii) and (e)(3) provide that the Department may reimburse contractors for up to 80% of costs related to settled Whistleblower Pilot Program claims where the contracting officer, in consultation with Department Counsel, has determined that there was "very little likelihood that the claimant would have been successful on the merits." The contracting officer's decision must be in writing. In determining whether there was very little likelihood that the claimant would have been successful on the merits, contracting officers must adhere to the following two principles:

First, because the contracting officer's decision must be based on an assessment of the facts of the claim, the contracting officer, in consultation with Department Counsel, must request that the contractor submit all necessary information to assist the contracting officer's decision making. Necessary information includes a written rationale for the contractor's assertion that the plaintiff had very little likelihood of success on the merits, including specific and detailed supporting information. The contractor's written rationale must include a description of all claims and procedural actions in the case, copies of all filings and associated pre- or post-Complaint demand letters, and the settlement agreement or proposed settlement agreement. The contractor should be permitted to submit any other information it desires. The contracting officer may request any additional information that he or she deems necessary to evaluate whether the claim has very little likelihood of success on the merits, including motions for summary judgment and responses to such motions. The contractor is solely responsible for ensuring that it submits in a timely manner all information that the contracting officer requests. If the contractor does not fulfill this responsibility, the contracting officer may, at their discretion, elect not to conclude there was "very little likelihood that the claimant would have been successful on the merits."

Second, in the contracting officer's determination whether a claim has very little likelihood of success on the merits, the contracting officer, in consultation with Department Counsel, is to examine claims with an objective view of the facts surrounding them. Settlement costs may be determined to be allowable where an objective review of the claim results in a determination that the claim had very little likelihood of success on the merits. Some settlements are appropriate and prudent because, as a matter of fact, it is unlikely that the plaintiff's allegations are true but, for reasons other than the actual, factual merits of the case, there is a risk that a jury might reach a verdict in the plaintiff's favor. While

exogenous circumstances not related to the actual facts of a claim or the actual conduct of the contractor may support a decision to settle a claim, such circumstances are not relevant to determining whether the contractor engaged in prohibited retaliatory conduct and should not be considered in the objective review of the merits of a claim under this guidance.

SIGNIFICANT MATTERS

For all whistleblower matters under contracts covered by 10 CFR part 719 (i.e., all management and operating contracts; other cost reimbursement contracts exceeding $100,000,000; and contracts exceeding $100,000,000 that include cost reimbursable elements exceeding $10,000,000 -- see 10 CFR 719.3), Department Counsel should inform contractor counsel that the Department will view a whistleblower claim and/or a Whistleblower Pilot Program claim as a "significant matter" as that term is defined in 10 CFR 719.2, without regard to whether legal costs are expected to exceed $100,000. Therefore, staffing and resource plan requirements set forth in 10 CFR 719.15 and 719.16 shall apply to whistleblower claims and Whistleblower Pilot Program claims, without regard to the anticipated defense costs associated with the claims. In addition, Department Counsel are advised that the requirement set forth in 10 CFR 719.52 regarding consultation with the General Counsel regarding significant matters also applies to whistleblower claims and Whistleblower Pilot Program claims.

PROVISIONAL REIMBURSEMENT

The contracting officer, in conjunction with Department Counsel, must consider all contractor requests for provisional reimbursement of whistleblower proceeding costs on a case-by-case basis.

Whistleblower Claims

For whistleblower claims, DEAR 931.205-47(h)(2)(i) provides that a contracting officer "[m]ay authorize reimbursement of costs on a provisional basis, in appropriate cases." Before considering a contractor's request for provisional reimbursement, contracting officers, in coordination with Department Counsel, shall require the contractor to submit a written justification supporting its request for provisional reimbursement that includes a thorough explanation of the facts underlying the proceeding. Contracting officers, with the assistance of Department Counsel, must consider facts surrounding the underlying whistleblower claim(s) in determining the appropriateness of provisional reimbursement. For example, the contracting officer must weigh a contractor's history of violations of Federal law or policies prohibiting reprisal against whistleblowers in deciding whether to permit provisional reimbursement. The contracting officer must also request an explanation as to how legal costs will be effectively managed where such a description has not already been submitted in connection with a 10 CFR part 719 significant matter determination. A contractor's past compliance with Legal Management Plans, if applicable, should also be considered.

Whistleblower Pilot Program Claims

For Whistleblower Pilot Program claims, FAR 31.205-47(g) provides that contacting officers are to generally avoid provisional reimbursement, but provides that provisional reimbursements may be made "if in the best interests of the Government" and the contractor provides "adequate security, or other adequate assurance, and agreement by the contractor to repay all unallowable costs, plus interest, if the costs are subsequently determined to be unallowable." The contracting officer should review the contractor's history in addressing overpayments and obligations to the government. Exemplary

contractor management of overpayments and obligations may be viewed as adequate assurance that the contractor will repay costs later determined to be unallowable.

OFFICE OF THE GENERAL COUNSEL COORDINATION

As provided above, contracting officers must coordinate whistleblower cost allowability decisions with Department Counsel. In all instances Department Counsel should consult the GC HQ Whistleblower POC before providing advice regarding provisional and final reimbursement of costs associated with whistleblower proceedings. The GC HQ Whistleblower POC can be reached at GCWBPOC@hq.doe.gov.