FAR Case # 85-64 : [illegible] 1/21/86

Subject: Company-furnished automobiles

Response Number	Date Received	Date of Letter	Commentor	Comments
85-64-01	1/6/86	12/27	The Library of Congress Procurement and Supply Division	85-63 thru 85-68
85-64-02	1/9/86	1/6	Pennsylvania Avenue Development Corporation	
85-64-03	1/9/86	1/6	Export-Import Bank of the United States	
85-64-04	1/15/86	1/10	American Defense Preparedness Association	85-63 thru 85-68 and 85-71
85-64-05	1/15/86	1/9	Mr. Ludwig Wittgenstein	
85-64-06	1/16/86	1/4	Federal Home Loan Bank Board	85-63 thru 85-68
85-64-07	1/16/86	1/10	National Science Foundation	85-63 thru 85-68
85-64-08	1/21/86	1/15	National Endowment for the Humanities	85-63 thru 85-68
85-64-09	1/22/86	1/15	Professional Services Council	
85-64-10	1/22/86	1/20	ARGO Systems	
85-64-11	1/22/86	1/20	Machinery Allied Products Institute	85-66-10
85-64-12	1/22/86	1/21	CBEMA	85-63 thru 85-68

Legend:
CONC: Concur
N/A: Not Applicable
NC: No Comments
C: Comments
FC: Forthcoming Comments

Published FR: 50FR 51776
Date: 12/19/85

To: CAAC/DARC
Date:

FAR Case # 85-64 : Public Comments Dec 1/21/86

Subject: Company-furnished automobiles

Response Number	Date Received	Date of Letter	Commentor	Comments
85-64-13	1/22/86	1/21	Council of Defense and Space Industry Associations	85-63 thru 85-68 and 85-73
85-64-14	1/23/86	1/16	United States Arms Control and Disarmament Agency	85-63 thru 85-68 and 85-73
85-64-15	1/23/86	1/17	United States Information Agency	85-63 thru 85-68
85-64-16	1/23/86	1/17	Inter-American Foundation	85-63 thru 85-68 85-71; 85-53; 85-43 and 85-73
85-64-17	1/23/86	1/21	Lockheed Corporation	85-63 thru 85-68 and 85-73
85-64-18	1/23	1/21	Litton Industries	85-63; 85-64 and 85-66
85-64-19	1/23/86	1/17	FMC Corporation	85-63; 85-66 and 85-68
85-64-20	1/23/86	1/17	Alan V. Washburn	
85-64-21	1/23/86	1/16	Hayes International Corporation	
85-64-22	1/24/86	1/21	Panama Canal Commission	85-63 thru 85-68 85-73; 85-43; 85-53; 85-54; and 85-71
85-64-23	1/24/86	1/21	U.S. Department of Housing and Urban Development	85-63 thru 85-68
85-64-24	1/24/86	1/20	Control Data Corporation	85-63 thru 85-68

Legend: CONC: Concur
N/A: Not Applicable
NC: No Comments
C: Comments
FC: Forthcoming Comments

Published FR: 50FR 51776
Date: 12/19/85

To: CAAC/DARC
Date:

FAR Case # 85-64 ; Public Meeting Date 1/21/86

Subject: Company-furnished automobiles

Response Number	Date Received	Date of Letter	Commentor	Comments
85-64-25	1/24/86	1/21	American Bar Association	85-63; 85-64; 85-66; 86-67; and 85-68
85-64-26	1/24/86	1/17	Professional Services Management Association	85-63 thru 85-68
85-64-27	1/24/86	1/23	Department of Defense Office of the Inspector General	
85-64-28	1/23/86	1/16	Fluor Technology, Inc.	
85-64-29	1/09/86	1/03	Armed Forces Communications and Electronics Association	85-63 thru 85-68

Legend: CONC: Concur
N/A: Not Applicable
NC: No Comments
C: Comments
FC: Forthcoming Comments

Published FR: 50FR 51776
Date: 12/19/85

To: CAAC/DARC
Date:

85-64-01
1 - 2

THE LIBRARY OF CONGRESS
PROCUREMENT AND SUPPLY DIVISION
LANDOVER CENTER ANNEX

1701 Brightseat Road
Landover, Maryland 20785

Administrative Officer: 287-8605
Contracts Section: 287-9541
Procurement Section: 287-8717
Materiel Section: 287-8758

December 27, 1985

Ms. Margaret A. Willis
FAR Secretariat (VRS)
General Services Administration
Office of Acquisition Policy
18th and F Streets, N.W. Room 4041
Washington, D.C. 20405

Ref: FAR Case 85-63 through 85-68

Dear Ms. Willis:

This letter is in response to your request for our consideration on a proposed revision to the Federal Acquisition Regulation that amends Part 31.

Our review has not produced any substantive improvement to the regulation as it is written, and implementation would seem to pose no problems for us.

Thank you for this opportunity.

Sincerely yours,

F. D. Hedrick, Chief
Procurement & Supply Division

84-64-02

PENNSYLVANIA AVENUE DEVELOPMENT CORPORATION

Suite 1220 North
1331 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-1703
202/724-9091

Henry A. Berliner, Jr.
Chairman

M. J. Brodie
Executive Director

January 6, 1986

FAR Secretariat (VRS)
General Services Administration
18th & F Streets, NW
Room 4041
Washington, DC 20405

Re: FAR Case 84-64

Gentlemen:

The Pennsylvania Avenue Development Corporation supports the change proposed in the above referenced FAR case.

Sincerely yours,

M.J. Brodie
Executive Director

MBS:MJB:ky

85-64-C

EXIMBANK

January 6, 1986

Ms. Margaret A. Willis
FAR Secretariat (VRS)
General Services Administration
Office of Aquisition Policy
18th & F Streets, N.W.
Room 4041
Washington, D.C. 20405

Subject: FAR Case 85-64

Dear Ms. Willis:

The Export-Import Bank of the United States concurs with the proposed change to FAR 31.205-6 and 31.205-46 concerning company-furnished automobiles.

Sincerely

Helene H. Wall
Administrative Officer

RECEIVED
JAN - 9 1986

85-64-04

AMERICAN DEFENSE PREPAREDNESS ASSOCIATION
DEDICATED TO PEACE WITH SECURITY THROUGH DEFENSE PREPAREDNESS

ROSSLYN CENTER, SUITE 900, 1700 NORTH MOORE STREET, ARLINGTON, VIRGINIA 22209
703-522-1820

Founded 1919

January 10, 1986

Ms. Margaret A. Willis
FAR Secretariat (VRS)
General Services Administration
18th & F Streets NW (Room 4041)
Washington, DC 20405

Dear Ms. Willis:

In accordance with your letters of December 23 and 25, 1985, we have reviewed the proposed revisions of FAR cost principles conforming with a number of provisions in section 911 of Public Law 99-145, the Department of Defense Authorization Act., 1986. (FAR cases 85-63/68 and 85-71.)

We concur in the adoption of all the proposed revisions, except that included in case 85-67, concerning "executive lobbying costs," which we find to be ambiguous, as described below.

As proposed, FAR 31.205-52 omits provisions from the statute (10 USC 2324(f)(1)(E)) and the "background" statement at page 51779 of the Federal Register, December 19, 1985.

The statute calls for regulatory definition of certain unallowable costs, including "executive lobbying costs:"

> "(E) Actions to influence (directly or indirectly) executive branch action on regulatory and contract matters (other than costs incurred in regard to contract proposals pursuant to solicited or unsolicited bids).

FAR 31.205-52 omits the material in the second parenthesis. The effect of the omission is to ignore the propriety of contractors attempting to influence contracting officers concerningthe merits of their "contract proposals". It seems to us that the language of 31.205-52 ("on any basis other than the merits") does not go far enough to conform to the language and intention of the statute, because it is limited to "contract matters". The latter term presupposes the existence of a definitive contract, whereas the statute permits "actions to influence" decisions concerning "contract proposals".

The ambiguity we see in the proposed revision could be

cleared up by incorporating the material in the second parenthesis from the statute.

For purposes of clarity, we think that 31.205-52 should incorporate the following from the Federal Register "background" statement:

> "Proper communication regarding policy matters are helpful and in many cases indispensable to Government decision makers and costs thereof should be allowable."

We appreciate the opportunity to review the proposed FAR revisions.

Sincerely,

William E. Eicher
Major General, US Army (Ret.)
Vice President and Director
Advisory Service

WEE:meh

85-64-05

Mr. Ludwig Wittgenstein
99 Einstein Drive
Princeton, New Jersey 08540
January 9, 1986

Ms. Margaret A. Willis
General Services Administration
FAR Secretariat (VRS)
18th & F Streets, NW
Room 4041
Washington, DC 20405

Dear Ms. Willis:

I wish to comment as an interested private party on the new rule proposed under FAR Case 85-64.

The proposed language states: "Costs made specifically unallowable under any subsection of 31.205 are not allowable under any other section or subsections of Subpart 31.2" While this proposed rule is an understandable reaction to the frustrations caused by the difficulty of writing and administering rules covering the complex and constantly changing universe of contractor cost, it is unnecessary at best and potentially harmful at worst. Let me try to explain this judgment by first outlining how the problem apparently addressed by this language is currently dealt with and then describing the difficulties that could arise under it.

The problem which the Councils' proposed language attempts to deal with is the occasional "ambiguity" of the cost principles. By this I mean the fact that a particular contractor expenditure can sometimes be classified under several cost categories, one of which may be allowable, the other unallowable. It should be realized at the outset that it is probably impossible to construct a body of cost principles of any substantial size that is totally free of ambiguity in this sense because of the fallibility of the rule-makers themselves, the vast array of contractor expenditures to be covered, and because of the lack of precision in the very language from which such rules must be constructed. So the problem is a real one. In practice, it has been handled by assuming that the more specific language governs. To give a very crude example, the specific prohibition against the recovery of product advertising expenditures has overriden the possible argument that such costs are recoverable because they fall under the category of "selling" expense which is a generally allowable cost. In those instances where it is genuinely unclear which guiding rule is more specific, the cost in question (if it is significant in magnitude and recurring in nature) is then elevated to the rule-makers so that its status may be clarified in the cost principles themselves. This set of procedures has been both effective and appropriate.

With this as background, let us consider the Councils' proposed language. It is possible that the Councils have themselves attempted to formulate the principle which I have tried to describe above, namely, that the more specific language governs. Certainly the use of the word "specifically" in the first sentence and the illustration chosen--in which the clearly more specific language governs--suggests such an intent. What I fear, however, is that the Councils have not gotten the matter quite right and that their proposed language (if implemented) could lead to frivolous arguments and perhaps even to the disallowanc of more cost than the rule-makers themselves ever really intended. The central difficulty is that the Councils' language only refers to one piece of the judgment that must be made in cases where several cost principles apply, namely, the

analysis of a particular cost vis-a-vis the relevant cost principle that might render it unallowable, whereas the process should be one of judging which of the relevant cost principles provides the more specific--and hence governing--guidance regarding the status of the expenditure in question. As a consequence, it is perfectly conceivable that, under a literal interpretation of the Councils' proposed language, costs could be automatically disallowed as falling "specifically" under an unallowable category of cost even though elsewhere in the cost principles there is language of equal or greater specificity that indicates the cost in question should be allowable. This is not, I believe, a purely hypothetical situation. Consider, for example, the following case involving one of the cost principles cited in the Councils' illustration.

Imagine a contractor who "donates" an employee's services during business hours for some time period to a community service organization such as the United Way. It is hard to avoid concluding that the salary and fringe benefits of the employee in question during that period constitute a contribution to the United Way and are as "specifically" unallowable under the current language of FAR 31.205-8 as the donation to a scholarship fund discussed in the Councils' illustration. However, the Councils have also proposed new language on "public relations" in the Federal Register of February 21, 1985 which would make the "costs of participation in community service activities" specifically allowable. Assume for the sake of argument that this proposed language becomes final as is and that FAR 31.205-8 also remains unchanged. Given all this, the cost we are considering, namely, that of a "donated" employee, would, on any reasonable meaning of the word "specific", be both "specifically" unallowable under one cost principle (31.205-8) and "specifically" allowable under another (31.205-1). In the absence of the Councils' proposed language under 31.201-2, I believe that this situation would be resolved by concluding that the language of 31.205-1 is more "specific", that is, more nearly and directly addresses the kind of cost in question, and hence should govern. The cost would be allowed . However, if the Councils' proposed language under 31.201-2 were also the rule, this outcome would at the very least be in doubt since it is unquestionably true that any contribution is specifically unallowable and the Councils' proposed language seems to make this alone decisive.

Let me conclude by first summarizing what has unfortunately been a rather lengthy argument and then offering a few suggestions. The Councils' proposed rule subtly but significantly misstates the decision process that should apply when several cost principles seem relevant to a disputed contractor expenditure. That process should turn on a weighing of the language of all the relevant rules and a choice of the guidance offered in the rule which seems to most directly address the cost at issue. The Councils' language, on the other hand, suggests that the only determination that need be made in such cases is whether the cost in question is "specifically" unallowable under any of the relevant cost principles. Given a perfect body of cost principles, to be sure, the Councils' proposed language would do no harm. For in such a perfect world all possible conflicts between cost principles would have been foreseen and ironed out (as perh the Councils will yet do in the case of the example we have cited above), and there would be no costs that are "specifically" unallowable under one rule and "more specifically" allowable under another. The point, however, is that such perfection may not be obtainable and is probably becoming more, not less, reachable as the rules are expanded to cover a longer and longer list of costs. In the real world, then, the Councils' proposed language could conceivably cause real mischief.

I believe, therefore, that the Councils would be well advised to withdraw the proposed language under 31.201-2(d), and simply let the allowability of "ambiguous" costs be determined as it has always been. However, should the Councils judge this course of action to be politically or otherwise unacceptable, then at least the language under the proposed new paragraph (d) should be altered to make clear that the judgment on the allowability of the kind of cost at issue here is not one considering only whether the cost falls under some unallowable category but rather one of considering which of the relevant cost principles comes closest to catching the essence of the cost at issue.

I appreciate the opportunity to comment on the Councils' proposal on this interesting matter, and I trust that my remarks will be taken into account in the Councils' choice of a final course of action.

Yours,

Ludwig Wittgenstein

Ludwig Wittgenstein

85-64-06

Federal Home Loan Bank Board

1700 G Street, N.W.
Washington, D.C. 20552
Federal Home Loan Bank System
Federal Home Loan Mortgage Corporation
Federal Savings and Loan Insurance Corporation

JAN 14 1986

Ms. Margaret A. Willis
FAR Secretariat (VRS)
General Services Administration
18th and F Streets, NW.
Room 4041
Washington, D.C. 20405

Dear Ms. Willis:

The Federal Home Loan Bank Board has reviewed the proposed changes which amends the following:

a. FAR 31.201-2, concerning unallowable costs under FAR 31.205. (FAR Case 85-63)

b. FAR 31.205-6 and 31-205-46, concerning company - furnished automobiles. (FAR Case 85-64)

c. FAR 31.205-14, concerning implementation of Congressional direction regarding the cost of membership in social, dining, and country clubs. (FAR Case 85-65)

d. FAR 31.205-33, concerning costs of litigating appeals against the Government. (FAR Case 85-66)

e. FAR 31.205-52, concerning executive lobbying costs. (FAR Case 85-67)

f. FAR 31-205-51, concerning alcoholic beverage costs. (FAR Case 85-68)

We have no problem nor comments on the changes as shown.

Sincerely,

Richard L. Petrocci
Director
Administration Office

RECEIVED
JAN 16 1986

85-64-07

NATIONAL SCIENCE FOUNDATION
WASHINGTON, D.C. 20550

January 10, 1986

Ms. Margaret A. Willis
FAR Secretariat (VRS)
General Services Administration
18th & F Streets, N.W.
Room 4041
Washington, D.C. 20405

Dear Ms. Willis:

The National Science Foundation supports the FAR changes proposed in your letter of December 23, 1985 as follows:

a. FAR Case 85-63;
b. FAR Case 85-64;
c. FAR Case 85-65;
d. FAR Case 85-66;
e. FAR Case 85-67; and
f. FAR Case 85-68;

The changes should reduce disagreements among participants in establishing allowable costs and improve negotiations in establishing overhead rates resulting in considerable savings to the Government.

The Foundation appreciates the opportunity to comment on the proposed changes.

Sincerely,

Wm B Cole

William B. Cole, Jr.
Procurement Executive

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JAN 16 1986

85-64-08

NATIONAL ENDOWMENT FOR THE HUMANITIES

WASHINGTON, D.C. 20506

January 15, 1986

Ms. Margaret A. Willis
General Services Administration
FAR Secretariat (VRS)
18th & F Sts., NW
Room 4041
Washington, DC 20405

Dear Ms. Willis:

I am writing in regard to the following:

FAR Case 85-63, unallowable costs, under FAR 31.205

FAR Case 85-64, concerning company-furnished automobiles, FAR 31-205-6, 31-205-46

FAR Case 85-65, concerning the cost of membership in social, dining and country clubs, FAR 31-205-14

FAR Case 85-66, concerning costs of litigating appeals against the government, FAR 31-205-33

FAR Case 85-67, concerning executive lobbying costs, FAR 31.205-52, and

FAR Case 85-68, concerning alcoholic beverage costs, FAR 31-205-51.

Please be advised that the National Endowment for the Humanities (NEH) has no objection to the proposed changes to the Federal Acquisition Regulations (Federal Register article dated December 19, 1985).

Sincerely,

Robert P. Stock
Contracting Officer
NEH

RECEIVED
JAN 21 1986

85-64-09

PROFESSIONAL
SERVICES
COUNCIL

Representing companies
that are creating the
future through innovation,
technology and ideas

John M. Toups
President

Virginia Littlejohn
Executive Director

January 15, 1986

General Services Administration
FAR Secretariat (VRS)
18th & F Streets, N.W.
Room 4041
Washington, D. C. 20405

Attention: Ms. Margaret A. Willis

SUBJECT: FAR Case 85-64
Company-Furnished Automobiles

Dear Ms. Willis:

On behalf of the members of the Professional Services Council (PSC), I would like to take this opportunity to comment on the proposed change to the Federal Acquisition Regulation (FAR) 31.205-6, compensation for personal services, and 31.205-46, travel costs, concerning company-furnished automobiles

PSC represents companies and trade associations in the fast-emerging professional and technical services industry. PSC members include research and development firms, independent laboratories and test facilities, architect and engineering firms, systems integration and support activities, program analysis and evaluation companies, computer software development companies, engineering houses, and public accounting firms, to name a few. Their personnel include engineers, mathematicians, chemists, physicists, statisticians, computer scientists and programmers, artificial intelligence specialists, lawyers, accountants, program analysts, operations research experts, and specialists from numerous other disciplines.

A company-furnished automobile for personal use is a form of compensation employed by numerous contractors, most times as an element of a total compensation package. Providing an automobile in lieu of additional salary should not be construed as an inappropriate form of compensation. To single out a specific element of compensation, the value of which is reasonable when combined with all of the other elements of a compensation package meeting the test of reasonableness, and to declare it an unallowable cost prejudices the intent of the compensation cost principle allowing for flexibility in the selection of forms of compensation. We do not believe this fringe benefit should be treated any differently than the others, particularly where it has been a long established policy of the contractor to provide a fringe benefit.

Recent U.S. Treasury Regulations require the value of the personal use of company-furnished automobiles to be treated as taxable income. Insofar as that

World Center, 918 16th Street, N.W., Suite 406, Washington, D.C. 20006, Phone: 202/296-2030, Fax: 202/296-2035

85-64-09

portion of compensation for personal use of company-furnished automobiles is concerned, it should be allowable under the FAR to the extent included in income pursuant to Treasury regulations, provided it meets the tests of reasonableness and allowability of FAR 31.201.

Based on the foregoing, the Professional Services Council, on behalf of our member companies, sincerely requests that the Civilian Agency Regulatory Council and the Defense Acquisition Regulatory Council revise the proposed change to FAR 31.205-6(m) in order to make compensation for personal use of company-furnished automobiles allowable to the extent it is treated as taxable personal income subject to the allowability and reasonableness tests of the FAR. Given that this recommendation is acceptable, no change to FAR 31.205-6 is required and should be withdrawn.

Sincerely,

Virginia Littlejohn
Executive Director

VL/eo

85-64-10

ARGOSystems

From the OFFICE OF THE PRESIDENT

January 20, 1986

General Services Administration
FAR Secretariat (VRS)
18th and "F" Streets, NW
Room 4041
Washington, DC 20405

Re: FAR Case 85-64

Gentlemen:

Thank you for the opportunity to comment on FAR Case 85-64.

While the denial of the allowability of costs for personal use of company-furnished automobiles seems understandable on policy grounds, the proposed revision is questionable in application. The revision would deny such costs "regardless of whether the cost is reported as taxable income to the employee."

If such costs are properly reported as taxable income to the employee, however, it seems arbitrary and discriminatory to deny recovery of costs. Providing a company-furnished automobile is an accepted method of employee compensation, the recovery of such reasonable and reported costs should not be unnecessarily restricted.

it is suggested that "unallowable regardless of whether the costs is reported as taxable income to the employee" in proposed revision FR Doc. 85-29975, 31.205-6(m)(2) be changed to "unallowable unless the cost is reported as taxable income to the employee."

Thank you again for the opportunity to respond in this matter.

Sincerely,

Bill B. May

Dr. Bill B. May
Chairman of the Board
Chief Executive Officer

RECEIVED
JAN 22 19

BBM/psf

ARGOSystems, Inc. / 310 N. Mary Avenue / P.O. Box 3452, Sunnyvale, California 94088-3452 / (408) 737-2000 / Telex 352077

85-64-11

MACHINERY and ALLIED PRODUCTS INSTITUTE

1200 EIGHTEENTH STREET, N.W. WASHINGTON, D.C. 20036

TELEPHONE (202) 331-8430 • FAX (202) 331-7160

January 20, 1986

RECEIVED
JAN 2

General Services Administration
FAR Secretariat (VRS)
18th and F Streets, NW
Room 4041
Washington, D.C. 20405

To Members of the Secretariat:

Proposed Amendments to Cost Principles Relating To Company-Furnished Automobiles and Professional Services

(FAR Cases 85-64 and 85-66)

We wish to comment on two proposed regulations, published in the Federal Register for December 19, 1985, that would amend the cost principles in Part 31 of the Federal Acquisition Regulation (FAR). The proposed regulations implement the requirement in Section 911 of the Defense Procurement Improvement Act of 1985 (Title IX of the 1986 Fiscal Year DOD Authorization Act, Public Law 99-145) for the Defense Department (DOD) to prescribe regulations defining and/or clarifying the allowability of costs associated with company-furnished automobiles, and professional and consultant services (including legal services). Although this statutory provision applies only to DOD, the proposed regulations would apply government wide because they amend the FAR.

We introduce our comments by saying a word about the Machinery and Allied Products Institute (MAPI) so you may understand the keen interest of the Institute in the allowability-of-costs issue. MAPI's member companies have diverse product lines including traditional capital goods and high technology equipment. Although most member companies are engaged predominantly in commercial rather than government sales, many of them are indispensable to the government's requirements, particularly in national defense and related areas. Accordingly, the government's policy on what contract costs are allowable is of considerable importance to our member companies.

Company-Furnished Automobiles

The proposed regulations published in connection with FAR Case 85-64 would amend the cost principles relating to compensation for personal services (FAR 31.205-6) and travel costs (FAR 31.205-46). The cost principles would be changed to render unallowable that portion of the cost of company-furnished

automobiles that relates to personal use by employees regardless of whether the cost is reported as taxable income to the employees. The rationale for disallowing such costs, as stated in the background information found on page 51777 of the Federal Register of December 19, 1985, is that ". . . it is inappropriate for the Government to reimburse contractor employees' personal costs at taxpayers' expense."

We disagree. In our view, it is unreasonable to disallow the costs of employees' personal use of company-furnished automobiles. To the extent that the company-furnished automobile is used for personal purposes, it should be treated as additional personal compensation to the employee. As an element of personal compensation it should be allowable and reimbursable to the contractor, assuming that total compensation is reasonable in amount.

Providing an employee with company-furnished automobiles, when needed for that employee's job, is an accepted practice in industry generally. Certainly there is no sound reason why that practice should be discouraged, by proposals such as this, for companies in defense industry.

Professional and Consultant
Services, Including
Legal Services

The proposed regulation issued in connection with FAR Case 85-66 would amend FAR 31.205-33, the cost principle relating to professional and consultant service costs. The proposed regulation would be changed, in part, to indicate in FAR 31.205-33(d) that the costs of legal, accounting and consultant services in connection with ". . . defense against Government claims or appeals . . ." are unallowable.

To not permit a contractor to recover such defense costs is grossly unfair, particularly when it may be apparent that the government claim in question was substantially without merit.

In any event, the proposed FAR 31.205-33(d) should be revised to clearly indicate that the costs associated with a contractor's defense of fraud proceedings are allowable if they fall within the ambit of FAR 31.205-47, the cost principle relating to the defense of fraud proceedings. If the government's proposal is adopted, a contracting officer could easily find that the defense of a fraud proceeding is subsumed within the broader term "defense against Government claims or appeals." In such a case, a contractor could not recover costs permitted by FAR 31.205-47 because the proposed new FAR 31.201-2(d) would prevent recovery of a cost under any cost principle if the cost were found specifically unallowable under any other cost principle.

The proposed regulation also adds a new paragraph (FAR 31.205-33(f)) to the cost principle relating to professional and consultant service costs to render unallowable costs of legal, accounting and consultant services incurred in connection with the defense or prosecution of lawsuits or appeals between two contractors arising from ". . . dual sourcing, co-production, or similar programs. . . ." The words "similar programs" could be construed to include licensing of proprietary data either directly by one contractor providing another contractor with data or indirectly by the government providing a contractor with data originated by another contractor.

Direct and indirect licensing are provided for in proposed changes to the Defense Department FAR Supplement (DFARS) concerning contractor rights in technical data./1 The indirect licensing provisions of the proposed regulations (DFARS 227.473-2(b) and Alternate IV to the clause at DFARS 252.227-7013) do not appear to adequately protect the interests of the contractor which originated the limited-rights data. Alternate IV to Clause 252.227-7013 states that the government "assumes no liability for use, duplication, or disclosure of such data by others for commercial purposes," yet the proposed regulations do not direct contracting officers to require the licensor to sign nondisclosure and non-use agreements that would allow direct enforcement by the originators of the data.

Even if the contracting officer were to require the licensee to sign a license agreement that permits direct enforcement by the originator of the data, the proposed FAR 31.205-33(f) would appear to preclude recovery of litigation costs incurred to enforce a license agreement created by the government but for which the government takes no responsibility with respect to violations. This is patently unfair and should be corrected by amending the proposed FAR 31.205-33(f) to allow recovery of litigation costs relating to the enforcement of indirect licensing arrangements.

Conclusion

The proposed rules, which would amend the cost principles relating to company-furnished automobiles and professional and consultant services (including legal services), should be revised to respond to the issues we have raised. Specifically, the proposed regulations concerning company-furnished automobiles are not based on a sound rationale and should be amended to make allowable that portion of the costs of company-furnished automobiles that is attributable to personal use by company employees.

The proposed rule relating to professional and consultant services (including legal services) should be amended to ensure that there is no conflict with two related cost principles. Specifically, the proposed rule should be clarified to indicate (1) that the proposed FAR 31.205-33(d) would not be a basis for disallowing the costs associated with a contractor's defense of fraud proceedings that are allowable pursuant to FAR 31.205-47 and (2) that the proposed FAR 31.205-33(f) would not preclude recovery of litigation costs relating to indirect licensing arrangements.

* * *

This concludes our comments on the proposed regulations. If we can be of further assistance, please let us know.

Cordially,

Charles Stewart

President

1/ The proposed rule, denominated DAR Case 84-187, was published in the Federal Register of September 10, 1985.

85-64-12/23

CBEMA

January 21, 1986

General Services Administration
FAR Secretariat (VRS)
18th and F Streets, N.W.
Room 4041
Washington DC 20405

Gentlemen:

Subject: FAR Cases 85-63 through 85-68

By notice in the December 19, 1985 Federal Register, interested parties were invited to comment on six (6) FAR cases, identified by the numbers 85-63 through 85-68.

On January 20, William E. Porter, Assistant General Counsel of the Control Data Corporation submitted general and detailed comments on the proposed revisions (attached).

CBEMA endorses those comments and calls your attention in particular to Control Data's points concerning FAR 85-66, subparagraph (d). We would appreciate your giving serious attention to our views.

Very truly yours,

Vico E. Henriques
President

Attachment

JAN 22 1986

85-64-12

8100 34th Avenue South
Mailing Address/Box 0
Minneapolis, Minnesota 55440
612/853-4770

William E. Porter
Assistant General Counsel

CONTROL DATA CORPORATION

January 20, 1986

General Services Administration
FAR Secretariat (VRS)
18th and F Streets N.W.
Room 4041
Washington, DC 20405

Gentlemen:

Subject: FAR Cases 85-63 through 85-68

By notice in the December 19, 1985, Federal Register, interested parties were invited to comment on six (6) FAR cases, identified by the numbers 85-63 through 85-68.

On behalf of Control Data, the following comments are submitted. Before offering specific comments on each of the six FAR cases, there are certain all-inclusive comments that must be made.

A. General Comments

1. Application beyond defense contracts: Section 911 of Title IX, the "Defense Procurement Improvement Act of 1985," amended only title 10 of the United States Code by adding a new section 2324. The prohibitions, limitations, and implementing tasks are specifically directed to the Secretary of Defense. For example, subsection (f) of 2324 makes it clear that it is the DOD's FAR Supplement (not the FAR itself) that is to be amended. We submit that it is a most questionable exercise of rule-making authority to apply these cost-principle changes "across the board" to all federal departments and agencies. We would point out:

   a. That there was no consideration, nor was companion legislation taken up, by the House Government Operations Committee or the Senate Committee on Governmental Affairs. This is in marked contrast to the passage of Title XII, the "Defense Procurement Reform Act of 1984" (P.L. 98-525) and the "Small Business and Federal Procurement Competition Enhancement Act of 1984" (P.L. 98-577).

b. That to adopt and apply the proposed changes beyond the legislatively-narrow application to DOD preempts the proper function of Congress and particularly the two committees mentioned above. These committees through hearings, etc., would conclude whether or not section 2324 merits government-wide application by amending the Federal Property and Administrative Services Act or the Office of Federal Procurement Policy Act.

2. Failure to limit implementation to "covered" contracts: Section 2324 is applicable to "covered contracts." By definition, this term encompasses contracts over $100,000 "other than a fixed-price contract with cost incentives." This definition excludes firm-fixed-price contracts, whether or not cost or pricing data was provided as a forerunner to award. The proposed FAR implementation of section 2324 "overreaches;" if adopted as written, it will apply to all fixed price contracts within the criteria of FAR 31.102. Moreover, the $100,000 "floor," for other than firm-fixed-price contracts, is not being recognized through the proposed language.

3. Impact re Regulatory Flexibility Act and Paperwork Reduction Act: As to the first act, we question the conclusion that there will be little, if any, significant economic impact. There are many small entities who do provide products and services on a noncompetitive, fixed price basis, supported by cost breakdowns. By applying the "covered contract" definition--which the proposed FAR revisions fail to do--these small vendors and subcontractors would not be burdened as to firm-fixed-price contracts and modifications, with cost breakdowns, nor any other contracts below the $100,000 threshold. By confining implementation to "covered contracts," the paperwork burden would be markedly reduced for the vendors and the purchasing departments that must deal with lower-tier vendors.

B. Specific Comments as to the Individual Cases

1. FAR 85-63: Unlike the other FAR cases, there is no statutory basis, or support, for the proposed revision to FAR 31.201-2. In fact, Congress specifically rejected such a provision when the legislation was taken up in conference. I refer you to the Congressional Record-House of July 29, 1985, page H6644. This page discusses section 911. Note that the Senate receded to the House with certain amendments. The fifth amendment was:

> "(5) deleting the prohibition that a cost disallowed under one cost principle may not be submitted under another cost principle;"

We consider it most inappropriate to adopt, via rule-making, the very language that Congress rejected in the course of its deliberation. In effect, the FAR Council would be rejecting the Senate's position, which the House was willing to accept in reaching a compromise bill. We recommend that FAR 85-63 be withdrawn.

2. FAR 85-64: No comment as to its substantive changes, keeping in mind our earlier general comments in section A of this letter.

3. FAR 85-65: Considering the wording of section 2324(e)(1)(E), this proposed language is correct. Again, our earlier section A comments as to the breadth of its application are relevant.

4. FAR 85-66: Control Data vigorously objects to the proposed new subparagraph (d) language which broadens the scope of disallowance beyond the present language in FAR 31.205-33(d). As you know, the present language reaches only "prosecution of claims against the Government." The proposed language covers both defense or prosecution of claims or appeals. Today's federal procurement environment is one of "procurement by certification," coupled with a standard of infallibility being imposed on the contractor, all of which results in increasing appeals before boards (e.g. ASBCA), let alone the risks associated with defending criminal and civil false claims charges. The Government mandates the forum for resolving disputes yet denies the recovery of the very costs necessary to prepare the claim (or assert the defense) before the board. We believe that costs associated with prosecution or defense of a claim founded on a contract should be allowable with one exception: where Government initiated litigation is based on a criminal statute (e.g. 18 U.S.C. 287) and the Goverment prevails after all appeals have been exhausted.

Section 2304(f), as we read it, directed the Secretary to clarify the listed cost principles, which included "professional and consulting services, including legal services." The direction to "clarify" does not suggest this proposed action. If ever the Packard Commission needed an example of Government procurement practices that are counterproductive to encouraging participation by the business community, I would recommend this proposed

revision. Explain, if you can, to the commercially-oriented supplier that costs of commercial arbitration, or litigation, are a business expense he can recover, via overhead (putting aside any court-directed recovery). However, he cannot obtain the same treatment when dealing in the arcane world of government contracting.

We also see the potential for many interpretative problems with respect to the proposed paragraph (f)--most particularly the phrase "(2) dual sourcing, co-production, or similar programs." For example, this could reach disputes between contractors under directed license agreements (when the Government is indirectly involved through its directed action). We see no valid reason for paragraph (f), when on a case-by-case basis the question should be addressed under the "reasonableness" criteria, with an advance agreement where appropriate.

5. FAR 85-67: Concerning the proposed text of 31.205-52 when compared with section 2324(f)(1)(E). The aforementioned subparagraph (E) in section 2324 contains the parenthetical at the end. Wouldn't the language be beneficial in the proposed FAR paragraph?

6. FAR 85-68: Based on the statutory prohibition, the language is acceptable as written. Again, our earlier Section A comments would also pertain.

On behalf of the company, I thank you for the opportunity to submit these comments; as is my practice, a copy will also be provided to the President of Control Data's trade association, CBEMA.

Very truly yours,

CONTROL DATA CORPORATION

William E. Porter
Assistant General Counsel

6153h/ss
cc: Vico E. Henriques, CBEMA

85-64

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS (CODSIA)

1725 DeSales Street, N.W.
WASHINGTON, D.C. 20036

(202) 429-4627

CODSIA Case 37-85
January 21, 1986

Ms. Margaret Willis
FAR Secretariat (VR)
General Services Administration
18th & F Streets, N.W.
Washington, D.C. 20405

Dear Ms. Willis:

The undersigned member associations of the Council of Defense and Space Industry Associations (CODSIA) welcome the opportunity to comment on the proposed rule changes to the FAR Part 31.2 as follows:

FAR 31.201-2	Unallowable Costs Under FAR 31.205 (FAR Case No. 85-63)
FAR 31.206-6,46	Company-furnished Automobiles (FAR Case No. 85-64)
FAR 31.205-14	Costs of Membership in Social, Dining and Country Clubs (FAR Case No. 85-65)
FAR 31.205-33	Costs of Litigating Appeals Against the Government and Professional and Consulting Service Costs (FAR Case No. 85-66)
FAR 31.205-52	Executive Lobbying Costs (FAR Case No. 85-67)
FAR 31.205-51	Alcoholic Beverage Costs (FAR Case No. 85-68)
FAR 31.205-8	Contributions and Donations (FAR Case No. 85-73)
FAR 31.205-15	Fines and Penalties (FAR Case No. 85-73)
FAR 31.205-47	Defense of Fraud Proceedings (FAR Case No. 85-73)

We strongly disagree with the statement contained in the Federal Register relative to the Paperwork Reduction Act. Member companies of our associations are convinced that the administration of these proposed changes to the current cost principles or new ones will significantly increase the costs of collecting and administering required information. The Paperwork Reduction Act not only speaks to the submission of data required of a proposed revision but also the creation of data.

We take strong exception to the statement made under the Regulatory Flexibility Act that many of the proposed revisions or additions to the regulations noted above are "not expected to have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 USC 601 et.seq.) because most contracts awarded to small entities are awarded on a competitive fixed price basis and cost principles do not apply." Many small contractors have non-competitively awarded fixed price and cost reimbursable contracts, (i.e., research firms, etc.) which will be adversely affected by these revisions.

We have an overriding concern that none of these proposed changes take into account the cost of implementation. When a contractor's facility has only a small amount of government business, this cost is far in excess of benefits derived to the government. By driving more and more firms from the market, they may, in fact, reduce the industrial base available to the government to produce the needed supplies and services. Thus, competition for contracts will be reduced rather than enhanced, and Congress' intent in enacting many recent initiatives, including CICA, will have been thwarted.

The comments, revisions, and other suggestions made should be given careful consideration in the context of the certification requirements and new civil and criminal penalties to which contractors are exposed under the FY 86 Defense Authorization Act. The growing confusion over these new liabilities should be minimized, rather than worsened, by these regulations.

In summary, we request representatives of CODSIA meet with the Defense Acquisition Regulatory Council (DARC) representatives before the regulations are implemented to further discuss these comments and to explore options which may be employed to accomplish the statutory requirement that the DARC and the Civilian Agency Acquisition Council promulgate or clarify the existing cost principles.

Sincerely,

for S. L. Straight
Karl G. Harr, Jr.
President
Aerospace Industries Association

for D. C. Heinin
Jean A. Caffiaux
Senior Vice President
Electronic Industries Association

Wallace H. Robinson, Jr.
President
National Security Industrial Assn.

Sheridan Brinley
Motor Vehicle Manufacturers Assn.

FAR Case 85-64
FAR 31.201-6, 46 - Company-furnished Automobiles

We recognize the Council's concern that the Government is reimbursing contractor employees' personal costs; however, we cannot see how providing company-furnished automobiles for personal use is any different from any other form of compensation to employees. Providing an automobile instead of additional salary does not mean this form of compensation is unreasonable. We believe the costs of all forms of compensation should be governed under existing reasonableness criteria.

Under the existing compensation cost principle (including the proposed revision that addresses the individual elements of compensation), recognition is given to the mix of compensation elements, which may vary from contractor to contractor. Further, the proposed revision of that portion of the cost principle that addresses the individual elements of compensation specifically recognizes that one element of cost, which might be high, can be offset by another element of compensation which is low, when compared to an appropriate standard. We see no reason why one part of fringe benefits, such as this, should be treated differently than any other element.

In addition, recently published Treasury regulations require the recognition of taxable income by individuals using company provided vehicles for personal purposes. Accordingly, we recommend that the imputed compensation for personal use of automobiles be allowable to the extent included in income pursuant to the Treasury regulations, subject to the reasonableness and other allowability criteria embodied in the compensation cost principle. To do otherwise is inconsistent with the clear intent of the compensation cost principle to allow management flexibility in the selection of forms of compensation.

Our recommendation is to amend the current cost principle on Compensation for Personal Service, FAR 31.205-6(m) Fringe Benefits, as follows:

> "Amounts attributable to personal use of automobiles reported as compensation to employees will be considered as a part of their compensation."

The proposed revision to FAR 31.205-46, Travel Costs, should therefore be withdrawn for the same reason as given above. We believe our recommendations are entirely consistent with the intent of Section 911 of the Defense Procurement Act of 1985.

85-64-14, .137

UNITED STATES ARMS CONTROL AND DISARMAMENT AGENCY
Washington, D.C. 20451

Ref: FAR Case 85-63
FAR Case 85-64
FAR Case 85-65
FAR Case 85-66
FAR Case 85-67
FAR Case 85-68
FAR Case 85-73

January 16, 1986

FAR Secretariat (VRS)
General Services Administration
18th and F Streets, N.W.
Washington, D.C. 20405

Attention: Margaret A. Willis

Gentlemen:

The Director of the U.S. Arms Control and Disarmament Agency has asked me to respond to your letters to him of December 23, 1985 and December 30, 1985, which requested comments on proposed rules to amend the Federal Acquisition Regulation.

The Agency appreciates the opportunity to review the proposed rules, but has no comments on the changes at this time.

Sincerely,

Evalyn W. Dexter

Evalyn W. Dexter
Chief,
Contracts Division

85-64-15

United States Information Agency

Washington, D.C. 20547

USI

January 17, 1986

Dear Ms. Willis:

We have reviewed and concur in all of the proposed rules to amend the Federal Acquisition Regulation (FAR) as follows:

a. FAR 31.201-2, Determining Allowability. (FAR Case 85-63).

b. FAR 31.205-6 and 31.205-46, Company furnished automobiles. (FAR Case 85-64).

c. FAR 31.205-14, concerning implementation of Congressional direction regarding the cost of membership in social, dining, and country clubs. (FAR Case 85-65).

d. FAR 31.205-33, concerning costs of litigating appeals against the Government. (FAR Case 85-66).

e. FAR 31.205-52, concerning executive lobbying costs. (FAR Case 85-67).

f. FAR 31.205-51, concerning Alcoholic beverage costs. (FAR Case 85-68).

Thank you for submitting this material for our review.

Sincerely,

Philip R Rogers

Philip R. Rogers
Director
Office of Contracts.

Ms. Margaret A. Willis
FAR Secretariat (VRS)
General Services Administration
18th & F Sts., N.W., Rm. 4041
Washington, D.C. 20405

85-64-16

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INTER-AMERICAN FOUNDATION

January 17, 1986

Margaret A. Willis
FAR Secretariat (VRS)
General Services Administration
18th & F Sts., N.W. Room 4041
Washington, D.C. 20405

Dear Ms. Willis:

I have no comments on the following FAR cases:

85-71;
85-53;
85-43;
85-63 through 85-68;
85-73;

Sincerely,

Melvin Asterken
Administrative Officer

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JAN 23 1986

01/21 14:08 (213)847-1959 #001 85-64-1

PLEASE FAX TO MS. WILLIS AT THE GENERAL SERVICES ADMINISTRATION #202-566-1731.
THANKS. R. N. MELTON 76560.

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210 Pgs

VR

Lockheed Corporation

Burbank, California 91520

January 21, 1986

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GSA C.O. COMCEN
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WASHINGTON, DC 20405

Ms. Margaret A. Willis
FAR Secretariat (VRS)
General Services Administration
18th & F Streets, NW, Rm. 4041
Washington, D. C. 20405

Subject: Comments on FAR Cases 85-63,64,65,66,67,68 and 73

Dear Ms. Willis:

Lockheed Corporation has reviewed the proposed changes to Federal Acquisition Regulation PART 31 as published in the Federal Register on December 19 and December 27, 1985, and wishes its comments to be considered. We are gravely concerned with the direction being taken in several of the proposed changes. We recognize that Congress has directed that many areas under PART 31 be revised or reviewed for clarification, and Lockheed shares the concern of Congress that different interpretations can be made of regulations in some areas of cost allowability. In reading the language of the proposed changes, however, we believe Government contractors will be unduly penalized by these revisions.

There are three major topics of concern arising from the proposed FAR changes. These are: (1) language in some of the proposed revisions will aggravate, rather than resolve, interpretation problems; (2) several of the proposals deny the allowability of certain costs of doing business, without a supportable rationale for the disallowance; and (3) several of the proposals impose administrative hardships on contractors unless the language is made less restrictive.

Our view on interpretation problems is that Government organizations, particularly the DCAA, are as guilty (or more guilty) of over-interpreting the FAR as contractors may be. We are extremely sensitive to the potential for new interpretation problems arising from any FAR changes. Several of the proposed changes promote obvious interpretation conflicts, and we urge that they be clarified or avoided.

With regard to the several changes that create new areas of disallowance that were not mandated as unallowable by Congress, we urge that reconsideration be given, not only to the language of the proposed regulations but also to the rationale as to why allowability of such costs should be contrary to public policy. The costs at issue are typically not direct costs paid by the Government, but are ordinary and necessary General and Administrative expenses, that are allocable to all business, including

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interpretation problems. Our concern is over the word "contribution", which previously would have referred only to charitable contributions or contributions for which no service or other activity was required. We believe that contributions by several companies for services of mutual benefit to industry or participating companies are not intended to be covered by this cost principle. In addition, membership costs are often referred to as "contributions" by professional organizations.

We urge that the regulations be clarified to show that contributions for professional services and memberships are not covered under this cost principle.

9. Changes to FAR 31.205-15, Fines and Penalties (FAR Case 85-73)

We do not object to the addition of foreign laws to this cost principle. As a general observation, however, we believe the regulations should be limited to willful violations of such laws. Inadvertent or disputable violations should not be unallowable.

We believe this matter should be considered for clarification.

10. Changes to FAR 31.205-47, Defense of Fraud Proceedings (FAR Case 85-73)

We are concerned with interpretations of the language "similar proceedings" since it is not specific.

We also question whether this change is actually necessary in view of other provisions of Section 911 of the Defense Procurement Improvement Act of 1985.

We request that this proposed change be withdrawn since it is unnecessary.

U.S. Government contracts. This is the fact even though the incurrence of some costs, such as the professional service costs proposed for disallowance, are the direct result of doing business with the Government. We believe the public, the Congress, the Government, and Government contractors deserve more detailed and considered rationale in order for a cost to become unallowable.

In addition, we urge that the administrative expense of these proposals be reexamined and clarifications be made to avoid unnecessary costs and record keeping. In view of the Certification of Overhead Costs imposed on contractors and penalties for claiming unallowable costs, it is essential that the regulations be written in a manner that will enable contractors to remove the unallowable costs simply and satisfactorily without incurring more expense for administration than the amount judged unallowable.

Our comments on the specific FAR proposals are attached.

Sincerely,

Robert N. Melton
(Act.) Corp. Director
Government Finance Relations

rr
ATTACHMENT

In the same way, the disallowance of legal costs arising from teaming arrangements, dual sourcing, etc. is unfair if applied in such a overly simplistic manner. Many of these contractor arrangements are the direct result of Government efforts to increase competition, and are encouraged or demanded by the Government. Furthermore, there can be many different types of legal disputes over such arrangements, involving such matters as performance, price, quality, etc., and disputes in such matters may be critical to the Government's interests.

We urge that these proposed changes be withdrawn.

5. New Section, FAR 31.205-52, Executive Lobbying Costs (FAR Case 85-67)

We object to this new cost principle as to its rationale, and interpretation problems.

This subject has previously been considered when current language on lobbying costs was developed. At that time, it was rejected as being unnecessary and unworkable. We see no reason that it is now needed.

From an interpretation standpoint, it is very unclear what activity is considered unallowable. The concept of "indirectly" inducing an employee of the executive branch would throw any contact with the executive branch employee into question. Alternately, although the language "other than the merits" presumably is intended to make the regulations less restrictive, it only causes confusion because it is not defined.

We urge that this proposed regulation be withdrawn.

6. New Section FAR 31.205-51, Alcoholic Beverages (FAR Case 85-68)

Although we do not object to the intent of this cost principle, we believe it needs clarification to avoid undue administrative burden on contractors. Contractor travel costs are already subject to reasonableness limitations imposed by separate legislation. In view of these reasonableness limitations, which will be administratively very expensive to implement and will accomplish the controls the Congress desires, it seems imprudent to require that contractors force employees to itemize their meal expenses to such an extent to insure no alcoholic beverage costs are included in their travel expenses.

We recommend the proposed cost principle be clarified to indicate travel and per diem are separately covered.

7. Changes to FAR 31.205-38, Selling Costs (FAR Case 85-71)

We plan to comment separately on these proposed changes. We consider the proposal to be unworkable and problematic in its present form, and it deserves separate discussion.

8. Changes to FAR 31.205-8, Contributions or donations (FAR Case 85-73)

Although we recognize that the language "regardless of the recipient" was mandated by Congress, we believe clarification is now necessary to avoid

1. Changes to FAR 31.201-2, Determining Allowability (FAR Case 85-63)

Our concerns on this change involve interpretation problems over the use of the words "made specifically unallowable." It is not clear whether the literal words of a subsection of 31.205 will make the costs unallowable, or whether a contracting officer or his representative, by determination, can make the cost unallowable. Although we believe the latter interpretation would be unreasonable, the proposed language needs clarification. We believe the use of the term already defined in Cost Accounting Standards and FAR, "expressly unallowable", would avoid these problems. We urge that the language, if viewed necessary, read: "Costs expressly unallowable under any subsection of 31.205 are not made allowable under any other sections or subsections of subpart 31.2".

2. Changes to FAR 31.205-6, Compensation for Personal Services, and 31.205-46, Travel Costs (FAR Case 85-64)

Our concerns on this change regard the rationale for such a change and implementation problems.

The rationale given for making personal use of company-furnished automobiles unallowable is the Councils' belief that it is inappropriate for the Government to reimburse contractor employees' personal costs at taxpayers' expense. We believe this logic is in error, since any compensation paid to an employee is for his personal costs. We object to the disallowance of this normal element of executive compensation, company-furnished automobiles, particularly in view of other proposed regulatory changes regarding the reasonableness of compensation. We believe such normal forms of compensation should be judged from an overall reasonableness of compensation standpoint rather than segregated and judged separately unallowable.

We recommend this proposal be withdrawn.

3. Changes to FAR 31.205-14, Entertainment Costs (FAR Case 85-65)

We have no objections to this proposed change.

4. Changes to FAR 31.205-33, Professional and Consultant Services (FAR Case 85-66)

Our objections to these changes involve the rationale for these changes.

With regard to defense against Government claims or appeals, or prosecution of claims or appeals, we believe that disallowance of these costs is grossly unfair and inequitable to Government contractors. The ASBCA has considered this issue recently and decided that the costs are a proper element of General and Administrative expenses. A position that these costs are unallowable places an unfair advantage in the hands of the Government in disputes arising from Government actions, since it imposes an economic penalty on contractors who contest a Government claim or determination. For example, we have an issue that has now been twice decided in the ASBCA in our favor, and may now be carried by the Government to the Court of Claims. Is it proper that in such a case where the Government is obviously wrong, we be denied allowability of the portion of our defense cost that would be allocated to Government contracts?

85-6418

LITTON INDUSTRIES

360 North Crescent Drive, Beverly Hills, California 90210 213 859 5[illegible]

Norman L. Roberts
Staff Vice President
Assistant General Counsel

21 January 1986

General Services Administration
FAR Secretariat (VRS)
18th & F Streets, N.W.
Room 4041
Washington, DC 20405

SUBJECT: FAR Cases: 85-63
85-64
85-66

Dear Sirs,

On behalf of Litton Industries, Inc. the following comments to the subject FAR cases are respectfully submitted for your consideration. The general thrust of these comments is that some flexibility in the application of any set of cost principles is necessary and this flexibility will operate to the positive benefit of both industry and the Government. Attempting to regulate out all discretion in the application of a set of rules to a set of complex factual issues may result in deleterious and unintended results. A set of inflexible rules should not be used as a substitute for rational and intelligent decision making within a set of principles.

1. FAR Case 85-63, FAR 31.201-2, Determining Allowability. This proposed revision makes any cost unallowable under one section of the cost principles unallowable under any other cost section. This regulation is proposed under the statutory requirement of clarifying the cost principles. It is suggested that rather than to clarify cost principles, this proposed regulation will create confusing treatment of costs and result in unintended results.

The illustration used in the proposed cost principle itself provides an example of the type of problems that can

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result. The illustration points out that contributions and donations are unallowable pursuant to FAR 31.205-8. This means that a contractor's donation to a scholarship fund for the family of a deceased employee will also be unallowable under FAR 31.205-13 relating to employee morale, health and welfare. It is suggested that this is precisely the type of situation where flexibility in the cost principles is necessary. As a general rule, it is accepted that contributions and donations are unallowable. The contractor, nevertheless, should have the ability to determine what is in the best interests of the company by determining proper actions in support of employee morale, health and welfare. In the illustration provided a contractor's sensitivity towards the plight of an individual employee fosters a sense of loyalty among all employees. Granted that this type of loyalty cannot be quantified or verified by a DCAA auditor, but it is nevertheless a fact of efficient business performance. Precluding the contractor from reacting to unusual situations by rigid standards does not make good business sense.

Another example of problems in this area is when awards are made to employees on the basis of technical excellence. Frequently contractors award a cash bonus to an employee on the basis of the employee's sustained technical contributions as evidenced by the body of the work the individual has created. Frequently this award is in the name of a deceased employee as a memorial to the memory and accomplishments of that deceased employee. There is no set criteria for the receipt of this award and there are no specific or individual acts that an employee can do in order to receive the award. The award is presented based upon the judgment of the company after reviewing the overall technical accomplishments of an individual. This award is not considered to be compensation for personal services within the definition of FAR 31.205-6 and had been in the past considered to be allowable pursuant to FAR 31.205-13, Employee, Morale, Health and Welfare. The present FAR regulation would consider this to be a contribution or donation made pursuant to FAR 31.205-8 and therefore not allowable under FAR 31.205-13.

It appears that this treatment of cost is inconsistent with the IRS treatment of these costs in analogous situations. In Jones v. Commissioner of Internal Revenue, 743 Fed. 2nd. 1429, an employee received an award on the basis of his technical contribution which was determined to have significant value to aeronautical and space activities.

85-64-18

The 9th Circuit stated, in interpreting IRS Code Section 74, that this was not taxable income because it was an award made in recognition of scientific achievement without any specific action on the part of the employee and the employee was not required to perform future services. Thus, it is the policy of the IRS, as supported by the 9th Circuit, to permit an employee to receive awards in recognition of past accomplishments in scientific fields. This policy encourages scientific achievement by the workforce and does not penalize an employee, through taxation, for being recognized in a monetary fashion for scientific achievement. The DAR Council seems to ignore these benefits and requires that any recognition of an employee's scientific contribution which does not constitute compensation, be unallowable. This penalizes the contractor for encouraging employee morale, particularly as it relates to scientific achievement.

Another example of where this proposed FAR regulation may cause difficulty is in the difference between FAR 31.205-33 dealing with professional and consultant service costs and FAR 31.205-47 which deals with defense of fraud proceedings. FAR 31.205-47 makes unallowable the defense of fraud proceedings only where the contractor is unsuccessful in that defense. The proposed change to FAR 31.205-33 would make the cost of the defense incurred in defending against a Government claim unallowable regardless of the outcome of the lawsuit. Thus, in large part the proposed regulation would effectively eliminate FAR 31.205-47 since the subject matter of that FAR section would be included in part in the revised 31.205-33.

For these reasons it is recommended that proposed FAR 31.201-2 be deleted in its entirety.

2. <u>FAR Case 85-64, FAR 31.205-6, Compensation for Personal Services.</u> This proposed FAR revision makes unallowable the cost associated with the personal use of company furnished automobiles even where that cost is included as part of the employee's taxable income. To the extent Public Law 99-145 deals with the use of company furnished automobiles it is to require regulations to clarify the allowability of these costs, not to require regulations eliminating a portion of these costs.

This proposed FAR principle conflicts with the concepts contained in FAR 31.205-6, Compensation for Personal Services. Internal Revenue Service regulations set forth the standards and the formula regarding when an employee is to be taxed for personal use of a company furnished automobile and the methodology by which that tax is to be computed. In spite of the fact that the IRS Code requires that the personal use of company furnished automobiles be considered as personal income the DAR Counsel has decided that it should not be personal income for purposes of Government contracts. Thus, one agency of the U.S. Government requires that the personal use of the company furnished automobile be considered as compensation while another agency of the U.S. Government states that the personal use of company furnished automobiles cannot be considered as compensation.

Since the existing FAR 31.205-6 considers as allowable reasonable amounts of compensation, including fringe benefits, it is recommended that this proposed FAR modification be modified to recognize the FAR principle for compensation for personal services. To accomplish this, it is recommended that the proposed FAR 31.205-6 be modified as follows: Delete from subparagraph (n)(2) the words "regardless of whether" and substitute therefor "except if." Additionally, delete from proposed FAR 31.205-46 the term "unallowable" in the last line and substitute therefor "allowable." These modifications make the personal use of a company automobile unallowable except where that personal use is reported as taxable income in which case the issue should be treated pursuant to FAR 31.205-6, Compensation for Personal Services.

3. <u>FAR Case 85-66, FAR 31.205-33, Professional and Consultant Service Costs.</u> This FAR regulation will make the defense of claims by the U.S. Government an unallowable cost regardless of the ultimate outcome of the case. Additionally, this principle will make the cost of claims between contractors unallowable where the dispute arose from a Teaming Agreement, Joint Venture or similar arrangement.

Again, Public Law 99-145 only requires a clarification of existing cost principles not the exclusion of valid business operating costs. The Background material to this proposed

regulation contains, as justification for the proposed regulation, statements that may be factually incorrect. Specifically, the Background material states "These revisions are considered necessary because of problems encountered in administering this cost principle and they are not a change in policy. Such costs are presently being disallowed but disputed by some contractors." The change proposed by this FAR regulation is in fact sweeping in nature and represents a major policy change by the U.S. Government. Additionally, to my knowledge, costs associated in the defense of Government claims are allowable where the contractor is successful in that defense.

The present FAR regulation at FAR 31.205-33 basically makes unallowable the prosecution of claims against the Government. The proposed regulation would dramatically change this concept and make costs unallowable if incurred where the Government is a plaintiff in its suit against the contractor. Making the costs of the defense against Government claims unallowable, particularly where the contractor is successful in that defense, is unconscionable. This proposal would permit the Government to be in a position to cause the contractor to incur a great deal of unallowable expenses merely by bringing an action, regardless of the merits of that actions. It is noted that the concept contained in this proposal is contrary to the Equal Justice Act, although this applies to small businesses, which requires that the Government assume some accountability for its prosecutorial acts by requiring the Government to pay for legal fees where the Government's position was not justified.

Additionally, this proposal states that disallowed costs include appeals against the Government, not just claims against the Government. Again, this increases the cost to the contractor of protecting its legitimate rights. The Government has, by legislative and regulatory fiat, taken cases which are logically claims by the Government and turned them around so that it is the contractor who must file the appeal. The classic example of this is defective pricing. A defective pricing case is in fact a claim by the Government against the contractor for money. Because of the way the appeal system is statutorily mandated, the contractor is required to file an appeal with the Government in order to retain the funds

alleged to be defectively priced rather than have the Government file a claim against the contractor. This proposal, by adding the word "appeal" to that segment of costs which are unallowable and in conjunction with the unusual appeal process required in Government contracts, is now in a position where Government action requiring a contractor to resort to the legal process to defend himself, will cause the contractor to incur increased costs. Again, to make such costs unallowable is unconscionable.

The proposed regulation adds an entire new section making costs unallowable when incurred as a result of two contractors being involved in litigation arising out of Teaming Agreements, Joint Ventures, Dual Sourcing, Coproduction, and like contracts. Again, this new principle is without any specific statutory foundation whatsoever. The Government is attempting in this proposed regulation to take routine costs of litigation and make them unallowable. This is particularly burdensome in light of the fact, often in dealings with the Government, that situations arise which cause contractors to enter into unique types of relationships in the first instance. It is only when dealing in large contracts where a single contractor cannot perform all the work himself and where a customer like the U.S. Government wants a single contractor to be the prime contractor, that contractors will enter into teaming arrangements to share the work. Thus, the nature of doing business with governmental customers has required this unusual business format. The Government now is proposing that contractors cannot include as a routine business cost the litigation costs associated with this form of contracting. This situation is excaberated by the fact that many times it is the Government that requires contractors to enter into agreements with their competitors to establish dual or second sources on major programs. Contractors force-fit agreements to meet the requirements of their customer, the U.S. Government. The Government is now stating that where they have required contractors to enter into unusual agreements which, without pressure from the Government would not have been entered into in the first instance, such contractors may not include as an allowable cost litigation costs associated with disputes arising from these unusual agreements.

Litton is not insensitive to the Government's desire to eliminate as an allowable cost the costs associated with

85-64-18

litigation between contractors where the U.S. Government is not at all involved as a potential beneficiary. This concept is similar to that found at FAR 31.205-38, Selling Costs, where selling costs incurred in conjunction with foreign sales are not allowable. Such costs arising from disputes over the previously described arrangements which are not related to U.S. Government contract programs could be made similarly unallowable unless specifically approved in advance by the U.S. Government. This latter provision is designed to cover special arrangements which although are designed to principally benefit a foreign government are also sponsored by the U.S. Government.

In furtherance of the above comments it is recommended that proposed paragraph (d) be deleted in its entirety. Delete from paragraph (f)(1) "in a Government contract; or" and substitute therefor "where the purpose of such arrangement relates to other than selling to the U.S. Government." Delete paragraph (f)(2) in its entirety.

Very truly yours,

Norman L. Roberts

1-150
85-64-1

FMC Corporation

[redacted]

17 January 1986
C-86.3260H

FMC

FAR Secretariat (VRS)
18th & F Streets, N.W., Room 4041
Washington, D.C. 20405

Reference:
FAR Cases 85-63, 85-64, 85-66 and 85-68
Unallowable Costs Under FAR 31.205

We appreciate the opportunity to submit the following comments on the referenced FAR cases:

FAR Case 85-63, Determining Allowability

There is no statutory basis for the addition of the proposed paragraph (d) to FAR 31.201-2, determining allowability. Providing that costs made specifically unallowable under any subsection of 31.205 are not allowable under any other sections or subsections of Subpart 31.2 appears to put in question those types of costs which are made qualifications of statements of unallowability by the use of such language as "(but see 31.205-6(g), (h), (j), (k), and (m) below)" in subparagraph (a)(1) of 31.205-6. Such qualifiers are used in a number of the cost principles (see, for example, 31.205-14, 31.205-16, 31.205-20, 31.205-24 and 31.205-30). It is recommended that paragraph (d) not be added to 31.201-2. If it is, all the cost principles which include qualifiers of the type referred to above should be re-written to eliminate any possibility of an interpretation to the effect that the introduction of paragraph (d) overrides the qualifications and makes such costs unallowable.

FAR Case 85-64, Company-Furnished Automobiles

The proposed revisions to 31.205-6 and 31.205-46 typify the direction now being taken by the Government on cost principles: considerable additional verbiage in the interest of achieving greater specificity and the introduction of new requirements for record-keeping. It is recognized that these changes have been proposed in answer to Congress' demand for clarification of the cost principles. However, the ever-increasing record-keeping burdens arising from these revisions will inevitably increase the overhead costs of all contractors subject to them. And the growth in size and specificity of the cost principles will increase the probability that contractors will inadvertently bill costs incorrectly, thereby becoming subject to adverse publicity and increasingly burdensome sanctions.

85-64-19

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FAR Secretariat (VRS)
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17 January 1986

FAR Case 85-66, Costs of Litigating Appeals Against the Government

Boards of contract appeals and courts have held that certain actions by contractors (such as defense against government claims) are not "claims against the government". It is unreasonable for the writers of regulations to reverse those decisions. Therefore, paragraph (d) of 31.205-33, Professional and Consultant Services Costs, should not be revised.

Not infrequently, large defense programs involving widely divergent technologies can be handled only through teaming agreements, joint ventures, or other similar arrangements. The government benefits from such arrangements through the successful performance of the programs. It is to be expected that there will sometimes be lawsuits or appeals between the contractors which are parties to such arrangements and the pursuit of lawsuits and appeals in such instances is a necessary part of the cost of doing business. Such costs should not be made unallowble by the introduction of paragraph (f) of 31.205-33.

FAR Case 85-68, Alcoholic Beverage Costs

The identification and segregation of all costs of alcoholic beverages on the books of defense contractors and of their corporate headquarters (to the extent that costs are allocated from the headquarters to the contractors) will probably cost more in administrative effort than will be saved by the government by the disallowance of alcoholic beverage costs. Regulations which are not cost-effective should not be introduced.

FMC CORPORATION
Northern Ordnance Division

N. C. Duffy
Contracts Manager

jad

85-64-20

ALAN V. WASHBURN
WEST PENTHOUSE
1228 31ST STREET, N. W.
WASHINGTON, D. C. 20007
(202) 337-8203
January 17, 1986

FAR Secretariat (VRS)
General Services Administration
Room 4041
18th and F Streets, N.W.
Washington, D.C. 20405

Re: FAR Case 85-64

Dear Sirs:

The proposed changes to FAR Part 31 concerning personal use of company cars have both procedural and substantive defects.

A procedural defect arises from the claim (44 Fed. Reg. 1116) that "The proposed revisions ... are not expected to have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act ... because most contracts awarded to small entities are awarded on a competitive fixed price basis and cost principles do not apply." As discussed in my comments of even date on FAR case 85-63, this statement is of doubtful validity.

Another defect inheres in the justification offered for the changes: "The Councils believe it is inappropriate for the Government to reimburse contractor employees' personal costs at taxpayers' expense." (44 Fed. Reg. 1116) The term "personal costs" here is the classification applicable for federal income tax purposes. This raises serious questions. For example, are all costs that would be treated as "personal" for federal income tax purposes to be considered subject to disallowance when reimbursed by contractors? If so, that could include bus fare for getting to and from work, reimbursed by an employer as part of a program to

reduce automobile traffic, or to cut the amount of land devoted to parking places. The IRS may also deem to be "personal" any tuition paid by the employer for college courses unless very strict requirements have been met. However, employers might reasonably conclude that such expenses should be reimbursed, as part of personnel compensation if under no other rubric. To make costs unallowable simply because the IRS might classify them as "personal" for purposes of federal income taxation seems impossible to support rationally.

Further, the proposed changes concerning company cars may on balance increase, not decrease, amounts paid by the Government. Suppose, for instance, that a company now provides company-owned cars, figuring that it can obtain the cars far more cheaply than can individual employees and any amount allocable to "personal" use is in effect a cheap fringe benefit. Under the rules proposed in Case 85-64, the company will probably stop providing company cars and may, in order to retain employees, increase salaries to provide the same benefits to the employees that is represented by the company cars. The result will be that the Government may have to pay more, even though the total value provided to employees (and the figure used to compare the compensation to the contractor employees with that paid to employees by other firms) will not be changed.

By using a meat cleaver rather than a scalpel, the changes proposed by FAR Case 85-64 are likely to increase costs and decrease certainty.

Sincerely,

Alan V. Washburn

Alan V. Washburn

AVW/pse

HAYES
INTERNATIONAL
CORPORATION

85-64-2

P. O. BOX 2287
BIRMINGHAM, AL 35201-2287
(205) 592-0011
TELEX: 810-733-3087

MICHAEL E. HAWORTH JR.
VICE PRESIDENT & SECRETARY

16 January 1986

General Services Administration
FAR Secretariat (VRS)
Room 4041
18th & F Streets, N.W.
Washington, D.C. 20405

Re: Proposed Revision to FAR 31.205-6(b)

Paragraph (b)(1) states, as one of the facts which may be relevant, "... the cost of comparable services obtainable from outside sources."

We recently experienced a Contractor Employee Compensation System Review by the Defense Logistics Agency. The reasonableness of compensation paid to security guards was challenged, and we were faced with a potential disallowance if steps weren't taken to bring those wages more in line with the local area, including, if necessary, contracting-out the function.

The security guards are represented by a union. The results of the review were made known to the union. The union took the view that the government was injecting itself in the collective bargaining process, and was threatening the job security of its members. A congressional inquiry resulted.

Our experience may be of benefit to the FAR Councils in considering that provision. That is the reason for this letter of comment.

Sincerely,

85-64-22

PANAMA CANAL COMMISSION
2000 L STREET, N.W.
FIFTH FLOOR
WASHINGTON, D.C. 20036

OFFICE OF
THE SECRETARY

January 21, 1986

Ms. Margaret A. Willis
FAR Secretariat (VRS)
General Services Administration
18th + F Streets, N.W.
Room 4041
Washington, D. C. 20405

Dear Ms. Willis:

The Panama Canal Commission concurs in the changes proposed to amend the Federal Acquisition Regulation (FAR) with respect to the following FAR Cases:

- FAR Case 85-63
- FAR Case 85-64
- FAR Case 85-65
- FAR Case 85-66
- FAR Case 85-67
- FAR Case 85-68
- FAR Case 85-73

In addition, we have reviewed FAR Cases 85-43; 85-53; 85-54 and 85-71 and offer no comments.

Sincerely,

Barbara A. Fuller

Barbara A. Fuller
Assistant to the Secretary

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20410-3000

OFFICE OF THE ASSISTANT SECRETARY
FOR ADMINISTRATION

85-64-23

JAN 21 1986

Ms. Margaret Willis
FAR Secretariat (VRS)
General Services Administration
18th & F Streets, N. W., Room 4041
Washington, D. C. 20405

Dear Ms. Willis:

Thank you for your letter of December 23, 1985, to Assistant Secretary Tardy, regarding the following six proposed FAR revisions:

a. FAR 31.201-2, concerning unallowable costs under FAR 31.205 (FAR Case 85-63);

b. FAR 31.205-6 and 31.205-46, concerning company-furnished automobiles (FAR Case 85-64);

c. FAR 31.205-14, concerning implementation of Congressional direction regarding the cost of membership in social, dining, and country clubs (FAR Case 85-65);

d. FAR 31.205-33, concerning costs of litigating appeals against the Government (FAR Case 85-66);

e. FAR 31.205-52, concerning executive lobbying costs, (FAR Case 85-67) and

f. FAR 31.205-51, concerning alcoholic beverage costs, (FAR Case 85-68).

The Department of Housing and Urban Development supports the proposed changes as drafted.

If you have any questions, please contact Edward L. Girovasi, Jr., Director, Policy and Evaluation Division, on 755-5294.

Sincerely,

Roosevelt Jones
Director
Office of Procurement and Contracts

RECEIVED

JAN 24 1986

85-63,24,5

8100 34th Avenue South
Mailing Address/Box O
Minneapolis, Minnesota 55440
612/853-4770

William E. Porter
Assistant General Counsel

CONTROL DATA CORPORATION

January 20, 1986

General Services Administration
FAR Secretariat (VRS)
18th and F Streets N.W.
Room 4041
Washington, DC 20405

Gentlemen:

Subject: FAR Cases 85-63 through 85-68

By notice in the December 19, 1985, Federal Register, interested parties were invited to comment on six (6) FAR cases, identified by the numbers 85-63 through 85-68.

On behalf of Control Data, the following comments are submitted. Before offering specific comments on each of the six FAR cases, there are certain all-inclusive comments that must be made.

A. General Comments

1. Application beyond defense contracts: Section 911 of Title IX, the "Defense Procurement Improvement Act of 1985," amended only title 10 of the United States Code by adding a new section 2324. The prohibitions, limitations, and implementing tasks are specifically directed to the Secretary of Defense. For example, subsection (f) of 2324 makes it clear that it is the DOD's FAR Supplement (not the FAR itself) that is to be amended. We submit that it is a most questionable exercise of rule-making authority to apply these cost-principle changes "across the board" to all federal departments and agencies. We would point out:

   a. That there was no consideration, nor was companion legislation taken up, by the House Government Operations Committee or the Senate Committee on Governmental Affairs. This is in marked contrast to the passage of Title XII, the "Defense Procurement Reform Act of 1984" (P.L. 98-525) and the "Small Business and Federal Procurement Competition Enhancement Act of 1984" (P.L. 98-577).

85-64-24

b. That to adopt and apply the proposed changes beyond the legislatively-narrow application to DOD preempts the proper function of Congress and particularly the two committees mentioned above. These committees through hearings, etc., would conclude whether or not section 2324 merits government-wide application by amending the Federal Property and Administrative Services Act or the Office of Federal Procurement Policy Act.

2. Failure to limit implementation to "covered" contracts: Section 2324 is applicable to "covered contracts." By definition, this term encompasses contracts over $100,000 "other than a fixed-price contract with cost incentives." This definition excludes firm-fixed-price contracts, whether or not cost or pricing data was provided as a forerunner to award. The proposed FAR implementation of section 2324 "overreaches;" if adopted as written, it will apply to all fixed price contracts within the criteria of FAR 31.102. Moreover, the $100,000 "floor," for other than firm-fixed-price contracts, is not being recognized through the proposed language.

3. Impact re Regulatory Flexibility Act and Paperwork Reduction Act: As to the first act, we question the conclusion that there will be little, if any, significant economic impact. There are many small entities who do provide products and services on a noncompetitive, fixed price basis, supported by cost breakdowns. By applying the "covered contract" definition--which the proposed FAR revisions fail to do--these small vendors and subcontractors would not be burdened as to firm-fixed-price contracts and modifications, with cost breakdowns, nor any other contracts below the $100,000 threshold. By confining implementation to "covered contracts," the paperwork burden would be markedly reduced for the vendors and the purchasing departments that must deal with lower-tier vendors.

B. Specific Comments as to the Individual Cases

1. FAR 85-63: Unlike the other FAR cases, there is no statutory basis, or support, for the proposed revision to FAR 31.201-2. In fact, Congress specifically rejected such a provision when the legislation was taken up in conference. I refer you to the Congressional Record-House of July 29, 1985, page H6644. This page discusses section 911. Note that the Senate receded to the House with certain amendments. The fifth amendment was:

> "(5) deleting the prohibition that a cost disallowed under one cost principle may not be submitted under another cost principle;"

We consider it most inappropriate to adopt, via rule-making, the very language that Congress rejected in the course of its deliberation. In effect, the FAR Council would be rejecting the Senate's position, which the House was willing to accept in reaching a compromise bill. We recommend that FAR 85-63 be withdrawn.

2. FAR 85-64: No comment as to its substantive changes, keeping in mind our earlier general comments in section A of this letter.

3. FAR 85-65: Considering the wording of section 2324(e)(1)(E), this proposed language is correct. Again, our earlier section A comments as to the breadth of its application are relevant.

4. FAR 85-66: Control Data vigorously objects to the proposed new subparagraph (d) language which broadens the scope of disallowance beyond the present language in FAR 31.205-33(d). As you know, the present language reaches only "prosecution of claims against the Government." The proposed language covers both defense or prosecution of claims or appeals. Today's federal procurement environment is one of "procurement by certification," coupled with a standard of infallibility being imposed on the contractor, all of which results in increasing appeals before boards (e.g. ASBCA), let alone the risks associated with defending criminal and civil false claims charges. The Government mandates the forum for resolving disputes yet denies the recovery of the very costs necessary to prepare the claim (or assert the defense) before the board. We believe that costs associated with prosecution or defense of a claim founded on a contract should be allowable with one exception: where Government initiated litigation is based on a criminal statute (e.g. 18 U.S.C. 287) and the Goverment prevails after all appeals have been exhausted.

Section 2304(f), as we read it, directed the Secretary to clarify the listed cost principles, which included "professional and consulting services, including legal services." The direction to "clarify" does not suggest this proposed action. If ever the Packard Commission needed an example of Government procurement practices that are counterproductive to encouraging participation by the business community, I would recommend this proposed

revision. Explain, if you can, to the commercially-oriented supplier that costs of commercial arbitration, or litigation, are a business expense he can recover, via overhead (putting aside any court-directed recovery). However, he cannot obtain the same treatment when dealing in the arcane world of government contracting.

We also see the potential for many interpretative problems with respect to the proposed paragraph (f)--most particularly the phrase "(2) dual sourcing, co-production, or similar programs." For example, this could reach disputes between contractors under directed license agreements (when the Government is indirectly involved through its directed action). We see no valid reason for paragraph (f), when on a case-by-case basis the question should be addressed under the "reasonableness" criteria, with an advance agreement where appropriate.

5. FAR 85-67: Concerning the proposed text of 31.205-52 when compared with section 2324(f)(1)(E). The aforementioned subparagraph (E) in section 2324 contains the parenthetical at the end. Wouldn't the language be beneficial in the proposed FAR paragraph?

6. FAR 85-68: Based on the statutory prohibition, the language is acceptable as written. Again, our earlier Section A comments would also pertain.

On behalf of the company, I thank you for the opportunity to submit these comments; as is my practice, a copy will also be provided to the President of Control Data's trade association, CBEMA.

Very truly yours,

CONTROL DATA CORPORATION

William E. Porter
Assistant General Counsel

6153h/ss
cc: Vico E. Henriques, CBEMA

85-64-25

American Bar Association

WRITER'S ADDRESS AND TELEPHONE

8230 Boone Blvd.
Suite 400
Vienna, VA 22180
(703) 790-8750

January 21, 1986

FAR Secretariat (VRS)
General Services Administration
18th & F Streets, N.W.
Room 4041
Washington, D.C. 20405

Attn: Margaret A. Willis

RE: FAR Cases 85-63 through 85-68
Contract Cost Principles;
Costs Made Unallowable
(50 Fed. Reg. 51776-79, December 19, 1985)

Gentlemen:

This letter is written on behalf of the Section of Public Contract Law of the American Bar Association pursuant to special authority extended by the Association's Board of Governors for comments by the Section on acquisition regulations. The views expressed are those of the Section and have not been considered or adopted by the Association's Board of Governors or its House of Delegates.

The following are our comments and recommendations with respect to FAR Cases 85-63, 64, 66, 67 and 68.

FAR 31.201-2, Unallowable Costs Under FAR 31.205
(FAR Case 85-63)

In the background discussion on the proposed amendment to FAR 31.201-2, "Determining Allowability," the promulgators acknowledge that there are "ambiguities in the FAR which cause contractors, Government auditors, and contracting officers to have different interpretations on allowability." We suggest that these identified ambiguities be removed. Otherwise, there should be no reason why such ambiguities in the subsections of FAR 31.205 should be resolved in favor of the drafters.

SECTION OF PUBLIC CONTRACT LAW

With respect to the proposed language, there would appear to be no reason or justification for deviating from the language that now appears in FAR 31.201-6, "Accounting for Unallowable Costs." FAR 31.201-6(a) utilizes the term, "[c]osts that are expressly unallowable," as distinguished from the term in FAR 31.201-6(b), "[c]osts which specifically become designated as unallowable." To avoid confusion concerning the intended meaning of FAR 31.201-2(d), the term "[c]osts made specifically unallowable," should be changed to "costs that are expressly unallowable." This revision would conform FAR 31.201-2(d) with the language in FAR 31.201-6(a) that is used in the same context.

FAR 31.205-6 and 31-205-46, Company Furnished Automobiles (FAR Case 85-64)

The proposed change would make unallowable "[t]hat portion of the cost of company-furnished automobiles that relates to personal use by employees (including transportation to and from work)." This is a departure from the established rules for determining the allowability of compensation. We believe that the allowability of costs associated with the personal use of company automobiles should be judged under the established reasonableness rule generally used for determining the allowability of compensation.

This proposed revision poses a serious impediment to Defense contractors in their ability to hire top-notch personnel. Under the present regulatory scheme, the cost of company-furnished automobiles is allowable to the extent that it is a practice generally recognized among the contractor's competitors. (See FAR 31.205-6(b)). If Defense contractors are not permitted to recover a substantial portion of the cost of furnishing automobiles to selected employees, as non-Defense contractors may continue to do, Defense contractors easily could lose their ability to compete in the employment market, especially in the high-tech industries. Furthermore, the proposed revision would create particularly onerous accounting requirements for the company and accountability and recordkeeping requirements for the employee, thus exacerbating the employer's ability to compete for first caliber personnel.

> having to present its claim to the contracting officer and thereafter to be the appealing party in a proceeding before a Board of Contract Appeals, there is a distinction between a claim of the Government and that of a contractor. See Harrington and Richardson, Inc., ASBCA No. 9839, 72-2 BCA ¶ 9507. Certainly where the Government has asserted the existence of defective pricing data and seeks a downward adjustment of the contract price, it is the Government that is making a claim against appellant, not the appellant prosecuting a claim against the Government. Viewed as a Government claim against appellant, the costs incurred do not fall within the prohibition of ASPR 15-201.3(d).

Therefore, the Council's stated rationale for the change: "These revisions are considered necessary because of problems encountered in administering this cost principle and they are not a change in policy" is simply incorrect and unsupported. This part of the cost principle has been well understood for many years. Moreover, it is, as presently worded, consistent with the "Fraud" cost principle (if a contractor is exonerated of this government charge, it is entitled to recoup its provisionally disallowed defense costs). This change is a change in policy. It is also one, which, if it is made effective, will be inconsistent with the Fraud cost principle, FAR 31.205-47.

It is unreasonable and inequitable to force contractors to bear the cost of defending against Government claims, particularly since there is no overriding requirement that the claims be meritorious. Nor does the Equal Access to Justice Act provide an effective mechanism for more than a few contractors to recover the costs of litigation in such cases.

The proposed revision in 31.205-33(f) would disallow costs of litigation arising out of "a teaming arrangement, a joint venture, or similar arrangement of shared interest in a Government contract." This should be revised to make clear that costs of litigation with a subcontractor remain allowable, since those costs are a necessary and appropriate aspect of performing under government contracts.

85-67-28

FAR 31.205-33, Executive Lobbying Costs
(FAR Case 85-67)

In Section 31.205-52, "Executive Lobbying Costs," the DAR and CAA Councils have proposed a new cost principle that is intended to make unallowable costs that are "incurred to induce, directly or indirectly, an employee or officer of the executive branch of the Federal Government to give consideration or to act regarding a regulatory or contract matter on any basis other than the merits."

This language, however, does not appear to satisfy the requirement of the Defense Procurement Authorization Act of 1985. Section 911 of that Act specifies that, as a minimum, the cost principles applicable to executive branch lobbying shall be clarified to define in detail and in specific terms those costs that are unallowable under covered contracts. Rather than clarifying the question of allowability of executive branch lobbying costs, the proposed new cost principle would appear to create confusion and ambiguity by the use of an unworkable "merits" test.

There apparently has been no attempt to define in detail or specify the types of costs that are unallowable under the proposed cost principle. The brief discussion in the proposed Section 31.205-22 is in marked contrast to the detailed description and examples provided in FAR 31.205-22 of the types of lobbying costs that are unallowable (Section 31.205-22(a)) and those that are allowable (Section 31.205-22(b)).

FAR 31.205-51, Alcoholic Beverage Costs
(FAR Case 85-68)

This proposed change provides that "[t]he costs of alcoholic beverages are unallowable." We have no comment on this proposed change.

We trust that these comments and recommendations will be helpful in the development of the final regulations by the DAR and CAA Councils.

Sincerely,

John S. Pachter, Chairman
Federal Acquisition Regulation
Coordinating Council

FAR 31.205-33, Costs of Litigating Appeals Against the Government (FAR Case 85-66)

The proposed revision to FAR 31.205-33(d), "Professional and Consultant Service Costs," would greatly expand the description of costs for legal, accounting, and consultant services that are currently unallowable under existing Section 31.205-33(d) by making unallowable the cost of defending claims brought by the Government. That Section currently provides as follows:

> "(d) Costs of legal, accounting, and consulting services and directly associated costs incurred in connection with organization and reorganization ..., defense of antitrust suits, or the prosecution of claims against the Government are unallowable. Such costs incurred in connection with patent infringement litigation are unallowable unless otherwise provided for in the contract." (Emphasis added.)

The costs of prosecuting a claim against the Government, as described in the language quoted above, have been unallowable for many years. See, e.g., Grumman Aerospace Corp. v. United States, 579 F.2d 586 (Ct.Cl. 1978); J.E. Robertson Co. v. United States, 437 F.2d 1360 (Ct.Cl. 1971); Reed & Prince Manufacturing Co., ASBCA 3172, 59-1 BCA ¶ 2172. As to the recovery of costs incurred in defense of claims and appeals by the Government, however, we disagree with the CAA and DAR Council's statement that "Such costs are presently being disallowed but disputed by some contractors." If they are being disallowed, they should not be since the wording of the cost principle is clear. Moreover, any such disallowance is contrary to the interpretation of this cost principle as enunciated by the Armed Services Board of Contract Appeals. For example, in Hayes International Corp., ASBCA No. 18447, 75-1 BCA ¶ 10,076, the Board stated at 52,726:

> The first question which must be decided is whether the legal expenses were incurred in connection with the prosecution of a claim against the Government which, if so, under ASPR 15-205.31, would be unallowable. Although the Disputes clause places the Government contractor in the position of

85-64-26
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PSMA
PROFESSIONAL SERVICES MANAGEMENT ASSOCIATION
1213 Prince Street Alexandria, Virginia 22314
703/684-3993

January 17, 1986

Ms. Margaret A. Willis
FAR Secretariat (VRS)
General Services Administration
18th and F Streets, Northwest
Room 4041
Washington, D.C. 20405

Dear Ms. Willis:

Reference is made to your letter of December 23, 1985, concerning six proposed amendments to the FAR cost principles.

This Association recognizes that the proposed amendments have been dictated by GAO and by Congressional micro-management of Government contract procurement regulations. Therefore, in the comments that follow, we shall address ourselves to the theories and wording of the proposed amendments.

a. FAR 31.201-2, concerning unallowable costs under FAR 31.205 (FAR Case 85-63)

The theory that costs made specifically unallowable under any subsection of 31.205 are not allowable under any other sections or subsections of Subpart 31.2 is a far reaching one and totally unfair to contractors. It would overturn many case law decisions. You would need to completely revise all sections of Subpart 31.2 to make it play as that was not the intent of the old ASPR's and DAR's now incorporated into the FAR. Your own proposed amendment to FAR 31.205-28, Selling Costs, and to 31.205-33, Professional and Consultant Service Costs, violates your proposal under FAR 31.201-2.

b. FAR 31.205-6 and 31.205-46, concerning company-furnished automobiles (FAR Case 85-64)

Our member companies today credit the Government for personal use of company-furnished automobiles. However, we have considered transportation to and from work as an allocable business cost to Government contracts. Your proposed amendment would make such travel unallowable.

The impact would be greatest on executives who do not use company cars as much in dealing with customers as do, for example, engineers. The result would be to charge most of executive company car costs to commercial work even though the executive handles Government business in his office. It would be another example of the one-way street by the Government to penalize Government contractors.

c. FAR 31.205-14, concerning implementation of Congressional direction regarding the cost of membership in social, dining and country clubs (FAR Case 85-65)

Much business in transacted at the clubs you have covered. In the past costs were usually prorated between business and entertainment purposes if proper documentation were furnished. To disallow all such costs is another bonus for the Government. Only it can propose not allowing legitimate business costs.

d. FAR 31.205-33, concerning costs of litigating appeals against the Government (FAR Case 85-66)

You are attempting to overturn case law which has held that consultant costs on a claim by the Government against the contractor were allowable. Such costs have always been unallowable on litigating a claim by the contractor against the Government.

You are also using the theory of Single Screening where you would remove costs of lawsuits between contractors from the indirect expense pool but leave the costs related to such contracts in the base for calculating the rate.

We do not understand why you have included directly associated costs in this specific section. FAR Section 31.201-6 already indicates directly associated costs apply to all unallowable costs.

It is unclear when an appeal would be effective. Would appealing a DCAA audit to a Contracting Officer trigger your proposed disallowal?

e. FAR 31.205-52, concerning executive lobbying costs (FAR Case 85-67)

The purpose of your proposed is to add executive lobbying costs to legislative lobbying costs as an unallowable cost.

Certainly contractor executives are entitled to discuss contracts with employees or officers of the executive branch. What is meant by "the merits"? Clarification is needed to list what is and what is not executive lobbying.

f. FAR 31.205-51, concerning alcoholic beverage costs (FAR Case 85-68)

Although not specifically listed under FAR 31.205-14, Entertainment costs, in the past Government Auditors and contracts alike have always removed alcoholic beverage costs from their indirect pools.

We do not understand why you need a separate FAR Section for this item. A simple addition to FAR 31.205 would serve to confirm an approach presently being practiced.

We also have the following general observations about your six proposed amendments covered above, as follows:

1. Your statement that "the proposed changes are not expected to nave a significant impact on a substantial number of small entities because most contracts awarded to small entities are awarded on a competitive fixed price basis and cost principles do not apply "is totally without merit or a sound basis.

Many of our member companies are small entities with F.P. negotiated contracts and CPFF contracts. The cost principles do apply to them.

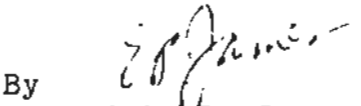
2. Some of the above proposals will require an inordinate amount of record keeping. Indirect costs will rise. In many cases, the costs will exceed the benefits.

3. Due to the timetable under which you are operating, it appears to this Association that you have not clearly thought through the wording you have used on the six proposed amendments.

We appreciate the opportunity to comment on these important proposed amendments to FAR Subpart 31.2. We earnestly hope that you will give our observations serious consideration.

Very truly yours,

PROFESSIONAL SERVICES
MANAGEMENT ASSOCIATION

By 
Edwin P. James
Arthur Andersen & Co.

JJM

85-64-27

DEPARTMENT OF DEFENSE
OFFICE OF THE INSPECTOR GENERAL
WASHINGTON, D.C. 20301

Audit Policy
and Oversight

JAN 23 1986

MEMORANDUM FOR GENERAL SERVICES ADMINISTRATION,
FEDERAL ACQUISITION REGULATION SECRETARIAT

SUBJECT: Proposed Changes to the Federal Acquisition Regulation, Part 31.205-6 and 31.205-46, Federal Acquisition Regulation Case No. 85-64

We have reviewed your proposed changes to add a paragraph (m) to Section 31.205-6 and to add a paragraph (f) to Section 31.205-46 of the Federal Acquisition Regulation. The new additions make the costs of personal usage of company-furnished automobiles specifically unallowable.

Based on our review, we concur with your proposed changes.

James H. Curry
Assistant Inspector General
for Audit Policy and Oversight

RECEIVED
JAN 24 1986

85-64-28

FLUOR TECHNOLOGY, INC.
ADVANCED TECHNOLOGY DIVISION

3333 MICHELSON DRIVE
IRVINE, CALIFORNIA 92730
TELEPHONE: (714) 553-5000
TELEX: 18-2294

January 16, 1986

General Services Administration
FAR Secretariat (VRS)
18th & F Streets NW, Room 4041
Washington, D.C. 20405

Gentlemen:

Re: FAR Case 85-64

Fluor Technology, Inc., a project management, engineering, procurement and construction management service contractor, is strongly opposed to the proposed amendment to FAR on "Determining Allowability."

The proposed rule would constitute a sweeping and fundamental change to the contract cost principles which have taken decades to develop. While perhaps well-intentioned, The GAO's recommended substitution of the present flexibility for rigidity will generate more conflicts and disputes than it will solve. By its very statement, the proposed clause would put numerous cost principles in direct contradiction, eviscerating and totally defeating the intent of many sound principles.

To take one example, "interest" expense is expressly unallowable under FAR 31.205-20, but is presently an allowable component of other principles such as: 31.205-2, 31.205-4, 31.205-6(j)(5)(ii), 31.205-10, 31.205-12 (in the case of capital leases,) 31.205-35(a)(7) and 31.205-36. Imagine the disputes and litigation that would be engendered by this single example, then multiply that by every other cost which would be affected by this proposed rule.

It must be remembered that the general cost principles and Cost Accounting Standards are purposely designed with some degree of flexibility and latitude for interpretation because they must apply to every type of contract, every type of industry, every kind and size of contractor, vendor and supplier, and to every conceivable circumstance and situation. Attempts to apply any but the most general rules rigidly across the entire diverse spectrum of contractors and contracting situations will either totally defeat the Government's objectives or run into a host of exceptions. It's like trying to fix a watch with a ball peen hammer.

85-64-28

FLUOR

General Services Administration
Washington, D.C.

January 16, 1986
2

This proposed rule should be withdrawn.

Sincerely,

M. E. Failing
Contract Administrator

MEF001:nas

85-64-29

Armed Forces Communications
and Electronics Association
AFCEA International Headquarters Building
5641 Burke Centre Parkway • Burke, VA 22015
Telephone (703) 425-8500 • Telex 90 1114 AFCEA BURK

January 3, 1986

FAR Secretariat (VRS)
General Services Administration
18th & F Streets, NW
Room 4041
Washington, DC 20405

Dear Ms. Willis:

Re: Your letter of December 23, 1985 to our President.

We appreciate the opportunity to review FAR Cases 85-63 thru 85-68. AFCEA has no comment to offer on the proposed changes.

Sincerely,

J. F. Denniston
Colonel, USAF (Ret.)
Comptroller

JFD/mmd