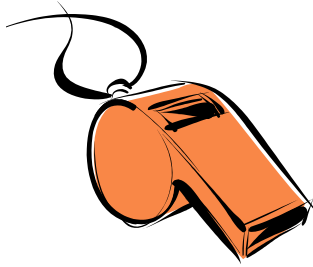


COSTS ASSOCIATED WITH WHISTLEBLOWER ACTIONS**Guiding Principle:**

Allowability determinations for costs associated with whistleblower actions are made on a case-by-case basis after considering contract terms, relevant cost regulations, and relevant circumstances.

Applicability:

This section is applicable to all elements of the Department of Energy including the National Nuclear Security Administration.

References:

- Section 627 of the Energy Policy Act of 2005, codified at 42 U.S.C. 5853
- DEAR 931.205-47(h), Costs related to legal and other proceedings
- DEAR 952.216-7, Allowable cost and payment
- DEAR 970.3102-05-47(h), Costs related to legal and other proceedings
- DEAR 970.5232-2, Payments and Advances

Rescission:

- AL 2001-03, Costs Associated with Whistleblower Actions, May 25, 2001

What is the Purpose of this Guidance?

The purpose of this guidance is to:

- (1) Assist contracting officers implementing the requirements contained at DEAR 931.205-47(h); and
- (2) Establish procedures for consulting with counsel on allowability determinations.

What is the Background Information You Need to Know?

During the 1990s the Department established a program (10 CFR Part 708) providing an administrative forum for contractor employees to bring claims of discriminatory action by contractors resulting from whistleblower activities of the employees.

The Department also addressed the issue of reimbursement of contractor costs related to defense of actions under this new program and under related administrative whistleblower forums. A final rulemaking addressing cost reimbursement issues was published in the Federal Register on October 18, 2000 (65 FR 62299).

What are the requirements of the cost principle?

DEAR 931.205-47(h) requires contracting officers to determine allowability of defense, settlement and award costs on a case-by-case basis after considering the terms of the contract, relevant cost regulations, and relevant facts and circumstances, including federal law and policy prohibiting reprisal against whistleblowers, available at the conclusion of the employee whistleblower claim. The cost principle addresses only the costs associated with whistleblower retaliation claims filed in Federal and state courts and with Federal agencies under 29 CFR Part 24, 48 CFR (FAR) subpart 3.9, 10 CFR Part 708 or 42 U.S.C. 7239.

The DEAR cost principle also requires the Department to establish a whistleblower costs point-of-contact in the Office of General Counsel (the GC point-of-contact). Contracting officers, or their designated representatives, must consult with counsel before making an allowability determination on costs associated with whistleblower actions as specified in the regulation. The purpose of this requirement is to promote an evenhanded approach and to avoid unwarranted variation across the Department's complex of facilities.

Energy Policy Act (EPACT), 2005

Section 627 of EPACT 2005 (codified at 42 U.S.C. 5853) prohibits DOE from reimbursing contractors or subcontractors for legal fees or expenses incurred in whistleblower cases subsequent to an adverse determination on the merits by the Department's Office of Hearing and Appeals or a Department of Labor Administrative Law Judge, or final determination by a Federal or state court under a contract that was entered into on or after August 8, 2005. This prohibition also applies to M&O contracts that were noncompetitively extended after that date. Such costs must be disallowed unless and until the adverse determination or final judgment is reversed upon further administrative or judicial review.

Who is the Office of General Counsel Point-of-Contact?

The Office of the Assistant General Counsel for Procurement and Financial Assistance (GC-61) will serve as the GC point-of-contact. DEAR 931.205-47(h)(2)(ii) makes consultation with the GC point-of-contact mandatory. Contracting officer consultation with local counsel will also satisfy this requirement. Local counsel, when consulted instead of the GC point-of-contact, will determine whether further consultation with Headquarters is required. The GC point-of-contact will assist contracting officers, their designated representatives, and local counsel by providing summaries of relevant cases of Board of Contract Appeals decisions and other guidance material. When appropriate, and based on the information provided about the case, the GC point-of-contact will consult

with the General Counsel for NNSA when a NNSA site is involved, and with other Headquarters and program offices, including the Office of Environment, Safety and Health, and the Offices of Procurement and Assistance Management.

What is the Procedure for “Consulting” with Counsel?

The following information may be useful in any request for consultation:

- Type of action:
(Federal or state court, or administrative action under 29 CFR Part 24, 48 CFR subpart 3.9, 10 CFR Part 708 or 42 U.S.C. 7239)
- Breakdown of costs submitted for reimbursement, including settlement costs and any of the following categories if applicable:
 - (A) Employee back-pay award:
 - (B) Damages, if any, awarded to employee, and whether they are compensatory or punitive:
 - (C) Employee legal fees reimbursed:
 - (D) Contractor legal fees reimbursed:
- Any particular provisions in the contract addressing the pertinent cost and if there are any reasons why the costs should be treated or funded any differently than as a normal cost:
- Key facts or circumstances which may be pivotal in determination of allowability or unallowability:
(For example: the finding was reached by a judge or jury; any statements of culpability contained in a settlement agreement; the existence of similar complaints against the employer or a particular individual; or remedial action instituted by the contractor)
- Name, e-mail address, and phone number of person requesting the consultation.
- Guidance may be requested on provisional reimbursement to the contractor of its costs while the legal action is pending, but consultation on this is not required.

Counsel will review the available information and provide comments and guidance material to the individual requesting consultation within 30 days of receiving the information. The individual assisting in the consultation will then be available for further discussion with the contracting officer after he/she has reviewed the provided guidance.