

# Federal Government Contractors Beware: Certain Employment Relations Costs Now Unallowable

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## Background

In the weeks following President Barack Obama's inauguration, he issued a number of Executive Orders generally viewed by commentators as dramatically shifting U.S. labor policy in favor of unions and union organizing. federal government contracting departments and agencies to treat as unallowable the costs of any activities undertaken to persuade employees, whether employees of the recipient of federal funds or any other entity, to exercise or not exercise, or concerning the manner of exercising, the right to organize and bargain collectively. The stated purpose of the Executive Order was to promote economy and efficiency in government contracting, "...consistent with the policy of the United States to remain impartial concerning any labor-management dispute involving government contractors.

Examples of unallowable costs undertaken to "persuade" employees were listed as:

- (a) preparing and distributing materials;
- (b) hiring or consulting legal counsel or consultants;
- (c) holding meetings (including paying the salaries of the attendees at a meeting held for this purpose); and
- (d) planning or conducting activities by managers, supervisors, or union representatives during work hours.

The Executive Order became effective immediately, and directed the adoption of rules and regulations to carry out the directives of the Executive Order, to apply to contracts resulting from solicitations issued on or after the effective date of the rules.

## Amended Federal Acquisition Rules Effective December 2, 2011

The Department of Defense, General Services Administration and NASA published proposed rules pursuant to the direction contained in the Executive Order and, on November 2, 2011, published a

final rule (76 Federal Register 68040), to be effective December 2, 2011, to apply to federal contracts resulting from solicitations issued on or after the effective date, whereby the contractor's costs relating to "persuader activities" of the type set forth in the Executive Order were now unallowable. Costs incurred for maintaining satisfactory labor relations, including those arising from activities such as the costs of shop stewards, Labor-Management Committees, employee publications, and negotiating or administering collective bargaining agreements remain allowable. Interestingly, costs related to the development, implementation and enforcement of neutrality agreements, which aid unions in their organizing efforts, are also allowable.

### **Impact on Contractors**

Existing Federal Acquisition Regulations require contractors to have an accounting system which segregates allowable from unallowable costs. Care should be taken to properly allocate costs accordingly.

In addition, contractors should carefully monitor other administration and agency rulemaking efforts, particularly such as the pending Department of Labor proposed rule which would significantly increase the scope of "persuader" activities and narrow the "advice" exception. A final rule along these lines, which most anticipate will be issued in the near future, would not only greatly increase the reporting responsibilities of employers and their advisors, but also, increase the scope of unallowable costs under federal contracts. The attorneys at Michael Best will keep you advised of developments as they occur, and are available to answer your questions or discuss compliance concerns as well.

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