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Department of Defense
General Services Administration
National Aeronautics and Space Administration

48 CFR Chapter 1, Part 2, et al.
Federal Acquisition Circular 2005–04; Federal Acquisition Regulations; Interim and Final Rules

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

Federal Acquisition Circular 2005–04; Introduction

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Summary presentation of interim and final rules.

SUMMARY: This document summarizes the Federal Acquisition Regulation (FAR) rules agreed to by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council in this Federal Acquisition Circular (FAC) 2005–04. A companion document, the Small Entity Compliance Guide (SECG), follows this FAC. The FAC, including the SECG, is available via the Internet at *http://www.acqnet.gov/far.*

DATES: For effective dates and comment dates, see separate documents which follow.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, at (202) 501–4755, for information pertaining to status or publication schedules. For clarification of content, contact the analyst whose name appears in the table below in relation to each FAR case or subject area. Please cite FAC 2005–04 and specific FAR case number(s). Interested parties may also visit our Web site at *http://www.acqnet.gov/far.*

Item	Subject	FAR case	Analyst
I	Notification of Employee Rights Concerning Payment of Union Dues or Fees	2004–010	Marshall.
II	Telecommuting for Federal Contractors	2003–025	Zaffos.
III	Incentives for Use of Performance-Based Contracting for Services	2004–004	Wise.
IV	Submission of Cost or Pricing Data on Noncommercial Modifications of Commercial Items (Interim).	2004–035	Olson.
V	Applicability of SDB and HUBZone Price Evaluation Factor	2003–015	Marshall.
VI	Labor Standards for Contracts Involving Construction	2002–004	Nelson.
VII	Deferred Compensation and Postretirement Benefits Other Than Pensions	2001–031	Olson.
VIII	Gains and Losses	2004–005	Olson.

SUPPLEMENTARY INFORMATION:

Summaries for each FAR rule follow. For the actual revisions and/or amendments to these FAR cases, refer to the specific item number and subject set forth in the documents following these item summaries.

FAC 2005–04 amends the FAR as specified below:

Item I—Notification of Employee Rights Concerning Payment of Union Dues or Fees (FAR Case 2004–010)

This final rule adopts, without change, the interim rule published in the **Federal Register** at 69 FR 76352, December 20, 2004, and issued as Item IV of FAC 2001–26. It amends FAR parts 2, 22, and 52 to implement Executive Order (E.O.) 13201, Notification of Employee Rights Concerning Payment of Union Dues or Fees, and Department of Labor regulations at 29 CFR 470. The rule requires Government contractors and subcontractors to post notices informing their employees that under Federal law they cannot be required to join a union or maintain membership in a union to retain their jobs. The required notice also advises employees who are not union members that they can object to the use of their union dues for certain purposes. This rule applies to Federal contractors and subcontractors with contracts or subcontracts that exceed the simplified acquisition threshold, unless covered by an exemption granted by the Secretary of Labor.

Item II—Telecommuting for Federal Contractors (FAR Case 2003–025)

This rule finalizes without changes the interim rule published in the **Federal Register** at 69 FR 59701, October 5, 2004, and issued as Item III of FAC 2001–025. This final rule implements Section 1428 of the Services Acquisition Reform Act of 2003 (Title XIV of Public Law 108–136), which prohibits agencies from including a requirement in a solicitation that precludes an offeror from permitting its employees to telecommute or, when telecommuting is not precluded, from unfavorably evaluating an offeror's proposal that includes telecommuting unless it would adversely affect agency requirements, such as security. Contracting officers awarding service contracts should familiarize themselves with this rule.

Item III—Incentives for Use of Performance-Based Contracting for Services (FAR Case 2004–004)

This final rule amends the Federal Acquisition Regulation (FAR) to provide Governmentwide authority to treat performance-based contracts or task orders for services as commercial items, if certain conditions are met. Agencies must report on the use of this authority. This change implements sections 1431 and 1433 of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136) and is intended to promote the use of performance-based contracting.

Item IV—Submission of Cost or Pricing Data on Noncommercial Modifications of Commercial Items (FAR Case 2004–035)

This interim rule implements an amendment to 10 U.S.C. 2306a. The change requires that the exception from the requirement to obtain certified cost or pricing data for a commercial item does not apply to noncommercial modifications of a commercial item that are expected to cost, in the aggregate, more than $500,000 or 5 percent of the total price of the contract, whichever is greater. Section 818 applies to offers submitted, and to modifications of contracts or subcontracts made, on or after June 1, 2005. This new policy applies only to acquisitions funded by DoD, NASA, or the Coast Guard, since the statute amends 10 U.S.C. 2306a, which only applies to DoD, NASA, and the Coast Guard. The new language does not apply to acquisitions funded by other than DoD, NASA, or the Coast Guard because Section 818 did not amend 41 U.S.C. 254b, which prohibits obtaining cost or pricing data for commercial items. However, the new policy applies to contracts awarded or task or delivery orders placed on behalf of DoD, NASA, or the Coast Guard by an official of the United States outside of those agencies, because the statutory requirement of Section 818 applies to the funds provided by DoD, NASA, or the Coast Guard.

Item V—Applicability of SDB and HUBZone Price Evaluation Factor (FAR Case 2003–015)

This final rule removes some of the exceptions to the Small Disadvantaged Business and HUBZone preference programs. The contracting officer will now apply a price evaluation adjustment to offers of eligible products in acquisitions subject to the Trade Agreements Act. This rule will have a beneficial impact on all domestic concerns, especially small entities that are small disadvantaged business concerns or HUBZone small business concerns.

Item VI—Labor Standards for Contracts Involving Construction (FAR Case 2002–004)

This final rule implements in the FAR the DoL rule revising the terms ''construction, prosecution, completion or repair'' (29 CFR 5.2(j)) and ''site of the work'' (29 CFR 5.2(l)). In addition, the Councils have clarified several definitions relating to labor standards for contracts involving construction and made requirements for flow down of labor clauses more precise.

The most significant impact of this rule is that contractors must pay Davis-Bacon Act wages at a secondary site of the work, if a significant portion of the work is to be constructed at that site and the site meets the other criteria specified in the rule. When transporting portions of the building or work between the secondary site of the work and the primary site of the work, the wages for the primary site of the work are applicable. The contracting officer must coordinate with the Department of Labor when there is any uncertainty as to whether a work site is a secondary site of the work.

Item VII—Deferred Compensation and Postretirement Benefits Other Than Pensions (FAR Case 2001–031)

This final rule amends the FAR by revising paragraph (k), Deferred compensation other than pensions, and paragraph (o), Postretirement benefits other than pensions, of FAR 31.205–6, Compensation for personal services, cost principle. Changes to paragraph (k) include: deletion of language that duplicates definitions provided in FAR 31.001, elimination of obsolete coverage, and use of terminology consistent with Cost Accounting Standards. Changes to paragraph (o) include: moving and revising language in (o)(3) through (o)(5) to (o)(2)(iii) because these requirements only apply to accrual costing other than terminal funding. In addition, new coverage is added to the related contract clause at FAR 52.215–18, Reversion or Adjustment of Plans for Postretirement Benefits (PRB) Other Than Pensions, specifying the method of recovery of refunds and credits. The rule revises the cost principle and contract clause by improving clarity and structure, and removing unnecessary and duplicative language.

The case was initiated as a result of comments and recommendations received from industry and Government representatives during a series of public meetings. This rule is of particular interest to contractors and contracting officers who use cost analysis to price contracts and modifications, and who determine or negotiate reasonable costs in accordance with a clause of a contract, *e.g.,* price revision of fixed-price incentive contracts, terminated contracts, or indirect cost rates.

Item VIII—Gains and Losses (FAR Case 2004–005)

This final rule amends FAR 31.205–16 to address the timing of the gain or loss recognition of sale and leaseback arrangements of contractor depreciable property or other capital assets. The final rule defines the disposition date for a sale leaseback arrangement as the date the contractor begins to incur an obligation for lease or rental costs. Contracting officers, auditors, and contractors with responsibilities related to allowable cost determinations involving sale and leaseback arrangements of contractor depreciable property or other capital assets will be impacted by new policies governing that area.

Dated: May 27, 2005.

Julia B. Wise,

Director, Contract Policy Division.

Federal Acquisition Circular

Federal Acquisition Circular (FAC) 2005–04 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2005–04 is effective July 8, 2005, except for Items I, II, III, and IV, which are effective June 8, 2005.

Dated: May 26, 2005.

Vincent J. Feck,

Lt Col, Acting Director, Defense Procurement and Acquisition Policy.

Dated: May 27, 2005.

David A. Drabkin,

Senior Procurement Executive, Office of the Chief Acquisition Officer, General Services Administration.

Dated: May 26, 2005.

Scott Thompson,

Acting Assistant Administrator for Procurement, National Aeronautics and Space Administration.

[FR Doc. 05–11179 Filed 6–7–05; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 22, 52

[FAC 2005–04; FAR Case 2004–010; Item I]

RIN 9000–AK04

Federal Acquisition Regulation; Notification of Employee Rights Concerning Payment of Union Dues or Fees

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed to convert the interim rule amending the Federal Acquisition Regulation (FAR) published in the **Federal Register** at 69 FR 76352, December 20, 2004, to a final rule without change. This rule implemented Executive Order (E.O.) 13201, Notification of Employee Rights Concerning Payment of Union Dues or Fees. The rule requires Government contractors and subcontractors to post notices, in all plants and offices, whether or not used in performing work that supports a Federal contract, informing their employees that under Federal law they cannot be required to join a union or maintain membership in a union to retain their jobs. The required notices also advise employees who are not union members that they can object to the use of their union dues for certain purposes.

DATES: *Effective Date:* June 8, 2005.

The Department of Labor's final rule implementing E.O. 13201 was published on March 29, 2004, with an effective date of April 28, 2004. This FAR rule is the formal notification to contracting officers to insert the E.O. 13201 clause in covered solicitations issued on or after the effective date of this rule.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat at (202) 501–4755 for information pertaining to status or publication schedules. For clarification of content, contact Ms. Kimberly A. Marshall, Procurement Analyst, at (202) 219–0986. Please cite FAC 2005–04, FAR case 2004–010.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule amends the Federal Acquisition Regulation. DoD, GSA, and NASA published an interim rule in the **Federal Register** at 69 FR 76352, December 20, 2004. The 60-day comment period for the interim rule ended February 18, 2005. The Councils did not receive any public comments, and, therefore, agree to finalize the interim rule without change.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule merely requires contractors to post notices and to insert a clause in subcontracts and purchase orders requiring subcontractors and vendors to post the notices also. The notices advise the contractors' and subcontractors' nonunion member employees of their rights under existing law concerning use of their union dues or fees where a union security agreement is in place. The rule provides sanctions for noncompliance, but full compliance with the Executive Order and any related rules, regulations and orders of the Secretary of Labor is expected of all contractors. Further, this rule is only implementing the Department of Labor (DOL) final rule. The Secretary of Labor has certified to the Chief Counsel for Advocacy at the Small Business Administration that the DOL final rule will not substantially change existing obligations for Federal contractors. The Councils did not receive any comments relating to the Regulatory Flexibility Act. However, the Councils will consider comments from small entities concerning the affected FAR Parts 2, 22, and 52 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAC 2005–04, FAR case 2004–010), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does apply; however, these changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 1215–0203.

List of Subjects in 48 CFR Parts 2, 22, 52

Government procurement.

Dated: May 27, 2005.

Julia B. Wise,

Director, Contract Policy Division.

■ Interim Rule Adopted as Final Without Change

■ Accordingly, the interim rule amending 48 CFR parts 2, 22, and 52, which was published at 69 FR 76352, December 20, 2004, is adopted as a final rule without change.

[FR Doc. 05–11180 Filed 6–7–05; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 7, 11, 13, and 15

[2005–04; FAR Case 2003–025; Item II]

RIN 9000–AK03

Federal Acquisition Regulation; Telecommuting for Federal Contractors

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed to convert the interim rule published in the **Federal Register** at 69 FR 59701, October 5, 2004, to a final rule without change. The final rule amends the Federal Acquisition Regulation (FAR) to implement section 1428 of the Services Acquisition Reform Act of 2003, Title XIV of Public Law 108–136, Authorization of Telecommuting for Federal Contractors.

DATES: *Effective Date:* June 8, 2005.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat at (202) 501–4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Gerald Zaffos, Procurement Analyst, at (202) 208–6091. Please cite FAC 2005–04, FAR case 2003–025.

SUPPLEMENTARY INFORMATION:

A. Background

An interim rule implementing Section 1428 of the Services Acquisition Reform Act of 2003 (Title XIV of Public Law 108–136) was published in the **Federal Register** on October 5, 2004 (69 FR 59701). Five comments were received from four respondents in response to the interim rule. While all of the commenters were supportive of the rule, the commenters offered the following recommendations to maximize the use of telecommuting for Federal contractors. One commenter suggested that the Councils provide an incentive for ''suppliers who take the initiative to hire telecommuting contractors.'' The Councils did not adopt this suggestion because the statute does not establish incentives, and the Councils believe establishing such an incentive is beyond the scope and authority of the Councils. Another commenter believes that the rule does not go far enough because it allows the contracting officer to determine that allowing telecommuting would be contrary to the agency's requirements. The commenter believes that Government managers who are uncomfortable with the concept of telecommuting will convince contracting officers to disallow telecommuting more often than allow it. To prevent this, the commenter recommended that ''telecommuting be established as a 'requirement' for some percentage of government contracts and that telecommuting be defined as working offsite for 25 or more hours a week.'' This commenter also recommended that contracting officers who award contracts to firms that allow their employees to telecommute receive additional training, funds, ''and a leg up on promotion.'' The Councils did not adopt this recommendation because there is no evidence that contracting officers will not act in good faith when making a determination not to allow

telecommuting. Moreover, the requirement for a written determination will allow agencies to conduct periodic reviews as may be necessary to ensure there is no abuse of this discretion. Also, issues of contracting officer rewards are personnel issues that are beyond the scope of this case and the general purview of the Councils. Another commenter recommended creating a vetting procedure for determinations to prohibit telecommuting and to hold contracting officers' ''feet to the fire.'' The Councils did not adopt this recommendation because compliance issues are beyond the scope of this case and are more appropriately addressed by individual agency management.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because there is no Governmentwide policy or practice concerning contractor employee telecommuting. In addition, this rule will not be a major change, but instead a small positive benefit to small businesses.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 7, 11, 13, and 15

Government procurement.

Dated: May 27, 2005.

Julia B. Wise,

Director, Contract Policy Division.

■ Interim Rule Adopted as Final Without Change

■ Accordingly, the interim rule amending 48 CFR parts 7, 11, 13, and 15, which was published in the **Federal Register** at 69 FR 59701, October 5, 2004, is adopted as a final rule without change.

[FR Doc. 05–11181 Filed 6–7–05; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 4, 12, 37, and 52

[FAC 2005–04; FAR Case 2004–004; Item III]

RIN 9000–AJ97

Federal Acquisition Regulation; Incentives for Use of Performance–Based Contracting for Services

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed to convert the interim rule published in the **Federal Register** at 69 FR 34226, June 18, 2004, to a final rule with changes to amend the Federal Acquisition Regulation (FAR) to implement Sections 1431 and 1433 of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136). Section 1431 enacts Governmentwide authority to treat performance–based contracts or task orders for services as commercial items if certain conditions are met, and requires agencies to report on performance–based contracts or task orders awarded using this authority. Section 1433 amends the definition of commercial item to add specific performance–based terminology and to conform to the language added by Section 1431.

DATE: *Effective Date:* June 8, 2005.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat at (202) 501–4755 for information pertaining to status or publication schedules. For clarification of content, contact Ms. Julia Wise, Director, Contract Policy Division, at (202) 208–1168. Please cite FAC 2005–04, FAR case 2004–004.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule amends the Federal Acquisition Regulation. DoD, GSA, and NASA published an interim rule in the **Federal Register** at 69 FR 34226, June 18, 2004, implementing Section 1431 and Section 1433 of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136). Public comments were received from three entities. The Councils reviewed and resolved the comments. The disposition of comments, as stated below, requires one change to the rule, as requested in comment 7.

1. *Comment:* Requested clarification as to whether the term ''performance assessment'' should be used in place of ''quality assurance'' in FAR 37.601(a)(2). This comment was based on a statement in the ''Guidebook for Performance–Based Services Acquisition (PBSA) in the Department of Defense,'' December 2000, that, ''[h]ereafter, 'performance assessment' will be used in place of the term 'quality assurance' unless otherwise noted.''

Council's response: This statement applied only to usage in the Guide and was not meant as a change in Governmentwide policy. In fact, a more recent memo, dated August 19, 2003, from the Undersecretary of Defense for Acquisition, Technology and Logistics, continues to use the term ''quality assurance,'' as does the ''Seven Steps Guide to Procurement Based Services Acquisition Guide.'' This comment is more appropriate for FAR Case 2003–18, which covers a broader revision of Performance–Based Services Acquisition, and will be considered along with other comments received in response to that case. FAR Case 2003–18 was published in the **Federal Register** at 69 FR 43712, July 21, 2004; public comments were due September 20, 2004.

2. *Comment:* Suggested that the Councils move the reference to quality assurance surveillance plans from FAR 37.601(a)(2) and make it a new subparagraph (5) to emphasize the importance of quality assurance surveillance plans.

Council's response: The Councils did not adopt this suggestion because the purpose of this case is to allow agencies to use FAR Part 12 for noncommercial services if the services otherwise meet the existing definition of performance–based contracting. This comment is more appropriate for FAR Case 2003–18 and will be considered along with other comments received in response to that case.

3. *Comment:* Recommended revising FAR 12.102(g)(1) by adding the additional qualifying factor of ''Includes a performance work statement.''

Council's response: The Councils did not adopt this suggestion because the purpose of the case is to allow agencies to use FAR Part 12 for noncommercial services if the services otherwise meet the existing definition of performance–based contracting, which addresses use of a work statement that is performance–based. FAR

12.102(g)(1)(vi) further addresses this comment.

4. *Comment:* Recommended changing FAR 12.102(g)(1)(ii) to: ''has an estimated value at time of solicitation of not more that $25 million'' because they thought it would be very cumbersome to change back to FAR Part 15 if the contract value ends up exceeding $25 million.

Council's response: The Councils did not adopt this suggestion because it will change the intent of this SARA provision. If acquisition planning is properly performed, prudent independent Government estimates are constructed and market research is conducted, the contracting officer will know upfront if this SARA authority is appropriate for this acquisition.

5. *Comment:* Recommended changing the language in FAR 12.102(g)(1)(iv) to ''includes appropriate quality assurance provisions'' instead of ''includes a quality assurance surveillance plan'' since the Government should not require the creation of a quality assurance plan different from the one the contractor uses when providing commercial services as required by FAR 12.208.

Council's response: FAR 12.208 does require the Government to rely on contractors' existing quality assurance systems as a substitute for Government inspection and testing unless customary market practices for the commercial item being acquired include in–process inspection. Since the rule authorizes the use of FAR Part 12 procedures for certain non–commercial services, customary market practices for the non–commercial services may not exist. However, the Councils do not believe it is necessary to ''include'' the quality assurance surveillance plan in the contract or task order and revised the rule to require each contract or task order to ''use'' a quality assurance surveillance plan.

6. *Comment:* Recommended changing the language in FAR 12.102(g)(vii) to: ''under terms and conditions similar to those being offered to the Federal Government.''

Council's response: The Councils recognize the difference in the language, but believe this change is consistent with and clarifies the statutory language.

7. *Comment:* Stated that the language in FAR 12.102(g)(2) was more prescriptive than the language in FAR 12.302 for tailoring provisions and clauses for commercial items and recommended that the language be revised to avoid unnecessary tailoring of the inspection and acceptance provisions in FAR 52.212–4(a).

Council's response: The Councils recognize the need to avoid unnecessary tailoring when acquiring commercial items, and consequently changed the language in FAR 12.102(g)(2) by inserting the word ''may'' instead of the word ''should.'' However, this case authorizes the use of FAR Part 12 procedures when purchasing certain non–commercial services. The current basis for tailoring a FAR Part 12 contract at FAR 12.302 authorizes tailoring based, in part, on customary commercial practices. It is likely that customary commercial practices may not exist for non–commercial services, even when the services are acquired using a performance–based requirement. This is particularly important in the area of inspection and acceptance covered by FAR 12.102(g)(2) and the clause at FAR 52.212–4. The Councils believe that relying exclusively on FAR 12.302 as the basis for tailoring provisions for non–commercial services may not adequately ensure the Government's interests are protected in this area. Therefore, the Councils determined that the FAR should provide the ability to consider additional remedies if needed to protect the Government against nonconforming services since the items being procured are not commercial items as defined by FAR 2.101. Since the new language at FAR 12.102(g)(2) only allows the contracting officer to tailor the inspections and acceptance provisions when necessary to protect the Government, the Councils do not believe this flexibility will lead to unnecessary tailoring.

8. *Comment:* Recommended several revisions to FAR 37.601(a) to provide for additional flexibility when using performance–based contracts for services.

Council's response: The Councils did not adopt these suggestions because this rule does not change existing FAR requirements at FAR 37.601(a) that pertain to performance–based contracts for services. The only revision to FAR 37.601 in this rule is to add a cross reference to FAR 12.102(g). These comments are more appropriate for FAR case 2003–18, which covers a broader revision of Performance–Based Services Acquisition, and will be considered along with other comments received in response to that case.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The changes may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because we have changed procedures for award and administration of contracts or task orders enabling the Government to treat certain commercial services as commercial items when the contract or task order—

- Is entered into on or before November 24, 2013;
- Has a value of $25 million or less;
- Meets the definition of performance–based contracting at FAR 2.101;
- Includes a quality assurance surveillance plan;
- Includes performance incentives where appropriate;
- Specifies a firm–fixed price for specific tasks to be performed or outcomes to be achieved; and
- Is awarded to an entity that provides similar services to the general public under terms and conditions similar to those in the contract or task order.

Therefore, a Final Regulatory Flexibility Analysis (FRFA) was prepared in accordance with Title 5, of the United States Code 604. The rule revised the FAR in order to comply with recently enacted Public Law 108–136, Section 1431 and 1433 of the National Defense Authorization Act for Fiscal Year 2004. Section 1431 provides for Governmentwide authority to treat certain performance–based contracts or task orders for services as commercial items if the certain conditions are met. Section 1433 also amends the definition of commercial services to conform to the language added by Section 1431 by inserting performance–based terms for clarification.

The implementation of Sections 1431 and 1433 will change the FAR as follows:

- Revises the commercial items definition in FAR 2.101 and 52.202–1;
- Adds a new record requirement for reporting commercial performance–based contracts and task orders to FAR 4.601;
- Incorporates the conditions for using FAR Part 12 for any performance–based contract or task order for services in FAR 12.102;
- Adds performance–based terms as required by section 1433; and
- Adds a cross reference to FAR 12.102(g) in FAR 37.601.

An Initial Regulatory Flexibility Analysis (IRFA) was published with the interim rule, and no comments

concerning the IRFA were received. A Final Regulatory Flexibility Analysis (FRFA) was prepared. The rule is expected to have a positive impact on small business concerns. However, it is not expected to have a significant impact on a substantial number of small entities because it provides Governmentwide procurement authority that enables the contracting officer (CO) to treat a noncommercial service as commercial if specific conditions, most of which pertain to performance–based contracting, are met. The Government is encouraged to use performance–based contracting techniques on all service contracts and allowing this authority—

- Opens up opportunities to small businesses that otherwise would not have been available if they could not meet the commercial items definition in FAR 2.101 and 52.202–1;
- Provides contracting flexibility when using performance–based contracting techniques;
- Helps the Government move closer to achieving the performance–based contracting performance–goals for Fiscal Years 2004 and 2005; and
- Allows the CO to use FAR Part 12, and procure these types of services similar to the commercial marketplace.

Specifically, a query of the Central Contractor Registration (CCR) system indicates there are 198,732 small businesses registered, and many of these contractors were awarded performance–based contracts or task orders for noncommercial services and the Government was required to use FAR Part 13, Simplified Acquisition Procedures, FAR Part 14, Sealed Bidding, or FAR Part 15, Contracting by Negotiations, for these acquisitions because they were not commercial items. This authority allows the CO to use FAR Part 12, which is the Government's preference since this will allow us to procure these types of services similar to the commercial marketplace, and using FAR Part 12 will provide more contracting flexibility and opportunities to the small business community.

The rule will impose no new reporting or recording keeping requirements on large or small entities. It only requires the Government to report on contracts or task orders awarded under this authority. Specifically, implementation of Section 1431 requires agencies to collect and maintain reliable data sufficient to identify the contracts or task orders treated as contracts for commercial items using the authority of this section. The Federal Procurement Data System–Next Generation (FPDS–NG) will be revised to enable agencies to report on the use of such authority both Governmentwide and for each department and agency. By November 2006, the Office of Management and Budget will start reporting to the Committees on Governmental Affairs and Armed Services of the Senate, and the Committees on Government Reform and Armed Services of the House of Representatives on the implementation of this section. The authority of Section 1431 expires on November 24, 2013, ten years after enactment.

The FAR Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration. Interested parties may obtain a copy from the FAR Secretariat. The Councils will consider comments from small entities concerning the affected FAR Parts in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq*. (FAC 2005–004, FAR Case 2004–004), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq*.

List of Subjects in 48 CFR Parts 2, 4, 12, 37, and 52

Government procurement.

Dated: May 27, 2005.

Julia B. Wise,

Director, Contract Policy Division.

Interim Rule Adopted as Final With Changes

■ Accordingly, DOD, GSA, and NASA adopt the interim rule amending 48 CFR parts 2, 4, 12, 37, and 52, which was published in the **Federal Register** at 69 FR 34226, June 18, 2004, as a final rule with the following changes:

■ 1. The authority citation for 48 CFR parts 2, 4, 12, 37, and 52, is revised to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 12—ACQUISITION OF COMMERCIAL ITEMS

12.102 [Amended]

■ 2. Amend section 12.102 in paragraph (g)(1)(iv) by removing ''Includes'' and adding ''Uses'' in its place; and in paragraph (g)(2) by removing ''should'' and adding ''may'' in its place.

[FR Doc. 05–11189 Filed 6–7–05; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 15

[FAC 2005–04; FAR Case 2004–035; Item IV]

RIN 9000–AK17

Federal Acquisition Regulation; Submission of Cost or Pricing Data on Noncommercial Modifications of Commercial Items

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) regarding prohibition on obtaining cost or pricing data to implement Section 818 of Public Law 108–375, the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005.

DATES: *Effective Date:* June 8, 2005.

Comment Date: Interested parties should submit comments to the FAR Secretariat at the address shown below on or before August 8, 2005 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005–04, FAR case 2004–035, by any of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- Agency Web Site: *http://www.acqnet.gov/far/ProposedRules/proposed.htm*. Click on the FAR case number to submit comments.
- E–mail: *farcase.2004–035@gsa.gov*. Include FAC 2005–04, FAR case 2004–035, in the subject line of the message.
- Fax: 202–501–4067.
- Mail: General Services Administration, Regulatory Secretariat (VIR), 1800 F Street, NW, Room 4035, ATTN: Laurieann Duarte, Washington, DC 20405.

Instructions: Please submit comments only and cite FAC 2005–04, FAR case 2004–035, in all correspondence related to this case. All comments received will be posted without change to *http://*

www.acqnet.gov/far/ProposedRules/proposed.htm, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat at (202) 501–4755, for information pertaining to status or publication schedules. For clarification of content, contact Mr. Jeremy Olson at (202) 501–3221. Please cite FAC 2005–04, FAR case 2004–035.

SUPPLEMENTARY INFORMATION:

A. Background

Section 818, Submission of Cost or Pricing Data on Noncommercial Modifications of Commercial Items, of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, amends 10 U.S.C. 2306a. 10 U.S.C. 2306a provides exceptions to the requirement for submission of cost or pricing data, including an exception for commercial items. Section 818 states that the exception for a commercial item does not apply to noncommercial modifications of a commercial item that are expected to cost, in the aggregate, more than $500,000 or 5 percent of the total price of the contract, whichever is greater. Section 818 applies to offers submitted, and to modifications of contracts or subcontracts made, on or after June 1, 2005.

B. Discussion

The Councils are revising the commercial item discussion in paragraph (c)(3) of FAR 15.403–1, Prohibition on Obtaining Cost or Pricing Data, to reflect the requirements of Section 818. This includes inserting a new paragraph (3)(ii). This new paragraph provides the exception to the requirement for cost or pricing data for minor modifications that do not change the item from a commercial item to a noncommercial item. The exception applies to all such minor modifications for acquisitions funded by agencies other than DoD, NASA, and Coast Guard. For acquisitions funded by DoD, NASA, and Coast Guard, the exceptions apply to all such modifications if the total cost of the modifications do not exceed the greater of $500,000 or 5 percent of the total price of the contract.

This new policy applies only to acquisitions funded by DoD, NASA, or the Coast Guard, since the statute amends 10 U.S.C. 2306a, which only applies to DoD, NASA, and the Coast Guard. The new language does not apply to acquisitions funded by other than DoD, NASA, or the Coast Guard because Section 818 did not amend 41 U.S.C. 254b, which prohibits obtaining cost or pricing data for commercial items. However, the new policy applies to contracts awarded or task or delivery orders placed on behalf of DoD, NASA, or the Coast Guard by an official of the United States outside of those agencies, because the statutory requirement of section 818 applies to the funds provided by DoD, NASA, or the Coast Guard.

C. Regulatory Planning and Review

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

D. Regulatory Flexibility Act

The interim rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act,5 U.S.C. 601, *et seq.*, because the number of small entities providing commercial items with non–commercial modifications costing more than $500,000 is expected to be very low.

Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils will consider comments from small entities concerning the affected FAR Part 15 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 601, *et seq.* (FAC 2005–04, FAR case 2004–035), in correspondence.

E. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

F. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that an urgent and compelling reason exists to promulgate this interim rule without prior opportunity for public comment. This action is necessary to implement the changes resulting from the enactment of Section 818 of Public Law 108–375, the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 that are effective June 1, 2005. However, pursuant to Public Law 98–577 and FAR 1.501, the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Part 15

Government procurement.

Dated: May 27, 2005.

Julia B. Wise,

Director, Contract Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR part 15 as set forth below:

PART 15—CONTRACTING BY NEGOTIATION

■ 1. The authority citation for 48 CFR part 15 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

■ 2. Amend section 15.403–1 by revising the first sentence of paragraph (c)(3)(i), redesignating paragraph (c)(3)(ii) as (c)(3)(iii), and adding new paragraph (c)(3)(ii) to read as follows:

15.403–1 Prohibition on obtaining cost or pricing data (10 U.S.C. 2306a and 41 U.S.C. 254b).

* * * * *

(c) * * *

(3) *Commercial items.* (i) Any acquisition of an item that meets the commercial item definition in 2.101, or any modification, as defined in paragraph (3)(i) of that definition, that does not change the item from a commercial item to a noncommercial item, is exempt from the requirement for cost or pricing data. * * *

(ii) The following requirements apply to minor modifications defined in paragraph (3)(ii) of the definition of a commercial item at 2.101 that do not change the item from a commercial item to a noncommercial item:

(A) For acquisitions funded by any agency other than DoD, NASA, or Coast Guard, the modifications are exempt from the requirement for submission of cost or pricing data.

(B) For acquisitions funded by DoD, NASA, or Coast Guard, the modifications are exempt from the requirement for submission of cost or pricing data provided the total cost of the modifications do not exceed the greater of $500,000 or 5 percent of the total price of the contract.

(C) For acquisitions funded by DoD, NASA, or Coast Guard where the total cost of the modifications exceeds the greater of $500,000 or 5 percent of the total price of the contract and no other exception or waiver applies, the contracting officer must require submission of cost or pricing data.

* * * * *

[FR Doc. 05–11188 Filed 6–7–05; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 19 and 52

[FAC 2005–04; FAR Case 2003–015; Item V]

RIN 9000–AK02

Federal Acquisition Regulation; Applicability of SDB and HUBZone Price Evaluation Factor

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to remove some of the exceptions to the applicability of the Small Disadvantaged Business (SDB) and HUBZone price evaluation factor.

DATES: *Effective Date*: July 8, 2005.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat at (202) 501–4755 for information pertaining to status or publication schedules. For clarification of content, contact Ms. Kimberly Marshall, Procurement Analyst, at (202) 219–0986. Please cite FAC 2005–04, FAR case 2003–015.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule amends FAR 19.1103(a) and FAR 19.1307(b) in order to remove the exceptions to the Small Disadvantaged Business (SDB) and HUBZone preference programs that direct the contracting officer not to apply a price evaluation adjustment to offers of eligible products in acquisitions subject to the Trade Agreements Act (19 U.S.C. 2501, *et seq.*) or where application of the factor would be inconsistent with a Memorandum of Understanding (MOU) or other international agreement.

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 69 FR 53780, September 2, 2004. We received one response, which was entirely favorable to the rule. Therefore, we are converting the proposed rule to a final rule without change.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

This rule is expected to have a significant (beneficial) economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because it will reduce the exceptions to the preference for small disadvantaged businesses and HUBZone small businesses. A Final Regulatory Flexibility Analysis (FRFA) has been prepared and is summarized as follows:

This rule was initiated at the request of the Small Business Administration in order to remove preferential treatment for certain offers of foreign products in acquisitions intending to provide a preference for small disadvantaged business concerns or HUBZone small business concerns. The objective of this rule is to remove exceptions to the Small Disadvantaged Business (SDB) and HUBZone preference programs that direct the contracting officer not to apply a price evaluation adjustment to offers of eligible products in acquisitions subject to the Trade Agreements Act or where application of the factor would be inconsistent with a Memorandum of Understanding (MOU) or other international agreement. The rule applies to all offerors in acquisitions that provide a preference for small disadvantaged business concerns or HUBZone small business concerns. Because of the reduced exceptions to the preferences, this rule will have a beneficial impact on all domestic concerns, especially small entities that are small disadvantaged business concerns or HUBZone small business concerns.

The FAR Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration. Interested parties may obtain a copy from the FAR Secretariat. The Councils will consider comments from small entities concerning the affected FAR Parts 19 and 52 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAC 2005–04, FAR Case 2003–015), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 19 and 52

Government procurement.

Dated: May 27, 2005

Julia B. Wise,

Director,Contract Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 19 and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 19 and 52 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 19—SMALL BUSINESS PROGRAMS

19.1103 [Amended]

■ 2. Amend section 19.1103 by—

■ a. Adding ''or'' to the end of paragraph (a)(1);

■ b. Removing paragraphs (a)(2), (a)(3), and (a)(5); and redesignating paragraph (a)(4) as (a)(2); and

■ c. Removing ''; or'' from the end of newly redesignated paragraph (a)(2) and adding a period in its place.

19.1307 [Amended]

■ 3. Amend section 19.1307 by—

■ a. Adding ''or'' to the end of paragraph (b)(1);

■ b. Removing the semicolon from the end of paragraph (b)(2) and adding a period in its place; and

■ c. Removing paragraphs (b)(3) and (b)(4).

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.212–5 [Amended]

■ 4. Amend section 52.212–5 by—

■ a. Revising the date of the clause to read ''(JUL 2005)'';

■ b. Removing ''(Jan 1999)'' from paragraph (b)(3) of the clause and adding ''(JUL 2005)'' in its place; and

■ c. Removing ''(June 2003)'' from paragraph (b)(10)(i) of the clause and adding ''(JUL 2005)'' in its place.

52.219–4 [Amended]

■ 5. Amend section 52.219–4 by—

■ a. Revising the date of the clause to read ''(JUL 2005)''; and

■ b. Adding ''and'' to the end of paragraph (b)(1)(i) of the clause; removing the semicolon from the end of paragraph (b)(1)(ii) of the clause and adding a period in its place; and removing paragraphs (b)(1)(iii) and (b)(1)(iv) of the clause.

■ 6. Amend section 52.219–23 by revising the date of the clause and paragraph (b)(1) to read as follows:

52.219–23 Notice of Price Evaluation Adjustment for Small Disadvantaged Business Concerns.

* * * * *

NOTICE OF PRICE EVALUATION ADJUSTMENT FOR SMALL DISADVANTAGED BUSINESS CONCERNS (JUL 2005)

* * * * *

(b) *Evaluation adjustment.* (1) The Contracting Officer will evaluate offers by adding a factor of _____ [*Contracting Officer insert the percentage*] percent to the price of all offers, except—

(i) Offers from small disadvantaged business concerns that have not waived the adjustment; and

(ii) For DoD, NASA, and Coast Guard acquisitions, an otherwise successful offer from a historically black college or university or minority institution.

* * * * *

[FR Doc. 05–11187 Filed 6–7–05; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 22, 52, and 53

[FAC 2005–04; FAR Case 2002–004; Item VI]

RIN 9000–AJ79

Federal Acquisition Regulation; Labor Standards for Contracts Involving Construction

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to implement the revised definitions of ''construction'' and ''site of the work'' in the Department of Labor (DoL) regulations. In addition, the Councils have clarified several definitions relating to labor standards for contracts involving construction and made requirements for flow down of labor clauses more precise.

DATES: *Effective Date*: July 8, 2005.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat at (202) 501–4755 for information pertaining to status or publication schedules. For clarification of content, contact Ms. Linda Nelson, Procurement Analyst, at (202) 501–1900. The TTY Federal Relay Number for further information is 1–800–877–8973. Please cite FAC 2005–04, FAR case 2002–004.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule constitutes the implementation in the FAR of the DoL rule revising the terms ''construction, prosecution, completion or repair'' (29 CFR 5.2(j) and ''site of the work'' (29 CFR 5.2(l)). The DoL final rule (65 FR 80268) was published on December 23, 2000, and became effective on January 19, 2001. In addition, the Councils have clarified several definitions relating to labor standards for contracts involving construction and made requirements for flow down of labor clauses more precise.

The proposed rule was published in the **Federal Register** at 68 FR 74403, December 23, 2003. The Councils received comments in response to the proposed rule from 161 respondents. Responses to the more significant comments are as follows:

1. Support extension of Davis-Bacon Act (DBA) to secondary sites of the work.

The first category includes general comments in support of extending the DBA to secondary sites for various reasons. Among the reasons under this category given by the respondents in support of the rule are because it:

- Helps workers;
- Prevents companies from circumventing the DBA;
- Addresses the realities of new construction techniques in the construction industry;
- Correctly implements DoL final rule, which is not inconsistent with previous court cases.

The Councils concur. No further response is necessary.

2. *Oppose the extension of the DBA to secondary sites.*

Many respondents opposed extension of the DBA to a secondary site, because—

- It is too difficult to administer-confusing, burdensome, beyond logistic capability;
- It will increase costs of construction;
- Court decisions demonstrate that the DoL rule is invalid;
- The Councils have the authority to reject the DoL rule; or
- The respondent opposes the DBA entirely. Let the market prevail.

The Councils do not concur. It is apparent that many of the respondents misunderstood the concept of the ''secondary site of the work''. This concept only includes a site where ''a significant portion of the building or work is constructed.'' This does not cover the manufacture or sale of construction material to be used at the site, but only actual construction that is unique and integrally related to the final building or work. The Councils anticipate that very few construction projects will have a secondary site of the work.

With regard to increased cost to the contractor, this is not necessarily the case because the contractor should take all the labor costs into consideration in submitting his offer. With regard to increased cost to the Government, this is a benefit to the workers that the Government is willing to provide in accordance with the law.

Questions as to the validity of the DoL rule are outside the scope of this case. This rule implements the DoL rule, which has already been subject to notice and comment.

Comments regarding the benefits and value of the DBA itself are also outside the scope of this case.

3. *Oppose retroactive application of wage rates at secondary site, without change in contract price or estimated cost.*

Many respondents considered that this so-called ''retroactive'' aspect of the FAR rule was unfair to contractors, and goes beyond the DoL rule. These respondents were concerned about the term ''retroactive application'' which was used in the preamble to the proposed rule. These respondents mistakenly interpreted ''retroactive'' in this context to mean that the DBA rates would be applied retroactively to secondary sites on existing contracts. One respondent stated that the rule would require back pay through the year 2000 (effective date of the DoL rule) for secondary sites of current projects and pay in future payrolls at secondary sites through the remainder of the term of the contract. Combined with the misapprehension about what constitutes a secondary site, the small businesses fear bankruptcy with the implementation of the DoL rule in the FAR.

The Councils do not concur. The FAR rule is not retroactive. It does not apply to existing contracts or projects. It only applies to new solicitations or contracts entered into after the effective date of the FAR rule. See FAR 1.108(d). If these clauses were incorporated into a contract retroactively, then there would be an appropriate adjustment to the contract price. In new solicitations issued after the effective date of this rule, the contractor is forewarned that the DBA is applicable to the secondary site of the work pursuant to the solicitation provision 52.222–5, Davis-Bacon Act—Secondary Site of the Work. Moreover, the contract clause 52.222–6,

Davis-Bacon Act, also stipulates that DBA coverage extends ''to any other site where a significant portion of the building or work is constructed, provided that such site is located in the United States and established specifically for the performance of the contract or project.'' This regulatory language is intended to force contractors to come forward if they intend to use a secondary site. DoL says these instances should be rare. This will not be a regular occurrence. An example discussed in the DOL rule preamble is constructing a segment of a dam the size of a football field and floating it down a river. If a contractor intends to establish a secondary site of the work, and not disclose this information to the Government until after contract award with the preconceived objective to request a price adjustment to cover the increased DBA wages, this could skew the procurement process to the disadvantage of the other offerors. The contractor is in a position to anticipate the possible establishment of a secondary site of the work based on its entrepreneurial ability during preparation of his proposal or after it has been awarded the contract. The solicitation provision and contract clauses provide advanced and clear guidance and stipulations to the contractor on all the effects of a secondary site of work from the moment he intends to establish it.

4. *Oppose application of DBA wage rates for transportation of materials from secondary site of the work to primary site of the work.*

One respondent asserted that the proposed revision improperly covers drivers of materials for time spent transporting materials or pre-fabricated construction components between the newly expanded ''secondary'' site and the traditional site of the work. Another respondent contended that if a wage determination is to be applied to workers at secondary sites, it should at least be the wage determination for the secondary site.

The Councils do not concur. The Davis-Bacon Act covers transportation of the significant portion(s) of the public building or public work that were constructed at a covered secondary site of the work and are then moved to the primary site of the work where the building or work will remain when it is completed. The transportation of other materials and supplies between the two covered sites is not subject to DBA coverage, and is not provided for in the DoL rule nor the FAR rule. With regard to covering the transportation of a significant portion of the building or work between covered sites, the FAR rule is implementing the DoL final rule. With respect to which wage determinations should apply to the transportation of a significant portion of the building or work constructed at the secondary site of the work between the two covered sites, the decision to apply the wage determination for the primary site of the work for these situations represents a reasonable interpretation of the remedial purposes of the DBA. Even though DoL did not include in its final rule which wage determination was applicable in this circumstance, DoL did include in the preamble to the final rule, an administrative determination to enforce ''the wage determination for the area in which the construction will remain when completed.'' (See 65 FR 80276, December 20, 2000). This is consistent with the language included in the FAR implementation of the DoL rule.

5. *Councils failed to comply with the Regulatory Flexibility Act. Must perform Initial Regulatory Flexibility Analysis and publish it for public comment.*

Numerous respondents asserted that the Regulatory Flexibility Act requires that an analysis of the cost of this rule to small business must occur and be published for comment. The respondents state that the FAR Council has failed to comply with the Regulatory Flexibility Act because the rule will have a significant economic impact on small business. Most construction firms are small businesses (98%), and the retroactive aspects of the rule without any adjustment in contract price will have a devastating impact on small businesses.

The Councils have reviewed the Final Regulatory Flexibility Analysis of the Department of Labor and support the DoL determination in the Final Regulatory Flexibility Analysis that its regulation would not have a significant economic impact on a substantial number of small entities (see 65 FR 80277, Dec 20, 2000). The implementation in the FAR is within the framework provisions of the DoL rule. For further analysis of impact of this final rule, see Paragraph B. of this notice, which addresses the Regulatory Flexibility Act.

With regard to the so-called ''retroactive'' aspect of the FAR rule, which would increase the impact beyond that of the DoL rule, see the response to comment category 3. above.

6. *Requests for substantive changes made by various respondents to clarify or strengthen the rule. Some respondents suggested the following changes to the FAR rule:*

a. Specify in the provision that the contracting agency has the right to apply DBA to a site that the DoL or the agency determines to be a secondary site.

b. Define what is a ''significant portion of the work''

c. Include liquidated damages if contractor sets up a site, claims the site is permanent and previously established, then dismantles it at the end of the project.

d. Do not require the contractor to determine the applicability of a wage determination.

e. Do not limit ''site of the work'' geographically.

The Councils respond to these suggestions as follows:

a. The Councils do not concur. The Councils note that the DBA provision is directed to the offeror, requesting that the offeror identify any planned secondary site. It is not necessary to state in the provision that the contracting officer has the right to apply the DBA to a site that the DoL or the agency determined to be a secondary site because it is implicit in the law that DoL has the statutory authority to make this determination regarding the application of the DBA. Also, the contracting officer has the authority to make these determinations under the FAR. If a DBA wage coverage determination made on a secondary site by the DoL or the contracting officer is inconsistent, or in violation of the law, or the regulation, the contractor has the prerogative to administratively appeal this determination to the DoL Administrative Review Board in accordance with the FAR clause at 52.222–14, Disputes Concerning Labor Standards.

b. The Councils do not concur. The Councils do not have the jurisdiction to define this concept that was introduced in the DoL rule. The FAR rule implements the DoL final rule. The DoL rule does not define ''significant portion of the work'', because in DoL's view the size and the nature of the specific project will dictate what constitutes ''a significant portion'' under the provision. If an offeror or the cognizant agency is unsure whether a site meets the criteria of secondary site of the work, the agency should consult with DoL.

c. The Councils do not concur. This measure is not necessary because it is not possible to ''set up'' a ''previously established site.'' If the site was not previously established before award but meets the other criteria for DBA site of the work, it cannot be exempted from consideration as a DBA wage covered site of the work.

d. The Councils partially concur. The final rule revises the provision at FAR 52.222–5, Davis-Bacon Act—Secondary

Site of the Work, to stipulate in paragraph (a)(2) that if the offeror is uncertain if a planned work site satisfies the criteria for a secondary site of the work, the offeror shall request a wage determination for a secondary site from the contracting officer. This is intended to reduce the instances in which the DoL comes in after the fact and declares a site to be a secondary site of the work. In addition, the Councils revised the language in paragraph (b)(1) of the provision to require that if the wage determination provided by the Government for work at the primary site of the work is not applicable to the secondary site of the work, the offeror shall request a wage determination from the contracting officer, rather than requiring the offeror to seek the correct wage determination on line.

e. The Councils do not concur. The FAR rule is implementing the DoL final rule. DoL already considered and rejected this comment in the formulation of its final rule. DoL is constrained by case law.

The Councils are also adopting other clarifying changes, of which the most significant change is revision of the ''site of the work'' definition at FAR 22.401 and in the clause at FAR 52.222–6, Davis-Bacon Act, to include the requirement for a secondary site of work to be located in the United States. The DBA does not apply outside the United States. This was not an issue as long as the rules did not permit a secondary site of the work that is geographically removed from the primary site of the work. If the secondary site of the work is not located in the United States it would not qualify for DBA coverage. Therefore, since the Councils have removed the statement in the DBA secondary site of the work provision that the offeror shall notify the contracting officer ''if the Davis-Bacon Act is applicable to the secondary site of the work, '' the definition of ''site of the work'' must be more restrictive.

This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the Councils support the DoL determination in the Final Regulatory Flexibility Analysis that its regulation would not have a significant economic impact on a substantial number of small entities (see 65 FR 80277, December 20, 2000). The implementation in the FAR is within the framework provisions of the DoL rule.

In accordance with the DoL final rule, this FAR rule requires contractors to pay Davis-Bacon wages at a secondary site of the work, if there is a secondary site of the work. A secondary site of the work exists only if a significant portion of the building or work is constructed there and the site is established specifically for the performance of the contract or project. This is an issue not contemplated under the current regulatory language. However, we concur with the DoL estimate that such instances will be rare. We estimate that this will result in a negligible increase in application of Davis-Bacon wages, because we estimate that less than 5 sites will qualify as secondary sites, out of approximately 14,000 construction contracts per year.

Furthermore, with regard to dedicated facilities such as fabrication plants, mobile factories, batch plants, borrow pits, job headquarters, tool yards, etc., Davis-Bacon wages will now apply only if the dedicated facilities are ''adjacent or virtually adjacent to the site of the work.'' Currently the FAR states that the dedicated facilities must be ''so located in proximity to the actual construction location that it would be reasonable to include them.'' We estimate that this change will result in a negligible decrease in payment of Davis-Bacon wages, because usually these types of dedicated facilities are located adjacent to the site of the work, for economic reasons as well as security. Usually disputes regarding dedicated facilities have revolved around the functional test rather than the geographic test. We estimate that this change in definition will impact less than 100 sites out of 14,000 construction contracts per year.

Under this final rule, off-site transportation of materials, supplies, tools, is generally not covered. Contractors must only pay Davis-Bacon wage rates to employees that are transporting portions of the building or work between the secondary site of the work and the primary site of the work (an extremely rare occurrence, as stated above) or between the adjacent dedicated facility and the site of the construction. Furthermore, there are now a few less dedicated facilities that count as part of the ''site of the work'' and they are all adjacent rather than just ''in proximity''.

We estimate that these changes with regard to transportation will only slightly reduce the application of Davis-Bacon wages for transportation, because paying Davis-Bacon wages for off-site transportation of materials is currently a rare occurrence. Contractors must currently pay Davis-Bacon wage rates if an employee of the construction contractor or subcontractor is transporting materials or supplies to or from the building or work and (in accordance with court decisions) such employee spends more than a ''de minimus'' amount of time at the site of the work. However, most suppliers deliver materials to the construction site (rather than using an employee of the construction contractor to transport) and construction contractor employees that are transporting such bulk materials as sand, dirt, or snow to or from the site usually do not spend more time at the site than is required for a pick-up or delivery.

Therefore, we concur with the conclusion of the DoL that the number of projects affected by these changes is very limited and the prevailing wage implications are not substantial, especially with regard to the transportation activities attendant to these types of projects.

There were public comments filed on the impact on small business. One commenter provided extensive comments which also covered particular nuances of the Regulatory Flexibility Act not covered by other commenters. The substance of these comments has been addressed above in the discussion of public comments in Section A., paragraphs 3. through 5.

C. Executive Order 12866; Small Business Regulatory Enforcement Fairness Act; Unfunded Mandates Reform Act

Because of the interests expressed by some commenters, the final rule is nonetheless being treated as a significant rule. However, the rule is not economically significant and does not require preparation of a full regulatory impact analysis. This rule implements a Department of Labor rule which was not expected to have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a section of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. Therefore this rule also is not expected to have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a section of the economy, productivity, competition, jobs, the

environment, public health or safety, or State, local, or tribal governments or communities.

The modifications to regulatory language in this final rule implement the Department of Labor rule which limited coverage of off-site material and supply work from Davis-Bacon prevailing wage requirements as a result of appellate court rulings. In addition, this final rule implements the Department of Labor's limited amendment to the site of the work definition to address an issue not contemplated under then current regulatory language—those instances where significant portions of buildings or works may be constructed at secondary sites which are not in the vicinity of the project's final resting place. The Department of Labor believed that such instances will be rare, and that any increased costs which may arise on such projects would be offset by the savings resulting from the other changes that limit coverage.

The DoD, GSA, and NASA also conclude that the rule is not a ''major rule'' requiring approval by the Congress under the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*). DoD, GSA, and NASA agree with the Department of Labor assessment that this rule will not likely result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets.

For purposes of the Unfunded Mandates Reform Act of 1995, this rule does not include any Federal mandate that may result in excess of $100 million in expenditures by state, local and tribal governments in the aggregate, or by the private sector. Furthermore, the requirements of the Unfunded Mandates Reform Act, 2 U.S.C. 1532, do not apply here because the rule does not include a Federal mandate. The term Federal mandate is defined to include either a Federal intergovernmental mandate or a Federal private sector mandate (2 U.S.C. 658(6)). Except in limited circumstances not applicable here, those terms do not include an enforceable duty which is a duty arising from participation in a voluntary program (2 U.S.C. 658(7)(A)). A decision by a contractor to bid on Federal and Federally assisted construction contracts is purely voluntary in nature, and the contractor's duty to meet Davis-Bacon Act requirements arises from participation in a voluntary Federal program.

D. Executive Order 13132 (Federalism)

DoD, GSA, and NASA have reviewed this rule in accordance with Executive Order 13132 regarding federalism, and have determined that it does not have federalism implications. The rule does not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

E. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 22, 52, and 53

Government procurement.

Dated: May 27, 2005.

Julia B. Wise,

Director, Contract Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 22, 52, and 53 as set forth below:

■ 1. The authority citation for 48 CFR parts 22, 52, and 53 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

■ 2. Amend section 22.401 by—

■ a. Adding, in alphabetical order, the definitions ''Apprentice'' and ''Trainee;''

■ b. Removing from the first sentence of the definition ''Building or work'' the word ''generally;'' and

■ c. Revising the definitions ''Construction, alteration, or repair'', ''Laborers or mechanics'' and ''Site of the work.''

■ The added and revised text reads as follows:

22.401 Definitions.

* * * * *

Apprentice means a person—

(1) Employed and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Office of Apprenticeship Training, Employer, and Labor Services (OATELS), or with a State Apprenticeship Agency recognized by OATELS; or

(2) Who is in the first 90 days of probationary employment as an apprentice in an apprenticeship program, and is not individually registered in the program, but who has been certified by the OATELS or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice.

* * * * *

Construction, alteration, or repair means all types of work done by laborers and mechanics employed by the construction contractor or construction subcontractor on a particular building or work at the site thereof, including without limitations—

(1) Altering, remodeling, installation (if appropriate) on the site of the work of items fabricated off-site;

(2) Painting and decorating;

(3) Manufacturing or furnishing of materials, articles, supplies, or equipment on the site of the building or work;

(4) Transportation of materials and supplies between the site of the work within the meaning of paragraphs (1)(i) and (ii) of the ''site of the work'' definition of this section, and a facility which is dedicated to the construction of the building or work and is deemed part of the site of the work within the meaning of paragraph (2) of the ''site of work'' definition of this section; and

(5) Transportation of portions of the building or work between a secondary site where a significant portion of the building or work is constructed, which is part of the ''site of the work'' definition in paragraph (1)(ii) of this section, and the physical place or places where the building or work will remain (paragraph (1)(i) in the ''site of the work'' definition of this section).

Laborers or mechanics.—(1) Means—

(i) Workers, utilized by a contractor or subcontractor at any tier, whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from mental or managerial;

(ii) Apprentices, trainees, helpers, and, in the case of contracts subject to the Contract Work Hours and Safety Standards Act, watchmen and guards;

(iii) Working foremen who devote more than 20 percent of their time during a workweek performing duties of a laborer or mechanic, and who do not meet the criteria of 29 CFR part 541, for the time so spent; and

(iv) Every person performing the duties of a laborer or mechanic,

regardless of any contractual relationship alleged to exist between the contractor and those individuals; and

(2) Does not include workers whose duties are primarily executive, supervisory (except as provided in paragraph (1)(iii) of this definition), administrative, or clerical, rather than manual. Persons employed in a bona fide executive, administrative, or professional capacity as defined in 29 CFR part 541 are not deemed to be laborers or mechanics.

* * * * *

Site of the work.—(1) Means—

(i) T*he primary site of the work.* The physical place or places where the construction called for in the contract will remain when work on it is completed; and

(ii) *The secondary site of the work, if any.* Any other site where a significant portion of the building or work is constructed, provided that such site is—

(A) Located in the United States; and

(B) Established specifically for the performance of the contract or project;

(2) Except as provided in paragraph (3) of this definition, includes fabrication plants, mobile factories, batch plants, borrow pits, job headquarters, tool yards, etc., provided—

(i) They are dedicated exclusively, or nearly so, to performance of the contract or project; and

(ii) They are adjacent or virtually adjacent to the ''primary site of the work'' as defined in paragraphs (1)(i) of ''the secondary site of the work'' as defined in paragraph (1)(ii) of this definition;

(3) Does not include permanent home offices, branch plant establishments, fabrication plants, or tool yards of a contractor or subcontractor whose locations and continuance in operation are determined wholly without regard to a particular Federal contract or project. In addition, fabrication plants, batch plants, borrow pits, job headquarters, yards, etc., of a commercial or material supplier which are established by a supplier of materials for the project before opening of bids and not on the project site, are not included in the ''site of the work.'' Such permanent, previously established facilities are not a part of the ''site of the work'', even if the operations for a period of time may be dedicated exclusively, or nearly so, to the performance of a contract.

Trainee means a person registered and receiving on-the-job training in a construction occupation under a program which has been approved in advance by the U.S. Department of Labor, Employment and Training Administration, Office of Apprenticeship Training, Employer, and Labor Services (OATELS), as meeting its standards for on-the-job training programs and which has been so certified by that Administration.

* * * * *

■ 3. Amend section 22.404–3 by revising paragraph (c) to read as follows:

22.404–3 Procedures for requesting wage determinations.

* * * * *

(c) *Time for submission of requests.* (1) The time required by the Department of Labor for processing requests for project wage determinations varies according to the facts and circumstances in each case. An agency should expect the processing to take at least 30 days. Accordingly, agencies should submit requests for project wage determinations for the primary site of the work to the Department of Labor at least 45 days (60 days if possible) before issuing the solicitation or exercising an option to extend the term of a contract.

(2) Agencies should promptly submit to the Department of Labor an offeror's request for a project wage determination for a secondary site of the work.

* * * * *

22.404–4 [Amended]

■ 4. Amend section 22.404–4 by revising the section heading as set forth below; and amending paragraphs (a), (b), and (c) by adding ''for the primary site of the work'' after ''determination'' each time it appears.

22.404–4 Solicitations issued without wage determinations for the primary site of the work.

* * * * *

■ 5. Amend section 22.404–5 by—

■ a. Revising the first sentence of paragraphs (b)(1), (b)(2) introductory text, and (b)(2)(i);

■ b. Revising paragraph (b)(2)(ii);

■ c. Revising the first sentence of paragraphs (c)(2) and (c)(3); and

■ d. Revising paragraph (c)(4).

■ The revised text reads as follows:

22.404–5 Expiration of project wage determinations.

* * * * *

(b) * * *

(1) If a project wage determination for the primary site of the work expires before bid opening, or if it appears before bid opening that a project wage determination may expire before award, the contracting officer shall request a new determination early enough to ensure its receipt before bid opening. * * *

(2) If a project wage determination for the primary site of the work expires after bid opening but before award, the contracting officer shall request an extension of the project wage determination expiration date from the Administrator, Wage and Hour Division. * * *

(i) If the new determination for the primary site of the work changes any wage rates for classifications to be used in the contract, the contracting officer may cancel the solicitation only in accordance with 14.404–1. * * *

(ii) If the new determination for the primary site of the work does not change any wage rates, the contracting officer shall award the contract and modify it to include the number and date of the new determination. (See 43.103(b)(1).)

(c) * * *

(2) The contracting officer need not delay opening and reviewing proposals or discussing them with the offerors while a new determination for the primary site of the work is being obtained. * * *

(3) If the new determination for the primary site of the work changes any wage rates, the contracting officer shall amend the solicitation to incorporate the new determination, and furnish the wage rate information to all prospective offerors that were sent a solicitation if the closing date for receipt of proposals has not yet occurred, or to all offerors that submitted proposals if the closing date has passed. * * *

(4) If the new determination for the primary site of the work does not change any wage rates, the contracting officer shall amend the solicitation to include the number and date of the new determination and award the contract.

■ 6. Amend section 22.404–6 by revising the second sentence of paragraph (a)(2), the first sentence of paragraph (a)(3), the first sentence of paragraph (b)(3), and paragraph (b)(4) to read as follows:

22.404–6 Modifications of wage determinations.

(a) * * *

(2) * * * The need to include a modification of a project wage determination for the primary site of the work in a solicitation is determined by the time of receipt of the modification by the contracting agency. * * *

(3) The need for inclusion of the modification of a general wage determination for the primary site of the work in a solicitation is determined by the publication date of the notice in the **Federal Register**, or by the time of receipt of the modification (annotated with the date and time immediately upon receipt) by the contracting agency, whichever occurs first. * * *

(b) * * *

(3) If an effective modification of the wage determination for the primary site of the work is received by the contracting officer before bid opening, the contracting officer shall postpone the bid opening, if necessary, to allow a reasonable time to amend the solicitation to incorporate the modification and permit bidders to amend their bids. * * *

(4) If an effective modification of the wage determination for the primary site of the work is received by the contracting officer after bid opening, but before award, the contracting officer shall follow the procedures in 22.404–5(b)(2)(i) or (ii).

* * * * *

■ 7. Amend section 22.404–8 by revising the introductory text of paragraph (a) and paragraph (a)(2); and in paragraphs (b)(1) introductory text, (b)(2), and (c) by adding ''of an improper wage determination for the primary site of the work'' after ''notification''.

22.404–8 Notification of improper wage determination before award.

(a) The following written notifications by the Department of Labor shall be effective immediately without regard to 22.404–6 if received by the contracting officer prior to award:

* * * * *

(2) A wage determination is withdrawn by the Administrative Review Board.

* * * * *

22.406–9 [Amended]

■ 8. Amend section 22.406–9 by—

■ a. Removing from the heading of paragraph (c)(1) ''Secretary of the Treasury'' and adding ''Comptroller General'' in its place; and removing from the last sentence of paragraph (c)(1) ''Secretary of the Treasury'' and adding ''Comptroller General (Claims Section)'' in its place; and

■ b. Removing from paragraph (c)(3) ''Secretary of the Treasury'' and adding ''Comptroller General'' in its place.

■ 9. Amend section 22.407 by—

■ a. Revising the heading as set forth below;

■ b. Removing from the introductory text of paragraph (a) ''The contracting officer shall insert'' and adding ''Insert'' in its place;

■ c. Removing from paragraphs (a)(1) through (a)(10) ''The clause at'';

■ d. Removing from paragraph (b) ''The contracting officer shall insert'' and adding ''Insert'' in its place;

■ e. Removing from the second sentence of paragraph (c) ''the contracting officer shall'';

■ f. Removing from paragraph (d) ''The contracting officer shall insert'' and adding ''Insert'' in its place; and

■ g. Adding paragraph (h) to read as follows:

22.407 Solicitation provision and contract clauses.

* * * * *

(h) Insert the provision at 52.222–5, Davis Bacon Act—Secondary Site of the Work, in solicitations in excess of $2,000 for construction within the United States.

PART 52—SOLICIATION PROVISIONS AND CONTRACT CLAUSES

■ 10. Amend section 52.212–5 by revising the date of the clause; and in paragraph (c)(1) and (e)(1)(vi) by removing ''(May 1989)'' and adding ''(JUL 2005)'' in its place. The revised text reads as follows:

52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

* * * * *

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS—COMMERCIAL ITEMS (JUL 2005)

* * * * *

■ 11. Amend section 52.213–4 by revising the date of the clause; and in paragraph (b)(1)(vi) by removing ''(May 1989)'' and adding ''(JUL 2005)'' in its place. The revised text reads as follows:

52.213–4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).

* * * * *

TERMS AND CONDITIONS—SIMPLIFIED ACQUISITIONS OTHER THAN COMMERCIAL ITEMS (JUL 2005)

* * * * *

■ 12. Amend section 52.222–4 by revising the date of the clause and paragraph (e) to read as follows:

52.222–4 Contract Work Hours and Safety Standards Act—Overtime Compensation.

* * * * *

CONTRACT WORK HOURS AND SAFETY STANDARDS ACT—OVERTIME COMPENSATION (JUL 2005)

* * * * *

(e) *Subcontracts.* The Contractor shall insert the provisions set forth in paragraphs (a) through (d) of this clause in subcontracts that may require or involve the employment of laborers and mechanics and require subcontractors to include these provisions in any such lower tier subcontracts. The Contractor shall be responsible for compliance by any subcontractor or lower-tier subcontractor with the provisions set forth in paragraphs (a) through (d) of this clause.

(End of clause)

■ 13. Add text to section 52.222–5 to read as follows:

52.222–5 Davis-Bacon Act—Secondary Site of the Work.

As prescribed in 22.407(h), insert the following provision:

DAVIS-BACON ACT—SECONDARY SITE OF THE WORK (JUL 2005)

(a)(1) The offeror shall notify the Government if the offeror intends to perform work at any secondary site of the work, as defined in paragraph (a)(1)(ii) of the FAR clause at 52.222–6, Davis-Bacon Act, of this solicitation.

(2) If the offeror is unsure if a planned work site satisfies the criteria for a secondary site of the work, the offeror shall request a determination from the Contracting Officer.

(b)(1) If the wage determination provided by the Government for work at the primary site of the work is not applicable to the secondary site of the work, the offeror shall request a wage determination from the Contracting Officer.

(2) The due date for receipt of offers will not be extended as a result of an offeror's request for a wage determination for a secondary site of the work.

(End of provision)

■ 14. Amend section 52.222–6 by—

■ a. Revising the date of the clause;

■ b. Redesignating paragraphs (a) through (d) as paragraphs (b) through (e);

■ c. Adding a new paragraph (a);

■ d. Revising the newly designated paragraph (b); and

■ e. Removing from the newly designated paragraph (c)(4) ''(b)(2)'' and ''(b)(3)'' and adding ''(c)(2)'' and ''(c)(3)''in their places, respectively.

■ The revised and added text reads as follows:

52.222–6 Davis-Bacon Act.

* * * * *

DAVIS-BACON ACT (JUL 2005)

(a) *Definition.—Site of the work*—(1) Means—

(i) *The primary site of the work.* The physical place or places where the construction called for in the contract will remain when work on it is completed; and

(ii) *The secondary site of the work, if any.* Any other site where a significant portion of the building or work is constructed, provided that such site is—

(A) Located in the United States; and

(B) Established specifically for the performance of the contract or project;

(2) Except as provided in paragraph (3) of this definition, includes any fabrication plants, mobile factories, batch plants, borrow pits, job headquarters, tool yards, etc., provided—

(i) They are dedicated exclusively, or nearly so, to performance of the contract or project; and

(ii) They are adjacent or virtually adjacent to the ''primary site of the work'' as defined in paragraph (a)(1)(i), or the ''secondary site

of the work'' as defined in paragraph (a)(1)(ii) of this definition;

(3) Does not include permanent home offices, branch plant establishments, fabrication plants, or tool yards of a Contractor or subcontractor whose locations and continuance in operation are determined wholly without regard to a particular Federal contract or project. In addition, fabrication plants, batch plants, borrow pits, job headquarters, yards, etc., of a commercial or material supplier which are established by a supplier of materials for the project before opening of bids and not on the Project site, are not included in the ''site of the work.'' Such permanent, previously established facilities are not a part of the ''site of the work'' even if the operations for a period of time may be dedicated exclusively or nearly so, to the performance of a contract.

(b)(1) All laborers and mechanics employed or working upon the site of the work will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act (29 CFR part 3)), the full amount of wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment computed at rates not less than those contained in the wage determination of the Secretary of Labor which is attached hereto and made a part hereof, or as may be incorporated for a secondary site of the work, regardless of any contractual relationship which may be alleged to exist between the Contractor and such laborers and mechanics. Any wage determination incorporated for a secondary site of the work shall be effective from the first day on which work under the contract was performed at that site and shall be incorporated without any adjustment in contract price or estimated cost. Laborers employed by the construction Contractor or construction subcontractor that are transporting portions of the building or work between the secondary site of the work and the primary site of the work shall be paid in accordance with the wage determination applicable to the primary site of the work.

(2) Contributions made or costs reasonably anticipated for bona fide fringe benefits under section 1(b)(2) of the Davis-Bacon Act on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics, subject to the provisions of paragraph (e) of this clause; also, regular contributions made or costs incurred for more than a weekly period (but not less often than quarterly) under plans, funds, or programs which cover the particular weekly period, are deemed to be constructively made or incurred during such period.

(3) Such laborers and mechanics shall be paid not less than the appropriate wage rate and fringe benefits in the wage determination for the classification of work actually performed, without regard to skill, except as provided in the clause entitled Apprentices and Trainees. Laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein; provided that the employer's payroll records accurately set forth the time spent in each classification in which work is performed.

(4) The wage determination (including any additional classifications and wage rates conformed under paragraph (c) of this clause) and the Davis-Bacon poster (WH–1321) shall be posted at all times by the Contractor and its subcontractors at the primary site of the work and the secondary site of the work, if any, in a prominent and accessible place where it can be easily seen by the workers.

* * * * *

■ 15. Amend section 52.222–9 by revising the date of the clause and paragraphs (a) and (b) to read as follows:

52.222–9 Apprentices and Trainees.

* * * * *

APPRENTICES AND TRAINEES (JUL 2005)

(a) *Apprentices.* (1) An apprentice will be permitted to work at less than the predetermined rate for the work performed when employed—

(i) Pursuant to and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Office of Apprenticeship Training, Employer, and Labor Services (OATELS) or with a State Apprenticeship Agency recognized by the OATELS; or

(ii) In the first 90 days of probationary employment as an apprentice in such an apprenticeship program, even though not individually registered in the program, if certified by the OATELS or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice.

(2) The allowable ratio of apprentices to journeymen on the job site in any craft classification shall not be greater than the ratio permitted to the Contractor as to the entire work force under the registered program.

(3) Any worker listed on a payroll at an apprentice wage rate, who is not registered or otherwise employed as stated in paragraph (a)(1) of this clause, shall be paid not less than the applicable wage determination for the classification of work actually performed. In addition, any apprentice performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed.

(4) Where a Contractor is performing construction on a project in a locality other than that in which its program is registered, the ratios and wage rates (expressed in percentages of the journeyman's hourly rate) specified in the Contractor's or subcontractor's registered program shall be observed. Every apprentice must be paid at not less than the rate specified in the registered program for the apprentice's level of progress, expressed as a percentage of the journeyman hourly rate specified in the applicable wage determination.

(5) Apprentices shall be paid fringe benefits in accordance with the provisions of the apprenticeship program. If the apprenticeship program does not specify fringe benefits, apprentices must be paid the full amount of fringe benefits listed on the wage determination for the applicable classification. If the Administrator determines that a different practice prevails for the applicable apprentice classification, fringes shall be paid in accordance with that determination.

(6) In the event OATELS, or a State Apprenticeship Agency recognized by OATELS, withdraws approval of an apprenticeship program, the Contractor will no longer be permitted to utilize apprentices at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(b) *Trainees.* (1) Except as provided in 29 CFR 5.16, trainees will not be permitted to work at less than the predetermined rate for the work performed unless they are employed pursuant to and individually registered in a program which has received prior approval, evidenced by formal certification by the U.S. Department of Labor, Employment and Training Administration, Office of Apprenticeship Training, Employer, and Labor Services (OATELS). The ratio of trainees to journeymen on the job site shall not be greater than permitted under the plan approved by OATELS.

(2) Every trainee must be paid at not less than the rate specified in the approved program for the trainee's level of progress, expressed as a percentage of the journeyman hourly rate specified in the applicable wage determination. Trainees shall be paid fringe benefits in accordance with the provisions of the trainee program. If the trainee program does not mention fringe benefits, trainees shall be paid the full amount of fringe benefits listed in the wage determination unless the Administrator of the Wage and Hour Division determines that there is an apprenticeship program associated with the corresponding journeyman wage rate in the wage determination which provides for less than full fringe benefits for apprentices. Any employee listed on the payroll at a trainee rate who is not registered and participating in a training plan approved by the OATELS shall be paid not less than the applicable wage rate in the wage determination for the classification of work actually performed. In addition, any trainee performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate in the wage determination for the work actually performed.

(3) In the event OATELS withdraws approval of a training program, the Contractor will no longer be permitted to utilize trainees at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

* * * * *

■ 16. Revise the clause in section 52.222–11 to read as follows:

52.222–11 Subcontracts (Labor Standards).

* * * * *

SUBCONTRACTS (LABOR STANDARDS) (JUL 2005)

(a) *Definition. Construction, alteration or repair*, as used in this clause, means all types

of work done by laborers and mechanics employed by the construction Contractor or construction subcontractor on a particular building or work at the site thereof, including without limitation—

(1) Altering, remodeling, installation (if appropriate) on the site of the work of items fabricated off-site;

(2) Painting and decorating;

(3) Manufacturing or furnishing of materials, articles, supplies, or equipment on the site of the building or work;

(4) Transportation of materials and supplies between the site of the work within the meaning of paragraphs (a)(1)(i) and (ii) of the ''site of the work'' as defined in the FAR clause at 52.222–6, Davis-Bacon Act of this contract, and a facility which is dedicated to the construction of the building or work and is deemed part of the site of the work within the meaning of paragraph (2) of the ''site of work'' definition; and

(5) Transportation of portions of the building or work between a secondary site where a significant portion of the building or work is constructed, which is part of the ''site of the work'' definition in paragraph (a)(1)(ii) of the FAR clause at 52.222–6, Davis-Bacon Act, and the physical place or places where the building or work will remain (paragraph (a)(1)(i) of the FAR clause at 52.222–6, in the ''site of the work'' definition).

(b) The Contractor shall insert in any subcontracts for construction, alterations and repairs within the United States the clauses entitled—

(1) Davis-Bacon Act;

(2) Contract Work Hours and Safety Standards Act—Overtime Compensation (if the clause is included in this contract);

(3) Apprentices and Trainees;

(4) Payrolls and Basic Records;

(5) Compliance with Copeland Act Requirements;

(6) Withholding of Funds;

(7) Subcontracts (Labor Standards);

(8) Contract Termination—Debarment;

(9) Disputes Concerning Labor Standards;

(10) Compliance with Davis-Bacon and Related Act Regulations; and

(11) Certification of Eligibility.

(c) The prime Contractor shall be responsible for compliance by any subcontractor or lower tier subcontractor performing construction within the United States with all the contract clauses cited in paragraph (b).

(d)(1) Within 14 days after award of the contract, the Contractor shall deliver to the Contracting Officer a completed Standard Form (SF) 1413, Statement and Acknowledgment, for each subcontract for construction within the United States, including the subcontractor's signed and dated acknowledgment that the clauses set forth in paragraph (b) of this clause have been included in the subcontract.

(2) Within 14 days after the award of any subsequently awarded subcontract the Contractor shall deliver to the Contracting Officer an updated completed SF 1413 for such additional subcontract.

(e) The Contractor shall insert the substance of this clause, including this paragraph (e) in all subcontracts for construction within the United States.

(End of clause)

52.222–41 [Amended]

■ 17. Amend section 52.222–41 by revising the date of the clause to read ''(JUL 2005)''; and in the first sentence of paragraph (r) of the clause by removing ''Bureau of Apprenticeship and Training, Employment and Training Administration'' and adding ''Office of Apprenticeship Training, Employer, and Labor Services (OATELS)'' in its place.

PART 53—FORMS

53.222 [Amended]

■ 18. Amend section 53.222 in paragraph (e) by removing ''*(Rev. 6/89)*'' and adding ''*(Rev. 7/2005)*'' in its place; and removing the last sentence.

■ 19. Amend section 53.301–1413 by revising the form to read as follows:

53.301–1413 Statement and Acknowledgement.

STATEMENT AND ACKNOWLEDGMENT

OMB No.: 9000-0014
Expires: 01/31/2008

Public reporting burden for this collection of information is estimated to average 30 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the FAR Secretariat, (VIR), Regulatory and Federal Assistance Division, GSA, Washington, DC 20405; and to the Office of Management and Budget, Paperwork Reduction Project (9000-0014), Washington, DC 20503.

PART I - STATEMENT OF PRIME CONTRACTOR

1. PRIME CONTRACT NO.	2. DATE SUBCONTRACT AWARDED	3. SUBCONTRACT NUMBER

4. PRIME CONTRACTOR			5. SUBCONTRACTOR		
a. NAME			a. NAME		
b. STREET ADDRESS			b. STREET ADDRESS		
c. CITY	d. STATE	e. ZIP CODE	c. CITY	d. STATE	e. ZIP CODE

6. The prime contract ☐ does, ☐ does not contain the clause entitled "Contract Work Hours and Safety Standards Act -- Overtime Compensation."

7. The prime contractor states that under the contract shown in Item 1, a subcontract was awarded on the date shown in Item 2 to the subcontractor identified in item 5 by the following firm:

a. NAME OF AWARDING FIRM

b. DESCRIPTION OF WORK BY SUBCONTRACTOR

8. PROJECT	9. LOCATION

10a. NAME OF PERSON SIGNING	11. BY *(Signature)*	12. DATE SIGNED
10b. TITLE OF PERSON SIGNING		

PART II - ACKNOWLEDGMENT OF SUBCONTRACTOR

13. The subcontractor acknowledges that the following clauses of the contract shown in Item 1 are included in this subcontract:

- Contract Work Hours and Safety Standards Act - Overtime Compensation - (If included in prime contract see Block 6)
- Payrolls and Basic Records
- Withholding of Funds
- Disputes Concerning Labor Standards
- Compliance with Davis-Bacon and Related Act Regulations
- Davis-Bacon Act
- Apprentices and Trainees
- Compliance with Copeland Act Requirements
- Subcontracts (Labor Standards)
- Contract Termination - Debarment
- Certification of Eligibility

14. NAME(S) OF ANY INTERMEDIATE SUBCONTRACTORS, IF ANY

A		A	
B		B	

15a. NAME OF PERSON SIGNING	16. BY *(Signature)*	17. DATE SIGNED
15b. TITLE OF PERSON SIGNING		

AUTHORIZED FOR LOCAL REPRODUCTION
PREVIOUS EDITION IS NOT USABLE

STANDARD FORM 1413 (REV. 7/2005)
Prescribed by GSA/FAR (48 CFR) 53.222(e)

[FR Doc. 05–11186 Filed 6–7–05; 8:45 am]
BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 31 and 52

[FAC 2005–04; FAR Case 2001–031; Item VII]

RIN 9000–AJ67

Federal Acquisition Regulation; Deferred Compensation and Postretirement Benefits Other Than Pensions

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) by revising the cost principles for Deferred compensation other than pensions, and Postretirement benefits other than pensions. The related contract clause, Reversion or Adjustment of Plans for Postretirement Benefits (PRB) Other Than Pensions, is also revised. The rule revises the cost principle and contract clause by improving clarity and structure, and removing unnecessary and duplicative language. The revisions are intended to revise contract cost principles and procedures, in light of the evolution of Generally Accepted Accounting Principles (GAAP), the advent of Acquisition Reform, and experience gained from implementation of the cost principles in the FAR.

DATES: *Effective Date*: July 8, 2005.

FOR FURTHER INFORMATION CONTACT The FAR Secretariat at (202) 501–4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Jeremy Olson, Procurement Analyst, at (202) 501–3221. Please cite FAC 2005–04, FAR case 2001–031.

SUPPLEMENTARY INFORMATION:

A. Background

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 68 FR 33326, June 3, 2003, with request for public comments. Four respondents submitted comments; a discussion of the comments is provided below. The Councils considered all comments and concluded that the proposed rule should be converted to a final rule, with changes to the proposed rule. Differences between the proposed rule and final rule are discussed in Section B, Comments 2, 5, 6, and Changes for Clarity, below.

B. Public Comments

Deferred compensation—Subsequent period awards

1. *Comment*: Revise proposed FAR 31.205–6(k)(2). One respondent commented that the word ''made'' could be misconstrued to mean ''paid'' versus when the award program is instituted. The sentence should be changed to read: ''Deferred compensation awards are unallowable if the award program is instituted in a period subsequent to the accounting period when the work being remunerated was performed.''

Councils' response: Nonconcur. The Councils believe that the proposed language (which is the same as the current language in the last sentence of paragraph (k)(1) and has been unchanged for many years) is clear. By definition, deferred compensation is an award ''made'' to compensate an employee in a future period, *i.e.*, the award is ''paid'' in the future. Therefore, the Councils do not believe it is likely that the word ''made'' will be misconstrued as ''paid.'' In addition, the respondent has provided no evidence that this language is being misinterpreted.

Furthermore, the respondent's proposed language would change the meaning of the provision and create an inappropriate result. Under that proposed language, the contractor could ''institute'' an award program in 1999, and award an employee in 2003 for work performed during 2000. The purpose of the FAR provision is to preclude such retroactive awards; the respondent's proposed revision would thwart this purpose.

Delayed recognition methodology for recognizing PRB past service costs

2. *Comment*: Revise proposed FAR 31.205–6(o)(2)(iii)(A). The respondent believes that the second sentence of the provision could be misinterpreted to mean that the entire amount of PRB costs attributable to the past service (transition obligation) is unallowable, not just the portion of the PRB costs in excess of the amount assignable under the delayed recognition methodology. The provision should be revised to read as follows:

''However, the portion of PRB costs attributable to past service (''transition obligation'') as defined in Financial Accounting Standards Board Statement 106, paragraph 110, that is in excess of the amount assignable under the delayed recognition methodology described in paragraphs 112 and 113 of Statement 106 is unallowable.''

Councils' response: Concur. The Councils agree that the language was intended to disallow only the excess amount, not the total amount. The Councils also agree that the respondent's proposed language, with some additional wording, is appropriate. Therefore, the Councils have revised the language to read as follows:

''However, the portion of PRB costs attributable to the transition obligation assigned to the current year that is in excess of the amount assignable under the delayed recognition methodology described in paragraphs 112 and 113 of Financial Accounting Standards Board Statement 106 is unallowable. The transition obligation is defined in Statement 106, paragraph 110.''

Refund of Government share of PRB costs which revert or inure to the contractor

3. *Comment*: Revise proposed FAR 31.205–6(o)(3). One respondent was concerned that, under the proposed language, the Government may be entitled to an equitable share of previously funded PRB costs when benefits are reduced but total costs are not. In the present environment, contractors may be required to reduce benefits to simply keep retiree health costs from increasing at an unsustainable level. The provision does not define what is meant by ''any amount of previously funded PRB costs which revert or inure to the contractor.'' The respondent recommends that the provision explicitly state that the Government is entitled to an equitable share of previously funded costs only when the costs are ultimately reduced.

Councils' response: Nonconcur. The Councils believe the respondent is misapplying the provision. Neither a reduction in PRB costs nor a reduction in PRB benefits alone entitles the Government to an equitable share of previously funded PRB costs under proposed FAR 31.205–6(o)(3) (FAR 31.205–6(o)(5) of the final rule) or FAR 52.215–18. The Government is entitled to an equitable share when previously funded PRB costs revert or inure to the contractor, for whatever reason. ''Inure'' is defined in Webster's College Dictionary as ''to come into use or operation,'' while ''revert'' means ''to return or go back.'' Thus, this language applies whenever assets return or go back to the contractor, or come into use

or operation (*i.e.*, are constructively received) by the contractor.

4. *Comment*: Revise proposed FAR 31.205–6(o)(3). Two respondents asserted that the provision is one-sided by entitling the Government to share in any proceeds resulting from over funding but shielding the Government from liability in the event of under funding. The respondents recommend that the provision require the Government to receive a pro-rata share of the unfunded liability that exists at the time of a segment closing, plan termination, or curtailment of benefits. In addition, the rule should be amended so that PRB plan closing adjustments operate the same way as pension plan closing adjustments.

Councils' response: Nonconcur. The assertion that the provision is one-sided is based on the assumption that this provision applies whenever the PRB plan is over funded. The provision at FAR 31.205–6(o)(3) of the proposed rule (FAR 31.205–6(o)(5) of the final rule) does not apply simply because a PRB plan is over funded. The provision applies only when the assets revert, inure, or are constructively received by the contractor.

The Councils do not believe that FAR 31.205–6(o)(3) should be revised to provide a segment closing adjustment for PRB costs. Unlike pension benefits, contractors generally reserve the right to reduce or eliminate PRB benefits. Therefore, the Councils do not believe an adjustment similar to the pension segment closing adjustment is appropriate for PRBs.

5. *Comment*: Revise proposed FAR 31.205–6(o)(3). Four respondents believe that the last sentence of the provision (that specifies the contractor shall credit the Government's share of previously funded PRB costs to the Government, either as a cost reduction or by cash refund, at the option of the Government) is inequitable and should be eliminated because it ignores the interest of the contractor, it is both unnecessary and undesirable, and it is unduly prescriptive. In addition, the respondents believe that explicitly dictating the required alternative methods of adjustment reduces the flexibility to negotiate an equitable adjustment that considers the unique facts relating to a particular situation. The provision should be revised to read as follows:

''When determining or agreeing on the method for treating the equitable share, the contracting parties should consider the following methods: cost reduction, amortizing the cost over a number of years, cash refund or some other agreed upon method.''

Councils' response: Partially concur. The Councils agree with the concept that the parties should attempt to negotiate the method of recovery for the Government's equitable share of PRB funds that inure or revert to the contractor. However, the rule must also address those instances where the parties fail to reach a settlement. While the contractor and the Government should attempt to negotiate a settlement, if the parties disagree, the Contracting Officer must designate the method for recovery of the equitable share. Therefore, to address this concern, the Councils deleted the last sentence of proposed 31.205–6(o)(3) and added the following language to the related contract clause at 52.215–18(b):

When determining or agreeing on the method for recovery of the Government's equitable share, the contracting parties should consider the following methods: cost reduction, amortizing the credit over a number of years (with appropriate interest), cash refund, or some other agreed upon method. Should the parties be unable to agree on the method for recovery of the Government's equitable share, through good faith negotiations, the Contracting Officer shall designate the method of recovery.

Reduced benefits for a PRB plan

6. *Comment*: Revise proposed FAR 52.215–18. One respondent asserted that the language in the first sentence of the contract clause, regarding what is meant by ''reduced benefits'' in a PRB plan, is ambiguous. A contractor might reduce benefits but, because of increased costs in other areas, the allocable costs of the PRB plan might stay steady or even increase. The respondent also believes that the language should focus on allocable costs and not on the level of benefits in the plan.

Councils' response: Partially concur. The Councils agree that the phrase ''reduce a PRB plan'' is ambiguous and has revised it to read ''reduce the benefits of a PRB plan.''

The Councils do not agree that the language should be revised to focus on allocable costs. The language requires the contractor to notify the contracting officer when there is a PRB termination or a reduction in benefits under the PRB plan. The purpose of this provision is to assure that the Government is promptly notified so that timely adjustments can be made for purposes of contract negotiations (forward pricing rate adjustments) and billing (billing rate adjustments). The purpose is also to assure that the Government receives its equitable share of any previously funded PRB costs which inure or revert to the contractor as a result of a plan termination or reduction in benefits, or for any other reason. In those cases where there is a reduction in benefits but it does not affect the amount of PRB costs allocable to Government contracts, no adjustments would be made to the forward pricing or billing rates. If no funds inure or revert to the contractor as a result of the reduction in benefits, there would also be no refund or credit due the Government under the provision. However, the contractor must still notify the Contracting Officer so that the Government has an opportunity to review any assertion that the reduction in benefits does not impact allocable costs or result in a refund or credit due the Government.

Changes for Clarity

For purposes of enhancing clarity and structure, the Councils have revised the language at FAR 31.205–6(o)(2) and (3). In addition, upon further review, the Councils have determined that the language at FAR 31.205–6(o)(3) applies to all of (o)(2), and not just (o)(2)(iii). Therefore, the language that was moved to FAR 31.205–6(o)(2)(iii)(D) in the proposed rule, has been moved back to FAR 31.205–6(o)(3) in the final rule.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because most contracts awarded to small entities use simplified acquisition procedures or are awarded on a competitive, fixed-price basis, and do not require application of the cost principle discussed in this rule.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq*.

List of Subjects in 48 CFR Parts 31 and 52

Government procurement.

Dated: May 27, 2005.

Julia B. Wise,

Director, Contract Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 31 and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 31 and 52 is revised to read as follows:

AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES

■ 2. Amend section 31.205–6 by revising paragraphs (k), (o)(2), (o)(3), and (o)(5) to read as follows:

31.205–6 Compensation for personal services.

* * * * *

(k) *Deferred compensation other than pensions.* The costs of deferred compensation awards are allowable subject to the following limitations:

(1) The costs shall be measured, assigned, and allocated in accordance with 48 CFR 9904.415, Accounting for the Cost of Deferred Compensation.

(2) The costs of deferred compensation awards are unallowable if the awards are made in periods subsequent to the period when the work being remunerated was performed.

* * * * *

(o) *Postretirement benefits other than pensions (PRB).*

* * * * *

(2) To be allowable, PRB costs shall be incurred pursuant to law, employer-employee agreement, or an established policy of the contractor, and shall comply with paragraphs (o)(2)(i), (ii), or (iii) of this subsection.

(i) *Pay-as-you-go.* PRB costs are not accrued during the working lives of employees. Costs are assigned to the period in which—

(A) Benefits are actually provided; or

(B) The costs are paid to an insurer, provider, or other recipient for current year benefits or premiums.

(ii) *Terminal funding.* PRB costs are not accrued during the working lives of the employees.

(A) Terminal funding occurs when the entire PRB liability is paid in a lump sum upon the termination of employees (or upon conversion to such a terminal-funded plan) to an insurer or trustee to establish and maintain a fund or reserve for the sole purpose of providing PRB to retirees.

(B) Terminal funded costs shall be amortized over a period of 15 years.

(iii) *Accrual basis.* PRB costs are accrued during the working lives of employees. Accrued PRB costs shall be—

(A) Measured and assigned in accordance with generally accepted accounting principles. However, the portion of PRB costs attributable to the transition obligation assigned to the current year that is in excess of the amount assignable under the delayed recognition methodology described in paragraphs 112 and 113 of Financial Accounting Standards Board Statement 106 is unallowable. The transition obligation is defined in Statement 106, paragraph 110;

(B) Paid to an insurer or trustee to establish and maintain a fund or reserve for the sole purpose of providing PRB to retirees; and

(C) Calculated in accordance with generally accepted actuarial principles and practices as promulgated by the Actuarial Standards Board.

(3) To be allowable, PRB costs must be funded by the time set for filing the Federal income tax return or any extension thereof, or paid to an insurer, provider, or other recipient by the time set for filing the Federal income tax return or extension thereof. PRB costs assigned to the current year, but not funded, paid or otherwise liquidated by the tax return due date as extended are not allowable in any subsequent year.

* * * * *

(5) The Government shall receive an equitable share of any amount of previously funded PRB costs which revert or inure to the contractor. Such equitable share shall reflect the Government's previous participation in PRB costs through those contracts for which cost or pricing data were required or which were subject to Subpart 31.2.

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. Revise section 52.215–18 to read as follows:

52.215–18 Reversion or Adjustment of Plans for Postretirement Benefits (PRB) Other Than Pensions.

As prescribed in 15.408(j), insert the following clause:

REVERSION OR ADJUSTMENT OF PLANS FOR POSTRETIREMENT BENEFITS (PRB) OTHER THAN PENSIONS (JUL 2005)

(a) The Contractor shall promptly notify the Contracting Officer in writing when the Contractor determines that it will terminate or reduce the benefits of a PRB plan.

(b) If PRB fund assets revert or inure to the Contractor, or are constructively received by it under a plan termination or otherwise, the Contractor shall make a refund or give a credit to the Government for its equitable share as required by 31.205–6(o)(5) of the Federal Acquisition Regulation (FAR). When determining or agreeing on the method for recovery of the Government's equitable share, the contracting parties should consider the following methods: cost reduction, amortizing the credit over a number of years (with appropriate interest), cash refund, or some other agreed upon method. Should the parties be unable to agree on the method for recovery of the Government's equitable share, through good faith negotiations, the Contracting Officer shall designate the method of recovery.

(c) The Contractor shall insert the substance of this clause in all subcontracts that meet the applicability requirements of FAR 15.408(j).

(End of clause)

[FR Doc. 05–11185 Filed 6–7–05; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 31

[FAC 2005–04; FAR Case 2004–005; Item VIII]

RIN 9000–AJ93

Federal Acquisition Regulation; Gains and Losses

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) by revising the contract cost principles for Gains and losses on disposition or impairment of depreciable property or other capital assets, Depreciation costs, and Rental costs. The final rule adds language to specifically address the gain or loss recognition of sale and leaseback transactions to be consistent with the date at which a contractor begins to incur an obligation for lease or rental costs. A date for recognition of gain or loss associated with sale and leaseback transactions was previously undefined within the cost principles. In addition, revised language is also added to recognize that an adjustment to the lease/rental cost limitations are required to ensure that the total costs associated with the use of the subject assets do not exceed the constructive costs of ownership.

DATES: *Effective Date*: July 8, 2005.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat at (202) 501–4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Jeremy Olson at (202) 501–3221. Please cite FAC 2005–04, FAR case 2004–005.

SUPPLEMENTARY INFORMATION:

A. Background

DoD, GSA, and NASA published a proposed FAR rule for public comment in the **Federal Register** at 68 FR 40466, July 7, 2003, under FAR case 2002–008. The proposed rule related to FAR 31.205–16, Gains and losses on disposition or impairment of depreciable property or other capital assets; FAR 31.205–24, Maintenance and repair costs; and FAR 31.205–26, Material costs. As result of the public comments received, the Councils converted the proposed rule relating to FAR 31.205–24 and FAR 31.205–26 to a final rule, with minor changes. The Councils also decided to make substantive changes to the proposed rule for FAR 31.205–16 and published a second proposed FAR rule in the **Federal Register** at 69 FR 29380, May 21, 2004, with a request for comments by July 20, 2004.

Three respondents submitted public comments in response to the second proposed FAR rule. A discussion of these public comments is provided below. The Councils considered all comments and concluded that the proposed rule should be converted to a final rule, with changes to the proposed rule and changes to FAR 31.205–11 and FAR 31.205–36 to address concerns raised in the public comments. Differences between the second proposed rule and final rule are discussed in Section B, Comments 1, 2, 3, and 5, below.

B. Public Comments

The Government and the contractor

1. *Comment*: Two respondents are opposed to the language ''the Government and Contractor shall'' take certain actions. One of the respondents specifically states, ''The new phrase implies that both parties perform such duties as accounting entries when in reality FAR provides requirements that must be met by the contractor and approved by the contracting officer.'' The respondents recommend removing the language ''the Government and Contractor shall'' and retaining the current language structure.

Councils' response: Concur. The Councils concur that the FAR cost principles are regulations that the contractor must meet with regard to the allowability of contract costs. Since the current language has not resulted in any problems and the proposed revision could cause potential confusion, the Councils have retained the current language and removed reference to ''the Government and the contractor shall'' at proposed FAR 31.205–16(a), (c), (d), (e)(1), (f), and (g).

Disposition date

2. *Comment*: Two respondents support the disposition date being the date of the sale and leaseback arrangement. However, the respondents noted that the use of the term ''arrangement'' is ambiguous and subject to various interpretations. The respondents have recommended using language that represents the effective date (*i.e.*, the date title passes from seller to buyer) as the disposition date for the sale and leaseback transaction.

Councils' response: Partially concur. The Councils agree that the date of the sale and leaseback arrangement may be subject to various interpretations. However, the Councils believe that the term ''effective date'' also would be subject to various interpretations because of the numerous underlying legal relationships that can affect a sale and leaseback arrangement. The Councils therefore have revised the language at FAR 31.205–16(b) to state that the gain or loss is determined on the date that the contractor becomes a lessee of the property. In addition, for clarity purposes, the Councils have removed the term ''disposition date'' from the proposed rule at FAR 31.205–16(b)(1) and (2), since that term is not used elsewhere in this provision in discussing other asset dispositions.

Depreciation recapture/lease cost limitation

3. *Comment*: One respondent asserts that ''the combined reading of proposed 31.205–16(a), (b), (c) and (d) with 31.205–11(m)(1) and 31.205–36(b)(2) to mean that the contractor must provide both depreciation recapture and limit future lease charges to what would have been the continuing ownership costs.'' This respondent further states:

> ''This unclear and contentious area has long been an inequitable proposition. For example, a contractor sells a building for the original value. This results in a full depreciation recapture and means that the Government received goods and services free of any building costs. However, if the leaseback exceeds the previous ownership costs, then the contractor is forced to provide future facilitization at less than cost. This is clearly inequitable compared to other contractors who receive full recovery of their facility costs.''

The respondent suggests that the sale and leaseback transaction should be limited to an ''either or'' negotiation. Either apply the depreciation recapture at the time of sale, or limit the lease cost for the period of time necessary to liquidate an amount equal to the depreciation recapture.

Councils' response: Partially concur. The Councils disagree with the respondent's recommendation regarding an ''either or'' negotiation. As stated in the **Federal Register** at 69 FR 29380, May 21, 2004, the FAR ''will continue to limit future lease costs to the costs of ownership.'' In addition, the long-standing policy, referred to as ''depreciation recapture'' by the respondent, will continue in that ''gains and losses on disposition of tangible capital assets, including those acquired under capital leases (see 31.205–11(i)), shall be considered as adjustments of depreciation costs previously recognized.'' (see FAR 31.205–16(c)).

However, the Councils have recognized that some additional language is needed to ensure that the contractor's and Government's interests are protected. The intent of this longstanding limitation in the cost principles is that, for Government contract costing purposes, the contractor should not benefit, nor should the contractor be harmed, for entering into a sale and leaseback agreement, and that the recovery of costs should be limited to the normal cost of ownership. As the respondent has noted, under the current proposed rule, the recognition of a gain may limit the contractor in its ability to recoup what would otherwise be considered allowable costs up to the original acquisition cost. Likewise, the recognition of a loss may have the opposite effect that being the Government would actually reimburse the contractor for costs in excess of the original acquisition cost. As a result, the limitation at FAR 31.205–11(i)(1) and FAR 31.205–36(b)(2) has been modified to reflect these concerns.

Limitation on losses from less than arm's-length transactions

4. *Comment*: One respondent states that the proposed rule ''is a boon for government contractors and a bust for the government and taxpayers.'' The respondent notes that proposed paragraph 31.205–16(d) clearly limits the amount of credit accruing to the Government but that the proposed rule has no limit on the losses the contractor can charge to the Government. The respondent recommends that paragraph (b) include language that eliminates the recognition of losses on Government

contracts that are not entered into in an arm's-length transaction.

Councils' response: Nonconcur. The provisions in the proposed paragraph 31.205–16(d) limiting recognition of any gain on the disposition of capital assets to the accumulated depreciation as of the disposition date has been the cost principle provision for many years. This provision is currently found in FAR 31.205–16(b). For contract costing purposes, gains and losses are ''considered as adjustments of depreciation costs previously recognized.'' The Government participates in the cost associated with the use of the capital asset by the contractor; this does not include any appreciation in asset value in excess of its original cost. Therefore, the cost principle limits the Government's recognition of the gain to the accumulated depreciation costs. In addition, the proposed paragraph at 31.205–16(b)(2) limits the allowable loss to the amount computed using ''fair market value,'' which protects the Government from participating in any potential ''paper losses.'' As a result, the Councils do not believe the recommendation to add a provision relative to less than arm's-length transactions is necessary.

Fair Market Value

5. *Comment*: Two respondents are opposed to using the language ''fair market value'' and recommend using the existing term ''net amount realized,'' which is used in the proposed paragraph at 31.205–16(c). The assertion is that the ''fair market value'' is an undefined term and subject to multiple interpretations, which one of the respondents noted as being a problematic concept that has led to litigation. In addition, one respondent asserted that the use of ''fair market value'' to measure the gain is inconsistent with the language provided at CAS 409.50(j)(1). This respondent stated that CAS 409 measures the gain or loss as the difference between the net amount realized and its undepreciated balance. The respondent believes that since CAS is the determining authority for the measurement and assignment of cost, the language should be revised to make it consistent with CAS.

Councils' response: Partially concur. The concept of ''fair market value'' is adopted widely in the financial and accounting literature and is representative of the price for which the property could be sold in an arm's-length transaction between unrelated parties. In the case of sale and leaseback arrangements, the use of ''net amount realized'' instead of ''fair market value'' places the Government at risk for potentially reimbursing the costs of raising capital. Sale and leaseback arrangements are unique and can be structured by the parties involved in many ways. Therefore, the use of ''fair market value'' helps to protect the Government from participating in any potential ''paper losses'' or artificially reduced gains. However, the Councils recognize that the CAS governs the measurement of the gain or loss for CAS covered contracts. Thus, the final rule reflects the measurement provisions at CAS 409 for such contracts. Since the Councils believe the measurement should be the same for all contracts, the final rule also measures the gain or loss for non-CAS covered contracts in accordance with CAS 409.

Although CAS 409 provides for the measurement of the gain or loss, the Councils continue to be concerned that the Government may be at risk of reimbursing the costs of raising capital (a cost the Government does not normally reimburse, as indicated by the provision at FAR 31.205–27). In addition, the parties can structure the transaction such that the Government participates in ''paper losses.'' Therefore, the final rule in 31.205–16(b)(2) limits the allowable portion of any loss to the difference between the fair market value and the undepreciated balance of the asset on the date the contractor becomes a lessee. While the Councils are also concerned about artificially reduced gains, the FAR cannot recognize a gain in excess of the amount measured by CAS. Thus, the allowable portion of the gain under the final rule is equal to the amount measured by CAS 409.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

C. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because most contracts awarded to small entities use simplified acquisition procedures or are awarded on a competitive, fixed-price basis and do not require application of the cost principle discussed in this rule.

D. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq*.

List of Subjects in 48 CFR Part 31

Government procurement.

Dated: May 27, 2005.

Julia B. Wise,

Director, Contract Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR part 31 as set forth below:

PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES

■ 1. The authority citation for 48 CFR part 31 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

■ 2. Amend section 31.205–11 by revising paragraph (i)(1) to read as follows:

31.205–11 Depreciation.

* * * * *

(i)* * *

(1) Lease costs under a sale and leaseback arrangement are allowable only up to the amount that would be allowed if the contractor retained title, computed based on the net book value of the asset on the date the contractor becomes a lessee of the property adjusted for any gain or loss recognized in accordance with 31.205–16(b); and

* * * * *

■ 3. Amend section 31.205–16 by—

■ a. Removing from paragraph (a) the words ''paragraph (d)'' and inserting ''paragraph (f)'' in its place;

■ b. Redesignating paragraphs (b), (c), (d), (e), (f), and (g), as (c), (e), (f), (g), (h), and (i), respectively;

■ c. Adding new paragraphs (b) and (d); and

■ d. Revising the newly designated paragraph (e)(2)(ii).

■ The revised and added text reads as follows:

31.205–16 Gains and losses on disposition or impairment of depreciable property or other capital assets.

* * * * *

(b) Notwithstanding the provisions in paragraph (c) of this subsection, when costs of depreciable property are subject to the sale and leaseback limitations in 31.205–11(i)(1) or 31.205–36(b)(2)—

(1) The gain or loss is the difference between the net amount realized and the undepreciated balance of the asset on the date the contractor becomes a lessee; and

(2) When the application of (b)(1) of this subsection results in a loss—

(i) The allowable portion of the loss is zero if the fair market value exceeds the undepreciated balance of the asset on the date the contractor becomes a lessee; and

(ii) The allowable portion of the loss is limited to the difference between the fair market value and the undepreciated balance of the asset on the date the contractor becomes a lessee if the fair market value is less than the undepreciated balance of the asset on the date the contractor becomes a lessee.

* * * * *

(d) The gain recognized for contract costing purposes shall be limited to the difference between the acquisition cost (or for assets acquired under a capital lease, the value at which the leased asset is capitalized) of the asset and its undepreciated balance (except see paragraphs (e)(2)(i) or (ii) of this subsection).

(e)* * *

(2)* * *

* * * * *

(ii) Recognize the gain or loss in the period of disposition, in which case the Government shall participate to the same extent as outlined in paragraph (e)(1) of this subsection.

* * * * *

■ 4. Amend section 31.205–36 by revising paragraph (b)(2) to read as follows:

31.205–36 Rental costs.

* * * * *

(b)* * *

(2) Rental costs under a sale and leaseback arrangement only up to the amount the contractor would be allowed if the contractor retained title, computed based on the net book value of the asset on the date the contractor becomes a lessee of the property adjusted for any gain or loss recognized in accordance with 31.205–16(b).

* * * * *

[FR Doc. 05–11184 Filed 6–7–05; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

Federal Acquisition Regulation; Small Entity Compliance Guide

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Small Entity Compliance Guide.

SUMMARY: This document is issued under the joint authority of the Secretary of Defense, the Administrator of General Services and the Administrator for the National Aeronautics and Space Administration. This *Small Entity Compliance Guide* has been prepared in accordance with Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of rules appearing in Federal Acquisition Circular (FAC) 2005–04 which amend the FAR. An asterisk (*) next to a rule indicates that a regulatory flexibility analysis has been prepared. Interested parties may obtain further information regarding these rules by referring to FAC 2005–04 which precedes this document. These documents are also available via the Internet at *http://www.acqnet.gov/far*.

FOR FURTHER INFORMATION CONTACT: Laurieann Duarte, FAR Secretariat, (202) 501–4755. For clarification of content, contact the analyst whose name appears in the table below.

LIST OF RULES IN FAC 2005–04

Item	Subject	FAR case	Analyst
I	Notification of Employee Rights Concerning Payment of Union Dues or Fees	2004–010	Marshall.
II	Telecommuting for Federal Contractors	2003–025	Zaffos.
*III	Incentives for Use of Performance-Based Contracting for Services	2004–004	Wise.
IV	Submission of Cost or Pricing Data on Noncommercial Modifications of Commercial Items (Interim).	2004–035	Olson.
*V	Applicability of SDB and HUBZone Price Evaluation Factor	2003–015	Marshall.
VI	Labor Standards for Contracts Involving Construction	2002–004	Nelson.
VII	Deferred Compensation and Postretirement Benefits Other Than Pensions	2001–031	Olson.
VIII	Gains and Losses	2004–005	Olson.

SUPPLEMENTARY INFORMATION: Summaries for each FAR rule follow. For the actual revisions and/or amendments to these FAR cases, refer to the specific item number and subject set forth in the documents following these item summaries.

FAC 2005–04 amends the FAR as specified below:

Item I—Notification of Employee Rights Concerning Payment of Union Dues or Fees (FAR Case 2004–010)

This final rule adopts, without change, the interim rule published in the **Federal Register** at 69 FR 76352, December 20, 2004, and issued as Item IV of FAC 2001–26. It amends FAR parts 2, 22, and 52 to implement Executive Order (E.O.) 13201, Notification of Employee Rights Concerning Payment of Union Dues or Fees, and Department of Labor regulations at 29 CFR 470. The rule requires Government contractors and subcontractors to post notices informing their employees that under Federal law they cannot be required to join a union or maintain membership in a union to retain their jobs. The required notice also advises employees who are not union members that they can object to the use of their union dues for certain purposes. This rule applies to Federal contractors and subcontractors with contracts or subcontracts that exceed the simplified acquisition threshold, unless covered by an exemption granted by the Secretary of Labor.

Item II—Telecommuting for Federal Contractors (FAR Case 2003–025)

This rule finalizes without changes the interim rule published in the **Federal Register** at 69 FR 59701, October 5, 2004, and issued as Item III of FAC 2001–025. This final rule implements Section 1428 of the Services Acquisition Reform Act of 2003 (Title XIV of Public Law 108–136), which prohibits agencies from including a requirement in a solicitation that precludes an offeror from permitting its employees to telecommute or, when telecommuting is not precluded, from

unfavorably evaluating an offeror's proposal that includes telecommuting unless it would adversely affect agency requirements, such as security. Contracting officers awarding service contracts should familiarize themselves with this rule.

Item III—Incentives for Use of Performance-Based Contracting for Services (FAR Case 2004–004)

This final rule amends the Federal Acquisition Regulation (FAR) to provide Governmentwide authority to treat performance-based contracts or task orders for services as commercial items, if certain conditions are met. Agencies must report on the use of this authority. This change implements sections 1431 and 1433 of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136) and is intended to promote the use of performance-based contracting.

Item IV—Submission of Cost or Pricing Data on Noncommercial Modifications of Commercial Items (FAR Case 2004–035)

This interim rule implements an amendment to 10 U.S.C. 2306a. The change requires that the exception from the requirement to obtain certified cost or pricing data for a commercial item does not apply to noncommercial modifications of a commercial item that are expected to cost, in the aggregate, more than $500,000 or 5 percent of the total price of the contract, whichever is greater. Section 818 applies to offers submitted, and to modifications of contracts or subcontracts made, on or after June 1, 2005. This new policy applies only to acquisitions funded by DoD, NASA, or the Coast Guard, since the statute amends 10 U.S.C. 2306a, which only applies to DoD, NASA, and the Coast Guard. The new language does not apply to acquisitions funded by other than DoD, NASA, or the Coast Guard because Section 818 did not amend 41 U.S.C. 254b, which prohibits obtaining cost or pricing data for commercial items. However, the new policy applies to contracts awarded or task or delivery orders placed on behalf of DoD, NASA, or the Coast Guard by an official of the United States outside of those agencies, because the statutory requirement of Section 818 applies to the funds provided by DoD, NASA, or the Coast Guard.

Item V—Applicability of SDB and HUBZone Price Evaluation Factor (FAR Case 2003–015)

This final rule removes some of the exceptions to the Small Disadvantaged Business and HUBZone preference programs. The contracting officer will now apply a price evaluation adjustment to offers of eligible products in acquisitions subject to the Trade Agreements Act. This rule will have a beneficial impact on all domestic concerns, especially small entities that are small disadvantaged business concerns or HUBZone small business concerns.

Item VI—Labor Standards for Contracts Involving Construction (FAR Case 2002–004)

This final rule implements in the FAR the DoL rule revising the terms ''construction, prosecution, completion or repair'' (29 CFR 5.2(j)) and ''site of the work'' (29 CFR 5.2(l)). In addition, the Councils have clarified several definitions relating to labor standards for contracts involving construction and made requirements for flow down of labor clauses more precise.

The most significant impact of this rule is that contractors must pay Davis-Bacon Act wages at a secondary site of the work, if a significant portion of the work is to be constructed at that site and the site meets the other criteria specified in the rule. When transporting portions of the building or work between the secondary site of the work and the primary site of the work, the wages for the primary site of the work are applicable. The contracting officer must coordinate with the Department of Labor when there is any uncertainty as to whether a work site is a secondary site of the work.

Item VII—Deferred Compensation and Postretirement Benefits Other Than Pensions (FAR Case 2001–031)

This final rule amends the FAR by revising paragraph (k), Deferred compensation other than pensions, and paragraph (o), Postretirement benefits other than pensions, of FAR 31.205–6, Compensation for personal services, cost principle. Changes to paragraph (k) include: deletion of language that duplicates definitions provided in FAR 31.001, elimination of obsolete coverage, and use of terminology consistent with Cost Accounting Standards. Changes to paragraph (o) include: moving and revising language in (o)(3) through (o)(5) to (o)(2)(iii) because these requirements only apply to accrual costing other than terminal funding. In addition, new coverage is added to the related contract clause at FAR 52.215–18, Reversion or Adjustment of Plans for Postretirement Benefits (PRB) Other Than Pensions, specifying the method of recovery of refunds and credits. The rule revises the cost principle and contract clause by improving clarity and structure, and removing unnecessary and duplicative language.

The case was initiated as a result of comments and recommendations received from industry and Government representatives during a series of public meetings. This rule is of particular interest to contractors and contracting officers who use cost analysis to price contracts and modifications, and who determine or negotiate reasonable costs in accordance with a clause of a contract, *e.g.,* price revision of fixed-price incentive contracts, terminated contracts, or indirect cost rates.

Item VIII—Gains and Losses (FAR Case 2004–005)

This final rule amends FAR 31.205–16 to address the timing of the gain or loss recognition of sale and leaseback arrangements of contractor depreciable property or other capital assets. The final rule defines the disposition date for a sale leaseback arrangement as the date the contractor begins to incur an obligation for lease or rental costs. Contracting officers, auditors, and contractors with responsibilities related to allowable cost determinations involving sale and leaseback arrangements of contractor depreciable property or other capital assets will be impacted by new policies governing that area.

Dated: May 27, 2005.

Julia B. Wise,

Director, Contract Policy Division.

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