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