

**33.204 [Amended]**

5. Section 33.204 is amended in the fifth sentence by removing "Public Law 100-522" and inserting "(5 U.S.C. 571, *et seq.*)".

6. Section 33.207 is amended by revising paragraph (a) to read as follows:

**33.207 Contractor certification.**

(a) Contractors shall provide the certification specified in paragraph (c) of this section when submitting any claim exceeding \$100,000.

7. Section 33.214 is amended at the end of paragraph (a)(3) by inserting "and"; at the end of paragraph (a)(4) by removing "; and" and inserting a period; by removing paragraph (a)(5); by revising paragraph (b); and by adding paragraphs (f) and (g) to read as follows:

**33.214 Alternative dispute resolution (ADR).**

(b) If the contracting officer rejects a contractor's request for ADR proceedings, the contracting officer shall provide the contractor a written explanation citing one or more of the conditions in 5 U.S.C. 572(b) or such other specific reasons that ADR procedures are inappropriate for the resolution of the dispute. In any case where a contractor rejects a request of an agency for ADR proceedings, the contractor shall inform the agency in writing of the contractor's specific reasons for rejecting the request.

(f)(1) A solicitation shall not require arbitration as a condition of award, unless arbitration is otherwise required by law. Contracting officers should have flexibility to select the appropriate ADR procedure to resolve the issues in controversy as they arise.

(2) An agreement to use arbitration shall be in writing and shall specify a maximum award that may be issued by the arbitrator, as well as any other conditions limiting the range of possible outcomes.

(g) Binding arbitration, as an ADR procedure, may be agreed to only as specified in agency guidelines. Such guidelines shall provide advice on the appropriate use of binding arbitration and when an agency has authority to settle an issue in controversy through binding arbitration.

**PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

8. Section 52.233-1 is amended by revising the date of the clause and paragraphs (d)(2)(i) and (g) to read as follows:

**52.233-1 Disputes.**

\* \* \* \* \*

**Disputes (Dec 1998)**

\* \* \* \* \*

(d)(2)(i) The Contractor shall provide the certification specified in paragraph (d)(2)(iii) of this clause when submitting any claim exceeding \$100,000.

\* \* \* \* \*

(g) If the claim by the Contractor is submitted to the Contracting Officer or a claim by the Government is presented to the Contractor, the parties, by mutual consent, may agree to use alternative dispute resolution (ADR). If the Contractor refuses an offer for ADR, the Contractor shall inform the Contracting Officer, in writing, of the Contractor's specific reasons for rejecting the offer.

\* \* \* \* \*

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**DEPARTMENT OF DEFENSE****GENERAL SERVICES ADMINISTRATION****NATIONAL AERONAUTICS AND SPACE ADMINISTRATION****48 CFR Parts 15, 31 and 52**

[FAC 97-09; FAR Case 89-012; Item IV]

RIN 9000-AC90

**Federal Acquisition Regulation; Pay-As-You-Go Pension Costs**

**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 have agreed on a final rule amending the Federal Acquisition Regulation (FAR) for consistency with the cost accounting standards for composition and measurement of pension cost and adjustment and allocation of pension cost. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993. This is not a major rule under 5 U.S.C. 804.

**EFFECTIVE DATE:** December 29, 1998.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, (202) 501-4755, for information pertaining to status or publication schedules. For clarification of content, contact Mr. Jeremy F. Olson at (202) 501-0692. Please cite FAC 97-09, FAR case 89-012.

**SUPPLEMENTARY INFORMATION:****A. Background**

An interim rule was published in the **Federal Register** at 54 FR 13022, March 29, 1989. The issuance of an interim rule was necessary because the United States Court of Appeals had ruled that FAR 31.205-6(j)(5) was inconsistent with 48 CFR 9904.412, Cost accounting standard for composition and measurement of pension cost (CAS 412), and that the controlling regulation was CAS 412.

Since the 1989 interim FAR rule was published, the Office of Federal Procurement Policy, Cost Accounting Standards Board, made substantial changes to CAS 412 and 48 CFR 9904.413, Adjustment and allocation of pension cost (CAS 413), relating to accounting for pension costs under negotiated Government contracts. These proposed changes were published and made available for public comment on November 5, 1993 (58 FR 58999). Public comments were received and considered in the development of the final CAS rule which was published in the **Federal Register** at 60 FR 16534, March 30, 1995. The changes in the final CAS rule addressed pension cost recognition for qualified pension plans subject to the tax-deductibility limits of the Federal Tax Code, problems associated with pension plans that are not qualified plans under the Federal Tax Code, and problems associated with overfunded pension plans.

A proposed FAR rule was published in the **Federal Register** at 62 FR 49900, September 23, 1997, to provide consistency with the revised CAS 412 and CAS 413. The rule proposed to (1) revise the definitions at FAR 31.001 to conform with the CAS Board's definitions; (2) delete references to "unfunded pension plans" since CAS 412 and CAS 413 no longer refer to unfunded pension plans; (3) add new language to FAR 31.205-6(j) to address transfer of assets to another account within the same fund, to address the allowability of costs for nonqualified pension plans using the pay-as-you-go cost method, and to address both CAS requirements and all other situations not covered by CAS; (4) add new language to FAR 31.205-6(j)(6), which was previously reserved, to refer to CAS 412 and CAS 413 for treatment of pension plans using the pay-as-you-go cost method; (5) provide other editorial changes to make FAR 31.001 and 31.205-6 consistent with the language of CAS 412 and CAS 413; and (6) revise the clause at FAR 52.215-27, Termination of Defined Benefit Pension Plans, to conform the clause with the

proposed FAR Part 31 changes. Six sources submitted comments in response to the proposed FAR rule. All comments were considered in the development of this final rule.

This final rule amends FAR 15.408, Solicitation provisions and contract clauses; FAR 31.001, Definitions; FAR 31.205-6, Compensation for personal services; and FAR 52.215-15, Pension Adjustments and Asset Reversions. The final rule differs from the proposed rule by—(1) revising FAR 31.205-6(j)(3)(i)(A) to address the deferral of pension costs pursuant to a waiver under the Employee's Retirement Income Security Act of 1974 (ERISA); (2) revising FAR 31.205-6(j)(3)(v) to clarify that the provisions of FAR 31.205-6(j)(4) apply if the withdrawal of assets is a pension plan termination under ERISA; (3) revising FAR 31.205-6(j)(4)(i) and 52.215-15(b) to clarify the calculation of the adjustment amounts for both CAS and non-CAS-covered contracts; and (4) making a number of editorial revisions, including changes (e.g., renumbering FAR 52.215-27 as FAR 52.215-15) resulting from publication of Federal Acquisition Circular 97-02 on September 30, 1997 (62 FR 51224).

## 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 contained in this rule.

## C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose recordkeeping or information collection requirements, or collections of information from offerors, contractors, or members of the public which 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 15, 31, and 52

Government procurement.

Dated: October 22, 1998.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Therefore, 48 CFR Parts 15, 31, and 52 are amended as set forth below:

1. The authority citation for 48 CFR Parts 15, 31, and 52 continues to read as follows:

**Authority:** 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

## PART 15—CONTRACTING BY NEGOTIATION

2. Section 15.408 is amended by revising paragraph (g) to read as follows:

### 15.408 Solicitation provisions and contract clauses.

\* \* \* \* \*

(g) *Pension Adjustments and Asset Reversions.* The contracting officer shall insert the clause at 52.215-15, Pension Adjustments and Asset Reversions, in solicitations and contracts for which it is anticipated that cost or pricing data will be required or for which any preaward or postaward cost determinations will be subject to Part 31 of the FAR.

\* \* \* \* \*

## PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES

3. Section 31.001 is amended by removing the definitions "Actuarial liability", "Termination of gain or loss" and "Unfunded pension plan"; by adding, in alphabetical order, the definitions "Actuarial accrued liability", "Nonqualified pension plan", "Qualified pension plan" and "Termination of employment gain or loss"; and by revising the definitions of "Accrued benefit cost method", "Actuarial assumption", "Actuarial cost method", "Actuarial valuation", "Funded pension cost", "Normal cost", "Pension plan", and "Projected benefit cost method", to read as follows:

### 31.001 Definitions.

*Accrued benefit cost method* means an actuarial cost method under which units of benefits are assigned to each cost accounting period and are valued as they accrue; *i.e.*, based on the services performed by each employee in the period involved. The measure of normal cost under this method for each cost accounting period is the present value of the units of benefit deemed to be credited to employees for service in that period. The measure of the actuarial accrued liability at a plan's inception date is the present value of the units of benefit credited to employees for service prior to that date. (This method is also known as the unit credit cost method without salary projection.)

\* \* \* \* \*

*Actuarial accrued liability* means pension cost attributable, under the actuarial cost method in use, to years

prior to the current period considered by a particular actuarial valuation. As of such date, the actuarial accrued liability represents the excess of the present value of future benefits and administrative expenses over the present value of future normal costs for all plan participants and beneficiaries. The excess of the actuarial accrued liability over the actuarial value of the assets of a pension plan is the unfunded actuarial liability. The excess of the actuarial value of the assets of a pension plan over the actuarial accrued liability is an actuarial surplus and is treated as a negative unfunded actuarial liability.

*Actuarial assumption* means an estimate of future conditions affecting pension cost; e.g., mortality rate, employee turnover, compensation levels, earnings on pension plan assets, and changes in values of pension plan assets.

*Actuarial cost method* means a technique that uses actuarial assumptions to measure the present value of future pension benefits and pension plan administrative expenses, and that assigns the cost of such benefits and expenses to cost accounting periods. The actuarial cost method includes the asset valuation method used to determine the actuarial value of the assets of a pension plan.

\* \* \* \* \*

*Actuarial valuation* means the determination, as of a specified date, of the normal cost, actuarial accrued liability, actuarial value of the assets of a pension plan, and other relevant values for the pension plan.

\* \* \* \* \*

*Funded pension cost* means the portion of pension cost for a current or prior cost accounting period that has been paid to a funding agency.

\* \* \* \* \*

*Nonqualified pension plan* means any pension plan other than a qualified pension plan as defined in this part.

*Normal cost* means the annual cost attributable, under the actuarial cost method in use, to current and future years as of a particular valuation date excluding any payment in respect of an unfunded actuarial liability.

\* \* \* \* \*

*Pension plan* means a deferred compensation plan established and maintained by one or more employers to provide systematically for the payment of benefits to plan participants after their retirements, provided that the benefits are paid for life or are payable for life at the option of the employees. Additional benefits such as permanent and total disability and death payments, and survivorship payments to

beneficiaries of deceased employees, may be an integral part of a pension plan.

\* \* \* \* \*

*Projected benefit cost method* means either—

(1) Any of the several actuarial cost methods that distribute the estimated total cost of all of the employees' prospective benefits over a period of years, usually their working careers; or

(2) A modification of the accrued benefit cost method that considers projected compensation levels.

\* \* \* \* \*

*Qualified pension plan* means a pension plan comprising a definite written program communicated to and for the exclusive benefit of employees that meets the criteria deemed essential by the Internal Revenue Service as set forth in the Internal Revenue Code for preferential tax treatment regarding contributions, investments, and distributions. Any other plan is a nonqualified pension plan.

\* \* \* \* \*

*Termination of employment gain or loss* means an actuarial gain or loss resulting from the difference between the assumed and actual rates at which pension plan participants separate from employment for reasons other than retirement, disability, or death.

\* \* \* \* \*

4. Section 31.201-5 is amended by revising the last sentence to read as follows:

#### 31.201-5 Credits.

\* \* \* See 31.205-6(j)(4) for rules governing refund or credit to the Government associated with pension adjustments and asset reversions.

5. Section 31.205-6 is amended by revising paragraphs (j)(1) through (j)(6) to read as follows:

#### 31.205-6 Compensation for personal services.

\* \* \* \* \*

(j) *Pension costs.* (1) A pension plan, as defined in 31.001, is a deferred compensation plan. Additional benefits such as permanent and total disability and death payments and survivorship payments to beneficiaries of deceased employees may be treated as pension costs, provided the benefits are an integral part of the pension plan and meet all the criteria pertaining to pension costs.

(2) Pension plans are normally segregated into two types of plans: defined-benefit or defined-contribution pension plans. The cost of all defined-benefit pension plans shall be measured, allocated, and accounted for

in compliance with the provisions of 48 CFR 9904.412, Cost accounting standard for composition and measurement of pension cost, and 48 CFR 9904.413, Adjustment and allocation of pension cost. The costs of all defined-contribution pension plans shall be measured, allocated, and accounted for in accordance with the provisions of 48 CFR 9904.412 and 48 CFR 9904.413. Pension costs are allowable subject to the referenced standards and the cost limitations and exclusions set forth in paragraphs (j)(2)(i) and (j)(3) through (8) of this subsection.

(i) Except for nonqualified pension plans using the pay-as-you-go cost method, to be allowable in the current year, pension costs must be funded by the time set for filing of the Federal income tax return or any extension thereof. Pension costs assigned to the current year, but not funded by the tax return time, shall not be allowable in any subsequent year. For nonqualified pension plans using the pay-as-you-go cost method, to be allowable in the current year, pension costs must be allocable in accordance with 48 CFR 9904.412-50(d)(3).

(ii) Pension payments must be reasonable in amount and must be paid pursuant to—an agreement entered into in good faith between the contractor and employees before the work or services are performed; and the terms and conditions of the established plan. The cost of changes in pension plans that are discriminatory to the Government or are not intended to be applied consistently for all employees under similar circumstances in the future are not allowable.

(iii) Except as provided for early retirement benefits in paragraph (j)(7) of this subsection, one-time-only pension supplements not available to all participants of the basic plan are not allowable as pension costs unless the supplemental benefits represent a separate pension plan and the benefits are payable for life at the option of the employee.

(iv) Increases in payments to previously retired plan participants covering cost-of-living adjustments are allowable if paid in accordance with a policy or practice consistently followed.

(3) *Defined-benefit pension plans.* This paragraph covers pension plans in which the benefits to be paid or the basis for determining such benefits are established in advance and the contributions are intended to provide the stated benefits. The cost limitations and exclusions pertaining to defined-benefit plans are as follows:

(i)(A) Except for nonqualified pension plans, pension costs (see 48 CFR

9904.412-40(a)(1)) assigned to the current accounting period, but not funded during it, shall not be allowable in subsequent years (except that a payment made to a fund by the time set for filing the Federal income tax return or any extension thereof is considered to have been made during such taxable year). However, any portion of pension cost computed for a cost accounting period, that exceeds the amount required to be funded pursuant to a waiver granted under the provisions of the Employee's Retirement Income Security Act of 1974 (ERISA), will be allowable in those future accounting periods in which the funding of such excess amounts occurs (see 48 CFR 9904.412-50(c)(5)).

(B) For nonqualified pension plans, except those using the pay-as-you-go cost method, allowable costs are limited to the amount allocable in accordance with 48 CFR 9904.412-50(d)(2).

(C) For nonqualified pension plans using the pay-as-you-go cost method, allowable costs are limited to the amounts allocable in accordance with 48 CFR 9904.412-50(d)(3).

(ii) Any amount funded in excess of the pension cost assigned to a cost accounting period is not allowable and shall be accounted for as set forth at 48 CFR 9904.412-50(a)(4), and shall be allowable in the future period to which it is assigned, to the extent it is allocable, reasonable, and not otherwise unallowable.

(iii) Increased pension costs caused by delay in funding beyond 30 days after each quarter of the year to which they are assignable are unallowable. If a composite rate is used for allocating pension costs between the segments of a company and if, because of differences in the timing of the funding by the segments, an inequity exists, allowable pension costs for each segment will be limited to that particular segment's calculation of pension costs as provided for in 48 CFR 9904.413-50(c). Determinations of unallowable costs shall be made in accordance with the actuarial cost method used in calculating pension costs.

(iv) Allowability of the cost of indemnifying the Pension Benefit Guaranty Corporation (PBGC) under ERISA Section 4062 or 4064 arising from terminating an employee deferred compensation plan will be considered on a case-by-case basis, provided that if insurance was required by the PBGC under ERISA Section 4023, it was so obtained and the indemnification payment is not recoverable under the insurance. Consideration under the foregoing circumstances will be primarily for the purpose of appraising

the extent to which the indemnification payment is allocable to Government work. If a beneficial or other equitable relationship exists, the Government will participate, despite the requirements of 31.205-19(a)(3) and (b), in the indemnification payment to the extent of its fair share.

(v) Increased pension costs resulting from the withdrawal of assets from a pension fund and transfer to another employee benefit plan fund, or transfer of assets to another account within the same fund, are unallowable except to the extent authorized by an advance agreement. If the withdrawal of assets from a pension fund is a plan termination under ERISA, the provisions of paragraph (j)(4) of this subsection apply. The advance agreement shall—

(A) State the amount of the Government's equitable share in the gross amount withdrawn or transferred; and

(B) Provide that the Government receive a credit equal to the amount of the Government's equitable share of the gross withdrawal or transfer.

(4) *Pension adjustments and asset reversions.* (i) For segment closings, pension plan terminations, or curtailment of benefits, the adjustment amount shall be the amount measured, assigned, and allocated in accordance with 48 CFR 9904.413-50(c)(12) for contracts and subcontracts that are subject to Cost Accounting Standards (CAS) Board rules and regulations (48 CFR Chapter 99). For contracts and subcontracts that are not subject to CAS, the adjustment amount shall be the amount measured, assigned, and allocated in accordance with 48 CFR 9904.413-50(c)(12), except the numerator of the fraction at 48 CFR 9904.413-50(c)(12)(vi) shall be the sum of the pension plan costs allocated to all non-CAS-covered contracts and subcontracts that are subject to Subpart 31.2 or for which cost or pricing data were submitted.

(ii) For all other situations where assets revert to the contractor, or such assets are constructively received by it for any reason, the contractor shall, at the Government's option, make a refund or give a credit to the Government for its equitable share of the gross amount withdrawn. The Government's equitable share shall reflect the Government's participation in pension costs through those contracts for which cost or pricing data were submitted or that are subject to Subpart 31.2. Excise taxes on pension plan asset reversions or withdrawals under this paragraph (j)(4)(ii) are unallowable in accordance with 31.205-41(b)(6).

(5) *Defined-contribution pension plans.* This paragraph covers those pension plans in which the contributions are established in advance and the level of benefits is determined by the contributions made. It also covers profit sharing, savings plans, and other such plans, provided the plans fall within the definition of a pension plan in paragraph (j)(1) of this subsection.

(i) Allowable pension cost is limited to the net contribution required to be made for a cost accounting period after taking into account dividends and other credits, where applicable. However, any portion of pension cost computed for a cost accounting period that exceeds the amount required to be funded pursuant to a waiver granted under the provisions of ERISA will be allowable in those future accounting periods in which the funding of such excess amounts occurs (see 48 CFR 9904.412-50(c)(5)).

(ii) The provisions of paragraphs (j)(3)(ii) and (iv) of this subsection apply to defined-contribution plans.

(6) *Pension plans using the pay-as-you-go cost method.* The cost of pension plans using the pay-as-you-go cost method shall be measured, allocated, and accounted for in accordance with 48 CFR 9904.412 and 9904.413. Pension costs for a pension plan using the pay-as-you-go cost method shall be allowable to the extent they are allocable, reasonable, and not otherwise unallowable.

\* \* \* \* \*

## PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

6. Section 52.215-15 is revised to read as follows:

### 52.215-15 Pension adjustments and asset reversions.

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

#### Pension Adjustments and Asset Reversions (Dec 1998)

(a) The Contractor shall promptly notify the Contracting Officer in writing when it determines that it will terminate a defined-benefit pension plan or otherwise recapture such pension fund assets.

(b) For segment closings, pension plan terminations, or curtailment of benefits, the adjustment amount shall be the amount measured, assigned, and allocated in accordance with 48 CFR 9904.413-50(c)(12) for contracts and subcontracts that are subject to Cost Accounting Standards (CAS) Board rules and regulations (48 CFR Chapter 99). For contracts and subcontracts that are not subject to CAS, the adjustment amount shall be the amount measured, assigned, and allocated in accordance with 48 CFR 9904.413-50(c)(12), except the numerator of the fraction at 48 CFR 9904.413-50(c)(12)(vi) shall be the sum of the pension plan costs

allocated to all non-CAS-covered contracts and subcontracts that are subject to Federal Acquisition Regulation (FAR) Subpart 31.2 or for which cost or pricing data were submitted.

(c) For all other situations where assets revert to the Contractor, or such assets are constructively received by it for any reason, the Contractor shall, at the Government's option, make a refund or give a credit to the Government for its equitable share of the gross amount withdrawn. The Government's equitable share shall reflect the Government's participation in pension costs through those contracts for which cost or pricing data were submitted or that are subject to FAR Subpart 31.2.

(d) The Contractor shall include the substance of this clause in all subcontracts under this contract that meet the applicability requirement of FAR 15.408(g). (End of clause)

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## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 22 and 52

[FAC 97-09; FAR Case 96-610; Item V]

RIN 9000-AH99

#### Federal Acquisition Regulation; Rehabilitation Act, Workers With Disabilities

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

**ACTION:** Interim rule adopted as final without change.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have agreed to adopt the interim rule published in the **Federal Register** at 63 FR 34073, June 22, 1998, as a final rule without change. The rule amends the Federal Acquisition Regulation (FAR) to implement revised Department of Labor regulations regarding affirmative action to employ and advance in employment qualified individuals with disabilities. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993, and is not a major rule under 5 U.S.C. 804.

**EFFECTIVE DATE:** October 30, 1998.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, (202)