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 address the placement of orders under existing contracts and agreements with contractors that have been debarred, suspended, or proposed for debarment.

DATES: *Effective Date:* January 12, 2004.

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. Craig R. Goral, Procurement Analyst, at (202) 501–3856. Please cite FAC 2001–18, FAR case 2002–010.

SUPPLEMENTARY INFORMATION:

A. Background

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 67 FR 67282, November 4, 2002, to require that discretionary actions on the part of agencies meet the same standards as agencies would have to meet in awarding new contracts. The rule prohibited agencies from placing orders exceeding the guaranteed minimum against existing contracts, placing orders against optional Federal Supply Schedule contracts, adding new work, exercising options or otherwise extending the duration of contracts with contractors that are debarred, suspended or proposed for debarment unless the agency head makes a determination that there are compelling reasons for doing so.

Two comments from two commenters were received in response to the proposed rule. The first commenter strongly supported the rule. The second commenter suggested that the rule be clarified to indicate whether it applies to credit card purchases or blanket purchase agreements (BPAs), Memorandums of Agreement (MOAs), Military Interdepartmental Purchase Requests (MIPRs), or Governmentwide acquisition contracts (GWACs). A change was made to the rule to address BPAs and Basic Ordering Agreements (BOAs) based on this recommendation. It was not appropriate to address MOAs or MIPRs because they are not entered into under the FAR. GWACs are indefinite delivery contracts and are, therefore, already covered by the rule. BPAs and BOAs are agreements rather than contracts. However, they should contain the basic clauses that will apply to orders placed under them. Therefore, the Councils revised the rule to address BPAs and BOAs. The requirement that contractors must be responsible is statutory. Contractors debarred, suspended, or proposed for debarment are excluded from doing business with the Government unless there is a compelling reason to conduct business with such a contractor.

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 it only affects orders placed by civilian agencies against existing contracts with contractors that are debarred, suspended or proposed for debarment. The Defense FAR Supplement already prohibits the placement of such orders.

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 Part 9

Government procurement.

Dated: December 4, 2003.

Laura Auletta,

Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR part 9 as set forth below:

PART 9—CONTRACTOR QUALIFICATIONS

■ 1. The authority citation for 48 CFR part 9 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 9.405 by revising paragraph (a); and removing from paragraphs (d)(2) and (d)(3) the words ''or a designee''. The revised text reads as follows:

9.405 Effect of listing.

(a) Contractors debarred, suspended, or proposed for debarment are excluded from receiving contracts, and agencies shall not solicit offers from, award contracts to, or consent to subcontracts with these contractors, unless the agency head determines that there is a compelling reason for such action (*see* 9.405–1(b), 9.405–2, 9.406–1(c), 9.407–1(d), and 23.506(e)). Contractors debarred, suspended, or proposed for debarment are also excluded from conducting business with the Government as agents or representatives of other contractors.

* * * * *

■ 3. Amend section 9.405–1 by removing from the first sentence of paragraph (a) the words ''or a designee''; revising paragraph (b); and removing paragraph (c). The revised text reads as follows:

9.405–1 Continuation of current contracts.

* * * * *

(b) For contractors debarred, suspended, or proposed for debarment, unless the agency head makes a written determination of the compelling reasons for doing so, ordering activities shall not—

(1) Place orders exceeding the guaranteed minimum under indefinite quantity contracts;

(2) Place orders under optional use Federal Supply Schedule contracts, blanket purchase agreements, or basic ordering agreements; or

(3) Add new work, exercise options, or otherwise extend the duration of current contracts or orders.

9.405–2 [Amended]

■ 4. Amend section 9.405–2 by removing from the first sentence of paragraph (a) the words ''or a designee''.

[FR Doc. 03–30476 Filed 12–10–03; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 31 and 52

[FAC 2001–18; FAR Case 2001–037; Item VI]

RIN 9000–AJ57

Federal Acquisition Regulation; Insurance and 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 (Councils) have agreed on a final rule

amending the Federal Acquisition Regulation (FAR) to revise the insurance and indemnification cost principle, and the portion of the compensation for personal services cost principle relating to pension costs. The rule revises both cost principles 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 pertaining to contract cost principles and procedures.

DATES: *Effective Date:* January 12, 2004.

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. Edward Loeb, Policy Advisor, at (202) 501–0650. Please cite FAC 2001–18, FAR case 2001–037.

SUPPLEMENTARY INFORMATION:

A. Background

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 68 FR 4880, January 30, 2003, with a request for 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 below:

B. Public Comments

General Reformatting of FAR 31.205

Comment 1: In addition to specific comments regarding the subject case, a respondent also recommended reformatting this cost principle as part of a general reformat effort of FAR Part 31, Contract Cost Principles and Procedures. The respondent advocates establishing a common format for the selected costs detailed in FAR 31.205 will increase the clarity of the cost principles and reduce misinterpretation.

Councils' response: Nonconcur. The Councils are unaware of any significant clarity problems with the current FAR cost principles and see no benefit in this recommendation. While it is true that the cost principles do not all share an identical format, it does not follow that this makes them difficult to understand. Moreover, such a comprehensive revision of the cost principles could actually increase disputes by substituting new wording for longstanding, court-tested language.

Of the 48 current FAR cost principles, 16 are only one paragraph long, and 11 more are only two or three paragraphs long. The Councils question the need to ''force-fit'' such short cost principles into a uniform format, particularly in the absence of any significant clarity problems. Not only would the recommended general reformatting of the cost principles be difficult to accomplish, but it would also offer no obvious benefit to either industry or the Government.

The Councils recommend instead that industry continue to identify those individual cost principles which it views as problematic and to provide specific proposals for appropriate revisions. It should be noted that the continuing Defense Procurement and Acquisition Policy initiative to reduce accounting and administrative burdens in the cost principles, without jeopardizing the Government's interests, has resulted in significant changes or deletions involving more than 20 different cost principles to date. The Councils continue to believe that such a case-by-case cooperative effort with industry offers the best opportunity for meaningful change in this often controversial area.

Incorporating CAS Provisions in FAR Cost Principles

Comment 2: A respondent asserted that the proposed rule incorporates substantial cost accounting standard (CAS) provisions into the FAR cost principles. The respondent believes this creates *de facto* CAS coverage when, by law, promulgations covering the measurement, assignment, and allocation of costs to cost objectives is assigned to the CAS Board, including the thresholds for which contracts will and will not include CAS provisions. The respondent further states that if the FAR includes CAS concepts, the inclusion should be done using direct quotes or references.

Councils' response: Nonconcur. The Councils considered this proposal, but believe that eliminating all CAS from the FAR would create significant problems.

It is the responsibility of the Councils, not the CAS Board, to promulgate rules for the measurement, assignment, and allocation of costs for non-CAS covered contracts. The CAS Board does not have jurisdiction over non-CAS covered contracts. For some costs, particularly deferred compensation including pension costs (CAS 412, 413, and 415), cost of money (CAS 414/417), and self-insurance (CAS 416), the Councils have chosen to use the same requirements for non-CAS covered contracts as the CAS Board has chosen to use for CAS-covered contracts. To eliminate all CAS from the FAR would require removal of these key FAR Part 31 provisions.

As for the subject rule, the issue of an alternative to CAS 412/413 for non-CAS covered contracts was discussed at the public meetings during the spring of 2001. None of the attendees proposed an alternative to the use of CAS 412/413. In fact, most of the attendees supported the application of CAS 412/413 to non-CAS covered contracts. As such, the Councils do not believe there is currently a viable alternative to applying CAS 412/413 to non-CAS covered contracts.

In regard to CAS 416, the proposed rule included the CAS requirements for self-insurance. Without this provision, insurance costs for non-CAS covered contracts would be subject to Generally Accepted Accounting Principles (GAAP), which do not permit a self-insurance charge. The Councils believe it would be inequitable to permit contractors with CAS-covered contracts to charge self-insurance costs while denying such charges for contractors with non-CAS covered contracts. In addition, a contractor with both CAS and non-CAS covered contracts would need two sets of accounting practices if it wanted to charge self-insurance for CAS-covered contracts. Such a requirement would result in an unnecessary administrative burden to both the contractor and the Government.

As for the incorporation of the CAS provisions into the FAR, the respondent did not specify any particular language that it believes has been paraphrased. Nevertheless, the Councils reviewed the proposed rule to see if any such paraphrasing existed and found that the proposed rule references the specific CAS standards (412, 413, and 416); it does not paraphrase any CAS requirements.

FAR 31.205–6—Compensation for Personal Services

FAR 31.205–6(j)—Definition of Pension Plan

Comment 3: A respondent recommends that the current language at FAR 31.205–6(j)(1) be retained and asserts that the current language includes allowability criteria that would be eliminated if the definition is removed. The language currently reads as follows:

(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. (Emphasis added.)

Councils' response: Nonconcur. The Councils do not believe the above-italicized language provides allowability criteria. It simply states when additional benefits ''may be treated as pension costs.'' In defining a pension plan, FAR 31.001, Definitions, reads in part:

* * * 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.

The Councils believe this definition, which is identical to that used in CAS 412, should not be supplemented by the language currently at FAR 31.205–6(j)(1). Under the language at FAR 31.205–6(j)(1), additional benefits that are an integral part of a pension plan ''may be treated as pension costs.'' This phrase could be misinterpreted to mean that a contractor has the right to subjectively choose when such benefits will be pension costs and when they will not. Conversely, the definition at FAR 31.001 and CAS 412 simply states that such benefits may be an integral part of the pension plan.

FAR 31.205–6(j)(3)(i)(C) and FAR Clause 52.215–15(b)(3)—Segment Closings

Comment 4: Two respondents stated that the language at FAR 31.205–6(j) regarding segment closings is more restrictive than the CAS requirements. One respondent asserts there are optional settlement methods provided for in CAS 413, specifically amortization, and that the proposed FAR language does not address underfunding as does the CAS.

Councils' response: Concur in part. Upon further review, the Councils determined that the proposed language on settlement should be deleted. The current language in CAS 413, which is incorporated into FAR 31.205–6(j) by reference, adequately addresses the issue of settlement. Thus, there is no need to include the specific language in the FAR. The Councils, therefore, deleted the proposed language at FAR 31.205–6(j)(3)(C) and the FAR clause at 52.215–5(b)(3).

FAR 31.205–6(j)(6)—Early Retirement Incentive Plans

Comment 5: A respondent asserts that current FAR language clearly states that plans based on life income settlements are not treated as early retirement incentives plans and recommends retaining that language.

Councils' response: Nonconcur. Based on a review of the original promulgation documents, it is clear that the drafters intended to include early retirement incentive payments made from within, as well as outside, the pension trust. Although the drafters believed it would be rare for a pension plan to include an early retirement incentive with a life income settlement, they intended that such amendments be included as early retirement incentives and be subject to the conditions outlined in the cost principle. There was no intention by the drafters to exclude such settlements.

The Councils believe this continues to be an appropriate policy. Early retirement incentive plans include any incentive given to an employee to retire early, regardless of whether payment is made in the form of a life income settlement or a lump sum. The method of payment should not determine whether the cost is allowable. The limitation should apply regardless of whether the contractor decides to make the payment over a period of years or in a single payment.

FAR 31.205–6(q)—Defer Revision to Employee Stock Ownership Plans (ESOPs)

Comment 6: Two respondents recommend that further FAR action be deferred until the CAS Board proposal on ESOPs can be reviewed for consistency.

Councils' response: Nonconcur. The proposed rule does not add any new measurement, assignment, or allocation provisions for ESOPs. Under both the existing and proposed rules, ESOPs that meet the definition of a pension plan are covered by CAS 412, and those that do not are covered by CAS 415. While the proposed rule consolidates the allowability requirements for ESOP costs into a single provision, it does not change the measurement, assignment, or allocability requirements for such costs. Since this FAR provision does not revise existing measurement, assignment, or allocation requirements, the Councils do not believe it should be delayed in anticipation of actions by the CAS Board. The Councils recognize that this FAR provision may require further modification as a result of the current ESOP project being pursued by the CAS Board.

FAR 31.205–6(q)(2)(iii)—Allowability Limitation on ESOP Contributions

Comment 7: A respondent asserts that the proposed provision that limits ESOP contributions in any one year to 25 percent of compensation is inconsistent with the IRS Code and should be revised accordingly.

Councils' response: Concur in part. The fact that the cost is deductible by the IRS does not necessarily mean that it is reasonable or allowable for Government contract costing purposes. Nevertheless, since ESOP costs are included in determining the overall reasonableness of compensation costs, the Councils revised the specific allowability ceiling for ESOP costs to only require that they be deductible under the IRS Code.

FAR 31.205–6(q)(2)(v)—ESOP Stock in Excess of Fair Market Value.

Comment 8: A respondent expressed concern regarding the ''new'' provision that disallows purchases in excess of fair market value. The respondent believes that this provision could be interpreted as either (a) requiring that valuation be based on the value of the stock immediately after a leveraged ESOP transaction occurs (the ''Farnum Theory'', which the respondent states has been discredited), or (b) measurement of the value of the stock based on its annual value, rather than the value at the time the shares were acquired by the ESOP trust

Councils' response: Nonconcur. The Councils have not added a new provision. The provision in the proposed rule currently exists in FAR 31.205–6(j)(8)(i)(E), which applies to ESOPs that meet the definition of a pension plan. The proposed rule merely extends the application of that provision to all ESOPs. The Councils believe that purchases in excess of fair market value should not be allowable costs. The words in the proposed FAR 31.205–6(q) are identical to those currently at FAR 31.205–6(j)(8). As such, the Councils do not agree that this change could be interpreted as an endorsement of any new valuation technique.

FAR 31.205–6(q)(2)(iv)—Valuation of ESOP Stock Using IRS Guidelines

Comment 9: A respondent expressed concern regarding the new language that requires valuation of ESOP stock using IRS guidelines on a ''case-by-case basis.'' The respondent recommends that, if the valuation has been done by a competent independent valuation expert, there is no need for the auditing agency to start with a valuation from ''scratch.''

Councils' response: Nonconcur. The Councils have not added a new provision. The provision in the proposed rule currently exists in FAR 31.205–6(j)(8)(i)(E), which applies to ESOPs that meet the definition of a pension plan. The proposed rule merely extends the application of that provision to all ESOPs. In addition, the Councils believe that deleting the words ''case-by-case basis'' would cause potential

confusion. The IRS guidelines must be applied based on the particular facts and circumstances of each case, *i.e.*, on a ''case-by-case basis.'' Furthermore, the concerns of the respondent focus on the extent to which the auditor is required to rely upon the work of others, in this case the valuation expert. An independent audit requires that the auditor determine the scope of the audit, including the extent of reliance on the work of others. This issue is properly addressed in Generally Accepted Government Auditing Standards. It is not something that should be addressed in the FAR.

FAR 31.205–19—Insurance and Indemnification

FAR 31.205–19(c)(4)—Definition of Catastrophic Losses

Comment 10: One respondent asserts that self-insurance charges for catastrophic losses should be allowable, and that the definition in the proposed rule could be interpreted to include deductibles or over ceiling amounts for property insurance policies and other high dollar policies. Another respondent states that the new definition of catastrophic losses may cause contention and uncertainty in the field because it does not account for the relatively large losses among different sized contractors. The respondent also believes ''very low frequency of loss'' adds confusion. The respondent further contends that the definition should be deleted and existing practices that rely upon individual circumstances and general reasonableness should continue to be used.

Councils' response: Concur in part. Upon further review, the Councils deleted the definition of catastrophic losses from the final rule. The Councils continue to believe that the proposed definition is consistent with the intent of the promulgators of the current language, as evidenced by the March 19, 1979, report underlying DAR case 78–400–7.

The intent of the proposed coverage was to distinguish catastrophic losses as used in the cost principle from the type of catastrophic loss anticipated by the illustration at CAS 416.60(h). In that illustration, motor vehicle liability losses in excess of a specified amount were absorbed by the home office and reallocated to all segments. In the particular case described, the specified amount was too low based on loss experience to be considered catastrophic under the provisions of CAS 416. However, the illustration appears to anticipate losses that may be catastrophic to a particular segment of a company but not necessarily catastrophic in a more general sense. The Councils do not believe the drafters of the cost principle intended to disallow self-insurance charges for the type of loss anticipated by the CAS illustration. However, since CAS does not include a definition of catastrophic loss, defining the term in the FAR could cause confusion by the users of these regulations.

As to the respondent's recommendation that self-insurance charges for catastrophic losses should be allowable, the Councils disagree. As was noted in the report on DAR case 78–400–7, the Government should not allow self-insurance charges for catastrophic losses, such as earthquakes, which have a very small likelihood of occurring for any particular contractor.

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 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.

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 31 and 52

Government procurement.

Dated: December 4, 2003.

Laura Auletta,

Director, Acquisition 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—

■ a. Removing from the second sentence of paragraph (g)(1) ''(j)(7)'' and adding ''(j)(6)'' in its place;

■ b. Revising paragraph (j);

■ c. Removing from the second parenthetical in paragraph (p)(2)(i) ''paragraphs (j)(5) and (j)(8)'' and adding ''paragraphs (j)(4) and (q)'' in its place; and

■ d. Adding paragraph (q) to read as follows:

31.205–6 Compensation for personal services.

* * * * *

(j) *Pension costs.* (1) Pension plans are normally segregated into two types of plans: defined-benefit and defined-contribution pension plans. The contractor shall measure, assign, and allocate the costs of all defined-benefit pension plans and the costs of all defined-contribution pension plans in compliance with 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. Pension costs are allowable subject to the referenced standards and the cost limitations and exclusions set forth in paragraph (j)(1)(i) and in paragraphs (j)(2) through (j)(6) of this subsection.

(i) Except for nonqualified pension plans using the pay-as-you-go cost method, to be allowable in the current year, the contractor shall fund pension costs by the time set for filing of the Federal income tax return or any extension. Pension costs assigned to the current year, but not funded by the tax return time, are not allowable in any subsequent year. For nonqualified pension plans using the pay-as-you-go method, to be allowable in the current year, the contractor shall allocate pension costs in the cost accounting period that the pension costs are assigned.

(ii) Pension payments 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 to the terms and conditions of the established plan. The cost of changes in pension plans are not allowable if the changes are discriminatory to the Government or are not intended to be applied consistently for all employees under similar circumstances in the future.

(iii) Except as provided for early retirement benefits in paragraph (j)(6) 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.

(2) *Defined-benefit pension plans.* 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, are not 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 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 in that period and shall be accounted for as set forth at 48 CFR 9904.412–50(a)(4). The excess amount is allowable in the future period to which it is assigned, to the extent it is not otherwise unallowable.

(iii) Increased pension costs are unallowable if the increase is caused by a delay in funding beyond 30 days after each quarter of the year to which they are assignable. 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). The contractor shall make determinations of unallowable costs in accordance with the actuarial method used in calculating pension costs.

(iv) The contracting officer will consider the 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 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(c)(3) and (d)(3), 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)(3) 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 receives a credit equal to the amount of the Government's equitable share of the gross withdrawal or transfer.

(3) *Pension adjustments and asset reversions.* (i) For segment closings, pension plan terminations, or curtailment of benefits, the amount of the adjustment shall be—

(A) For contracts and subcontracts that are subject to full coverage under the Cost Accounting Standards (CAS) Board rules and regulations, the amount measured, assigned, and allocated in accordance with 48 CFR 9904.413–50(c)(12); and

(B) For contracts and subcontracts that are not subject to full coverage under the CAS, 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) is 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)(3)(ii) are unallowable in accordance with 31.205–41(b)(6).

(4) *Defined-contribution pension plans.* In addition to defined-contribution pension plans, this paragraph also covers profit sharing, savings plans, and other such plans, provided the plans fall within the definition of a pension plan at 31.001.

(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)(2)(ii) and (iv) of this subsection apply to defined-contribution plans.

(5) *Pension plans using the pay-as-you-go cost method.* When using the pay-as-you-go cost method, the contractor shall measure, assign, and allocate the cost of pension plans in accordance with 48 CFR 9904.412 and 9904.413. Pension costs for a pension plan using the pay-as-you-go cost method are allowable to the extent they are not otherwise unallowable.

(6) *Early retirement incentives.* An early retirement incentive is an incentive given to an employee to retire early. For contract costing purposes, costs of early retirement incentives are allowable subject to the pension cost criteria contained in paragraphs (j)(2)(i) through (iv) of this subsection provided—

(i) The contractor measures, assigns, and allocates the costs in accordance with the contractor's accounting practices for pension costs;

(ii) The incentives are in accordance with the terms and conditions of an early retirement incentive plan;

(iii) The contractor applies the plan only to active employees. The cost of extending the plan to employees who retired or were terminated before the adoption of the plan is unallowable; and

(iv) The present value of the total incentives given to any employee in excess of the amount of the employee's annual salary for the previous fiscal year before the employee's retirement is unallowable. The contractor shall compute the present value in accordance with its accounting practices for pension costs. The contractor shall account for any unallowable costs in accordance with 48 CFR 9904.412–50(a)(2).

* * * * *

(q) *Employee stock ownership plans (ESOP).* (1) An ESOP is a stock bonus plan designed to invest primarily in the stock of the employer corporation. The contractor's contributions to an Employee Stock Ownership Trust (ESOT) may be in the form of cash, stock, or property.

(2) Costs of ESOPs are allowable subject to the following conditions:

(i) For ESOPs that meet the definition of a pension plan at 31.001, the contractor—

(A) Measures, assigns, and allocates the costs in accordance with 48 CFR 9904.412;

(B) Funds the pension costs by the time set for filing of the Federal income tax return or any extension. Pension costs assigned to the current year, but not funded by the tax return time, are not allowable in any subsequent year; and

(C) Meets the requirements of paragraph (j)(2)(ii) of this subsection.

(ii) For ESOPs that do not meet the definition of a pension plan at 31.001, the contractor measures, assigns, and allocates costs in accordance with 48 CFR 9904.415.

(iii) Contributions by the contractor in any one year that exceed the deductibility limits of the Internal Revenue Code for that year are unallowable.

(iv) When the contribution is in the form of stock, the value of the stock contribution is limited to the fair market value of the stock on the date that title is effectively transferred to the trust.

(v) When the contribution is in the form of cash—

(A) Stock purchases by the ESOT in excess of fair market value are unallowable; and

(B) When stock purchases are in excess of fair market value, the contractor shall credit the amount of the excess to the same indirect cost pools that were charged for the ESOP contributions in the year in which the stock purchase occurs. However, when the trust purchases the stock with borrowed funds which will be repaid over a period of years by cash contributions from the contractor to the trust, the contractor shall credit the excess price over fair market value to the indirect cost pools pro rata over the period of years during which the contractor contributes the cash used by the trust to repay the loan.

(vi) When the fair market value of unissued stock or stock of a closely held corporation is not readily determinable, the valuation will be made on a case-by-case basis taking into consideration the guidelines for valuation used by the IRS.

* * * * *

■ 3. Revise section 31.205–19 to read as follows:

31.205–19 Insurance and indemnification.

(a) Insurance by purchase or by self-insuring includes—

(1) Coverage the contractor is required to carry or to have approved, under the terms of the contract; and

(2) Any other coverage the contractor maintains in connection with the general conduct of its business.

(b) For purposes of applying the provisions of this subsection, the Government considers insurance provided by captive insurers (insurers owned by or under control of the contractor) as self-insurance, and charges for it shall comply with the provisions applicable to self-insurance costs in this subsection. However, if the captive insurer also sells insurance to the general public in substantial quantities and it can be demonstrated that the charge to the contractor is based on competitive market forces, the Government will consider the insurance as purchased insurance.

(c) Whether or not the contract is subject to CAS, self-insurance charges are allowable subject to paragraph (e) of this subsection and the following limitations:

(1) The contractor shall measure, assign, and allocate costs in accordance with 48 CFR 9904.416, Accounting for Insurance Costs.

(2) The contractor shall comply with (48 CFR) part 28. However, approval of a contractor's insurance program in accordance with part 28 does not constitute a determination as to the allowability of the program's cost.

(3) If purchased insurance is available, any self-insurance charge plus insurance administration expenses in excess of the cost of comparable purchased insurance plus associated insurance administration expenses is unallowable.

(4) Self-insurance charges for risks of catastrophic losses are unallowable (*see* 28.308(e)).

(d) Purchased insurance costs are allowable, subject to paragraph (e) of this subsection and the following limitations:

(1) For contracts subject to full CAS coverage, the contractor shall measure, assign, and allocate costs in accordance with 48 CFR 9904.416.

(2) For all contracts, premiums for insurance purchased from fronting insurance companies (insurance companies not related to the contractor but who reinsure with a captive insurer of the contractor) are unallowable to the extent they exceed the sum of—

(i) The amount that would have been allowed had the contractor insured directly with the captive insurer; and

(ii) Reasonable fronting company charges for services rendered.

(3) Actual losses are unallowable unless expressly provided for in the contract, except—

(i) Losses incurred under the nominal deductible provisions of purchased insurance, in keeping with sound business practice, are allowable; and

(ii) Minor losses, such as spoilage, breakage, and disappearance of small hand tools that occur in the ordinary course of business and that are not covered by insurance, are allowable.

(e) Self-insurance and purchased insurance costs are subject to the cost limitations in the following paragraphs:

(1) Costs of insurance required or approved pursuant to the contract are allowable.

(2) Costs of insurance maintained by the contractor in connection with the general conduct of its business are allowable subject to the following limitations:

(i) Types and extent of coverage shall follow sound business practice, and the rates and premiums shall be reasonable.

(ii) Costs allowed for business interruption or other similar insurance shall be limited to exclude coverage of profit.

(iii) The cost of property insurance premiums for insurance coverage in excess of the acquisition cost of the insured assets is allowable only when the contractor has a formal written policy assuring that in the event the insured property is involuntarily converted, the new asset shall be valued at the book value of the replaced asset plus or minus adjustments for differences between insurance proceeds and actual replacement cost. If the

contractor does not have such a formal written policy, the cost of premiums for insurance coverage in excess of the acquisition cost of the insured asset is unallowable.

(iv) Costs of insurance for the risk of loss of, or damage to, Government property are allowable only to the extent that the contractor is liable for such loss or damage and such insurance does not cover loss or damage which results from willful misconduct or lack of good faith on the part of any of the contractor's directors or officers, or other equivalent representatives.

(v) Costs of insurance on the lives of officers, partners, proprietors, or employees are allowable only to the extent that the insurance represents additional compensation (*see* 31.205–6).

(3) The cost of insurance to protect the contractor against the costs of correcting its own defects in materials and workmanship is unallowable. However, insurance costs to cover fortuitous or casualty losses resulting from defects in materials or workmanship are allowable as a normal business expense.

(4) Premiums for retroactive or backdated insurance written to cover losses that have occurred and are known are unallowable.

(5) The Government is obligated to indemnify the contractor only to the extent authorized by law, as expressly provided for in the contract, except as provided in paragraph (d)(3) of this subsection.

(6) Late premium payment charges related to employee deferred compensation plan insurance incurred pursuant to section 4007 (29 U.S.C. 1307) or section 4023 (29 U.S.C. 1323) of the Employee Retirement Income Security Act of 1974 are unallowable.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 4. Amend section 52.215–15 by revising the date of the clause and paragraph (b) to read as follows:

52.215–15 Pension Adjustments and Asset Reversions.

* * * * *

Pension Adjustments and Asset Reversions (Jan 2004)

* * * * *

(b) For segment closings, pension plan terminations, or curtailment of benefits, the amount of the adjustment shall be—

(1) For contracts and subcontracts that are subject to full coverage under the Cost Accounting Standards (CAS) Board rules and regulations (48 CFR Chapter 99), the amount measured, assigned, and allocated in accordance with 48 CFR 9904.413–50(c)(12); and

(2) For contracts and subcontracts that are not subject to full coverage under the CAS, 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 904.413–50(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.

* * * * *

(End of clause)

[FR Doc. 03–30477 Filed 12–10–03; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 52

[FAC 2001–18; FAR Case 2002–014; Item VII]

RIN 9000–AJ59

Federal Acquisition Regulation; Debriefing—Competitive Acquisition

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 sections 1014 and 1064 of the Federal Acquisition Streamlining Act of 1994 on requirements for debriefing unsuccessful offerors under competitive proposals.

DATES: *Effective Date:* January 12, 2004.

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, Procurement Analyst, at (202) 208–1168. Please cite FAC 2001–18, FAR case 2002–014.

SUPPLEMENTARY INFORMATION:

A. Background

This rule amends the FAR to include requirements for debriefing unsuccessful offerors under competitive proposals, as required by sections 1014 and 1064 of the Federal Acquisition Streamlining Act of 1994 which amended 10 U.S.C. 2305(b) and 41 U.S.C. 253b, respectively. Specifically, 10 U.S.C. 2305(b)(5)(D) and 41 U.S.C. 253b(e)(4) require each solicitation for competitive proposals to include a statement that prescribes minimal information that shall be disclosed in postaward debriefings. Some of the requirements were already incorporated into the clause at FAR 52.215–1, Instructions to Offerors—Competitive Acquisitions, but the notification for debriefings was overlooked during the drafting of the clause at 52.212–1, Instruction to Offerors—Commercial Items. This rule amends FAR 52.212–1 and 52.215–1 to implement the statutory requirements, and the past performance debriefing requirement at FAR 15.506(d)(2), by listing all the prescribed minimal information that shall be disclosed in postaward debriefings.

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 68 FR 5778, February 4, 2003. Two respondents submitted public comments. The Councils considered the comments before agreeing to publish the proposed rule as final without change. A summary of the comments and their disposition follows:

Comment: The revised FAR clauses should include a debriefing requirement to reveal the number of ''points'' an offeror received under the evaluation of its past performance.

Response: The Councils do not concur. The clauses, as revised by this final rule, establish a clear requirement for agencies to provide the results of its evaluation of an offeror's past performance. However, agencies successfully use different methods (*e.g.*, adjectival, color coding, and point scoring) to evaluate proposals. Specifying a particular method would limit agency discretion with no apparent associated benefit.

Comment: The revised FAR clauses should include a debriefing requirement to reveal the sources, other than the offeror, of any past performance information received.

Response: The Councils do not concur. FAR 15.506(e) prohibits the identification of individuals providing reference information about an offeror's past performance.

Comment: The rule should be revised to address the requirement to release unit price information clearly and consistently within the FAR.

Response: The Councils appreciate that, as a result of recent court cases, especially *MCI WorldCom* v. *GSA,* 163 F. Supp. 2d 28, the treatment of unit prices under exemption no. 4 of the Freedom of Information Act (5 U.S.C. 552(b)(4)) is in a state of flux which may