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

* * * * *

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

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

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

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

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 22, 52, and 53

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

RIN 9000–AJ79

Federal Acquisition Regulation; Labor Standards for Contracts Involving Construction

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

ACTION: Final rule.

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

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

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

SUPPLEMENTARY INFORMATION:

A. Background

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

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

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

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

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

The Councils concur. No further response is necessary.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Councils respond to these suggestions as follows:

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

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

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

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

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

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

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

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

B. Regulatory Flexibility Act

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

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

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

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

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

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

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

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

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

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

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

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

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

D. Executive Order 13132 (Federalism)

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

E. Paperwork Reduction Act

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

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

Government procurement.

Dated: May 27, 2005.

Julia B. Wise,

Director, Contract Policy Division.

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

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

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

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

■ 2. Amend section 22.401 by—

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

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

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

■ The added and revised text reads as follows:

22.401 Definitions.

* * * * *

Apprentice means a person—

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

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

* * * * *

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

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

(2) Painting and decorating;

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

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

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

Laborers or mechanics.—(1) Means—

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

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

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

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

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

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

* * * * *

Site of the work.—(1) Means—

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

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

(A) Located in the United States; and

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

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

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

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

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

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

* * * * *

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

22.404–3 Procedures for requesting wage determinations.

* * * * *

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

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

* * * * *

22.404–4 [Amended]

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

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

* * * * *

■ 5. Amend section 22.404–5 by—

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

■ b. Revising paragraph (b)(2)(ii);

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

■ d. Revising paragraph (c)(4).

■ The revised text reads as follows:

22.404–5 Expiration of project wage determinations.

* * * * *

(b) * * *

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

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

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

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

(c) * * *

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

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

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

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

22.404–6 Modifications of wage determinations.

(a) * * *

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

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

(b) * * *

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

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

* * * * *

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

22.404–8 Notification of improper wage determination before award.

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

* * * * *

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

* * * * *

22.406–9 [Amended]

■ 8. Amend section 22.406–9 by—

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

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

■ 9. Amend section 22.407 by—

■ a. Revising the heading as set forth below;

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

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

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

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

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

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

22.407 Solicitation provision and contract clauses.

* * * * *

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

PART 52—SOLICIATION PROVISIONS AND CONTRACT CLAUSES

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

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

* * * * *

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

* * * * *

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

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

* * * * *

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

* * * * *

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

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

* * * * *

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

* * * * *

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

(End of clause)

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

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

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

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

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

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

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

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

(End of provision)

■ 14. Amend section 52.222–6 by—

■ a. Revising the date of the clause;

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

■ c. Adding a new paragraph (a);

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

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

■ The revised and added text reads as follows:

52.222–6 Davis-Bacon Act.

* * * * *

DAVIS-BACON ACT (JUL 2005)

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

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

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

(A) Located in the United States; and

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

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

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

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

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

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

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

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

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

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

* * * * *

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

52.222–9 Apprentices and Trainees.

* * * * *

APPRENTICES AND TRAINEES (JUL 2005)

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

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

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

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

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

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

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

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

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

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

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

* * * * *

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

52.222–11 Subcontracts (Labor Standards).

* * * * *

SUBCONTRACTS (LABOR STANDARDS) (JUL 2005)

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

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

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

(2) Painting and decorating;

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

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

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

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

(1) Davis-Bacon Act;

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

(3) Apprentices and Trainees;

(4) Payrolls and Basic Records;

(5) Compliance with Copeland Act Requirements;

(6) Withholding of Funds;

(7) Subcontracts (Labor Standards);

(8) Contract Termination—Debarment;

(9) Disputes Concerning Labor Standards;

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

(11) Certification of Eligibility.

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

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

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

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

(End of clause)

52.222–41 [Amended]

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

PART 53—FORMS

53.222 [Amended]

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

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

53.301–1413 Statement and Acknowledgement.

STATEMENT AND ACKNOWLEDGMENT

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

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

PART I - STATEMENT OF PRIME CONTRACTOR

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

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

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

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

a. NAME OF AWARDING FIRM

b. DESCRIPTION OF WORK BY SUBCONTRACTOR

8. PROJECT	9. LOCATION

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

PART II - ACKNOWLEDGMENT OF SUBCONTRACTOR

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

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

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

A		A	
B		B	

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

AUTHORIZED FOR LOCAL REPRODUCTION
PREVIOUS EDITION IS NOT USABLE

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

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

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 31 and 52

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

RIN 9000–AJ67

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

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

ACTION: Final rule.

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

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

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

SUPPLEMENTARY INFORMATION:

A. Background

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

B. Public Comments

Deferred compensation—Subsequent period awards

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

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

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

Delayed recognition methodology for recognizing PRB past service costs

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

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

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

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

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

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

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