

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Chapter 1**

**Federal Acquisition Circular 2005–04; Introduction**

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

**ACTION:** Summary presentation of interim and final rules.

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

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

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

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

**SUPPLEMENTARY INFORMATION:**

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

FAC 2005–04 amends the FAR as specified below:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This final rule amends the FAR by revising paragraph (k), Deferred compensation other than pensions, and paragraph (o), Postretirement benefits other than pensions, of FAR 31.205–6, Compensation for personal services, cost principle. Changes to paragraph (k) include: deletion of language that duplicates definitions provided in FAR 31.001, elimination of obsolete coverage, and use of terminology consistent with Cost Accounting Standards. Changes to paragraph (o) include: moving and revising language in (o)(3) through (o)(5) to (o)(2)(iii) because these requirements only apply to accrual costing other than terminal funding. In addition, new coverage is

added to the related contract clause at FAR 52.215–18, Reversion or Adjustment of Plans for Postretirement Benefits (PRB) Other Than Pensions, specifying the method of recovery of refunds and credits. The rule revises the cost principle and contract clause by improving clarity and structure, and removing unnecessary and duplicative language.

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

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

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

Dated: May 27, 2005.

**Julia B. Wise,**  
*Director, Contract Policy Division.*

**Federal Acquisition Circular**

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

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

Dated: May 26, 2005.

**Vincent J. Feck,**  
*Lt Col, Acting Director, Defense Procurement and Acquisition Policy.*

Dated: May 27, 2005.

**David A. Drabkin,**  
*Senior Procurement Executive, Office of the Chief Acquisition Officer, General Services Administration.*

Dated: May 26, 2005.

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

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**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Parts 2, 22, 52**

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

RIN 9000–AK04

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

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

**ACTION:** Final rule.

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