

14. *Comment: Delete proposed FAR 31.205-6(f) except for legislative coverage at (f)(5) (Severance pay).* The deleted portion is adequately covered by the reasonableness criteria at FAR 31.201-3.

Councils' response: Do not concur. This paragraph makes it clear that, although severance pay must conform to the general reasonableness criteria of FAR 31.201-3, it must also conform to the more specific provisions contained in this cost principle.

15. *Comment: Deletion of "designee" in FAR 31.205-6(f)(5).* To avoid confusion, suggest that the express reason for deleting the term "designee" in the waiver provision of the proposed FAR 31.205-6(f)(5) be explained.

Councils' response: The term "or designee" is unnecessary because paragraph (b) under FAR 1.108, FAR conventions, states that "each authority is delegable unless specifically stated otherwise (see 1.102-3(b))." Accordingly, the term has been deleted from the final rule at FAR 31.205-6(g)(6), FAR 37.113-1(a), and FAR 37.113-2(b). To avoid any possible ambiguity in the clauses, "head of the agency, or designee," was changed to "agency" at FAR provision 52.237-8(a) and (b).

16. *Comment: Modify proposed FAR 31.205-6(g) (Backpay).* Replace the language at FAR 31.205-6(g) with the following sentence: "Backpay resulting from violations of Federal labor laws or the Civil Rights Act of 1964 other than that for work performed is unallowable." Under the current rule, the "backpay" provisions do not apply unless and until there is a violation of Federal labor laws or the 1964 Civil Rights Act. Until such a violation is found by a court, compensation costs are not covered by these backpay provisions and they are allowable to the extent they are reasonable as defined by the general reasonableness provisions at FAR 31.201-3 and not limited by additional compensation for work performed. This proposed change could be construed to expand the definition of backpay to now cover retroactive adjustment to salaries or wages for those instances in which there has been no finding of a violation of the 1964 Civil Rights Act or other Federal labor laws and limits recovery to the additional compensation for work performed.

Contractors are currently being reimbursed for prudent decisions to save litigation expense by settling wrongful discharge cases for nominal amounts. It is in the Government's interest to continue to incentivize contractors to make prudent decisions. If the Government begins disallowing all

settlements as unallowable "backpay," contractors may be incentivized to spend more allowable money litigating instead of settling.

Councils' response. Do not concur. The Councils rewrote this paragraph to improve its clarity without changing its meaning. Our intent was to emphasize that backpay for underpaid work is the only allowable retroactive adjustment, subject to the specific criteria listed in this paragraph. The current language might be improperly interpreted to mean that if a survey shows an employee is underpaid in a particular year, the contractor could make that underpayment up in a future year. Accordingly, we revised the language of the regulation to preclude such an interpretation.

Backpay for underpaid work that does not fall under the current FAR 31.205-6(h) criteria is unallowable, and the proposed FAR 31.205-6(g) language would not change that fact. The respondent's argument that all settlements would become unallowable is not correct. That part of the settlement that represents backpay for work actually performed is allowable.

17. *Comment: Eliminate FAR 31.205-6(m) (Fringe benefits).* Paragraph (m)(1) is covered by the general reasonableness provisions at FAR 31.201-3, and definitions and examples of allowable cost are not needed, only identification of unallowable cost. "List[s] of compensation elements have been eliminated throughout and should be eliminated here as well." Paragraph (m)(2), which covers the personal use of company furnished automobiles, should be eliminated unless legislated.

Councils' response. Do not concur. This paragraph needs to be retained as it includes needed criteria for allowability and not just general reasonableness criteria. The language on company furnished automobiles is required by 10 U.S.C. 2324(f)(1)(o).

18. *Comment: Eliminate FAR 31.206-6(n) (Employee rebate and purchase discount plans).* In an effort to move toward commercial practice, suggest the elimination of 31.205-6(n) "on the basis of immateriality and not cost efficient accounting." Also, employee rebates and purchase discounts are sales reductions and not compensation cost.

Councils' response. Do not concur. Employee rebates and discounts should be considered as a sales reduction; however, Generally Accepted Accounting Principles do allow such costs to be treated as compensation in some limited cases. Therefore, we retained this provision to prevent such sales reductions from being claimed as compensation costs.

19. *Additional change: Reinstate and revise FAR 31.205-6(g)(2)(ii).* This paragraph was deleted in the proposed rule because it was thought to be covered under FAR 31.201-4, Determining allocability. However, upon further analysis, the Councils have reinstated FAR 31.205-6(g)(2)(ii) (as FAR 31.205-6(g)(4) in the final rule) because the language exceeds the requirement stated in FAR 31.201-4 by expressly identifying what method equates to a proper allocation. The specific identification of what constitutes an allocable allocation of normal severance pay has worked and will continue to work to reduce disputes. The paragraph has been revised, however, to enhance its clarity.

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 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.

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 Parts 22, 31, 37, and 52

Government procurement.

Dated: July 16, 2003.

Laura Auletta,

Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 22, 31, 37, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 22, 31, 37, 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).