

Subpart 1809.1—Responsible Prospective Contractors

■ 2. Section 1809.105–2 is added to subpart 1809.1 to read follows:

1809.105–2 Determinations and documentation.

(a) The contracting officer shall provide written notification to a prospective contractor determined not responsible, which includes the basis for the determination. Notification provides the prospective contractor with the opportunity to take corrective action prior to future solicitations.

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NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**48 CFR Part 1850 and 1852**

RIN 2700–AD36

Miscellaneous Administrative Changes

AGENCY: National Aeronautics and Space Administration.

ACTION: Direct final rule.

SUMMARY: This direct final rule amends the NASA FAR Supplement (NFS) to make miscellaneous non-substantive administrative changes to be consistent with FAR numbering, FAR terminology, and to allow use of a URL Web site to identify the Agency and Center Ombudsman. These changes are necessary to ensure consistency with the FAR and terminology within NASA.

DATES: This direct final rule is effective January 23, 2012 unless Agency receives significant adverse comments by midnight Eastern Standard Time on December 23, 2011. If adverse comment is received, NASA will publish a timely withdrawal of the rule in the **Federal Register**. If no adverse comments are received, NASA will not publish a confirmation document.

ADDRESSES: Interested parties may submit comments, identified by RIN number 2700–AD36, via the *Federal eRulemaking Portal*: <http://www.regulations.gov>. Follow the instructions for submitting comments. Comments may also be submitted to Marilyn Seppi, NASA Headquarters, 300 E Street SW., Office of Procurement, Contract Management Division, Washington, DC 20546. Comments may also be submitted by email to Marilyn.Seppi-1@nasa.gov.

FOR FURTHER INFORMATION CONTACT: Marilyn J. Seppi, NASA, Office of Procurement, Contract Management

Division; (202) 358–0447; *email*: Marilyn.Seppi-1@nasa.gov.

SUPPLEMENTARY INFORMATION:**Direct Final Rule and Significant Adverse Comments**

NASA has determined this rulemaking meets the criteria for a direct final rule because it involves nonsubstantive changes dealing with NASA's management of procurement regulations and procedures. NASA does not anticipate this direct final rule will result in any changes in the functions or authority of the NFS. NASA expects no opposition to the changes and no significant adverse comments. However, if NASA receives a significant adverse comment, the Agency will withdraw this direct final rule by publishing a notice in the **Federal Register**. A significant adverse comment is one that explains: (1) Why the direct final rule is inappropriate, including challenges to the rule's underlying premise or approach; or (2) why the direct final rule will be ineffective or unacceptable without a change. In determining whether a comment necessitates withdrawal of this direct final rule, NASA will consider whether it warrants a substantive response in a notice and comment process.

A. Background

This final rule makes several administrative changes to the NFS. The numbering in NASA FAR Supplement 1850 is revised to reflect the FAR numbering changes made by Federal Acquisition Circular 2005–21. This final rule deletes the information required to be filled-in by Contracting Officers in NASA FAR Supplement Clause 1852.215–84 when identifying the Ombudsman for the Agency and specific Center. The fill-in is deleted and replaced with a URL Web site where the Agency and Center Ombudsman contact information will be continually updated and maintained by NASA.

This rule also deletes the term “Commerce Business Daily (CBD)” and replaces it with the term “Governmentwide Point of Entry (GPE)” in NASA FAR Supplement Clauses 1852.217–71 and 1852.217–72 to be consistent with the terminology in FAR Subpart 2.101 Definitions.

B. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic,

environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This final rule is not a “significant regulatory action” under section 3(f) of Executive Order 12866. This rule is not a major rule under 5 U.S.C. 804.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act does not apply to this final rule. This final rule does not constitute a significant revision within the meaning of FAR 1.501 and Public Law 98–577, and publication for public comment is not required. However, NASA will consider comments from small entities concerning the affected NFS coverage in accordance with 5 U.S.C. 610. Interested parties should cite 5 U.S.C. 601, *et seq.*, in correspondence. This rule is not expected to have a significant economic impact on a substantial number of small entities with the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the changes are administrative and do not impose new requirements.

D. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 104–13) is not applicable because the NFS changes 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 1850 and 1852

Government procurement.

Sheryl Goddard,

Director, Program Operations Division.

Accordingly, 48 CFR Part 1850 and 1852 are amended as follows:

■ 1. The authority citation for 48 CFR Parts 1850 and 1852 continues to read as follows:

Authority: 42 U.S.C. 2473(c)(1).

■ 2. Part 1850 is revised to read as follows:

PART 1850—EXTRAORDINARY CONTRACTUAL ACTIONS AND THE SAFETY ACT**Subpart 1850.1—Extraordinary Contractual Actions**

Sec.

1850.102 Delegation of and limitations of exercise of authority.

1850.102–2 Contract adjustment boards.

1850.103 Contract adjustments.

1850.103–5 Processing cases.

- 1850.103–570 Submission of request to the Contract Adjustment Board.
- 1850.103–6 Disposition.
- 1850.103–670 Implementation of the Contract Adjustment Board's decision.
- 1850.104 Residual powers.
- 1850.104–3 Special procedures for unusually hazardous or nuclear risks.
- 1850.104–370 Subcontractor indemnification requests.
- 1850.104–70 Lead NASA installation.

Subpart 1850.1—Extraordinary Contractual Actions

1850.102 Delegation of and limitations of exercise of authority.

1850.102–2 Contract adjustment boards.

14 CFR part 1209, subpart 3, Contract Adjustment Board, establishes the Contract Adjustment Board (CAB) as the approving authority to consider and dispose of requests from NASA contractors for extraordinary contractual actions.

1850.103 Contract adjustments.

1850.103–5 Processing cases.

1850.103–570 Submission of request to the Contract Adjustment Board.

(a) After investigating the facts and issues relevant to the contractor's request, the contracting officer shall forward the request to the Associate General Counsel for General Law, including in the forwarding letter—

- (1) The nature of the case;
 - (2) The recommended disposition;
- and,

(3) If contractual action is recommended, the contracting officer's opinion that the action will facilitate the national defense.

(b) The forwarding letter shall enclose the contractor's request, all supporting material submitted by the contractor, and any material the contracting officer has obtained while investigating the facts and issues relevant to the request. Any classified information in the material forwarded shall be so identified.

(c) Electronic submittal is preferred for unclassified material.

1850.103–6 Disposition.

1850.103–670 Implementation of the Contract Adjustment Board's decision.

(a) The contracting officer shall take action authorized in the CAB's decision.

(b) Immediately upon execution, including any required Headquarters approval, of a contract or contract modification or amendment implementing the CAB decision, the contracting officer shall forward a copy of the contractual document to the Associate General Counsel for General Law.

1850.104 Residual powers.

1850.104–3 Special procedures for unusually hazardous or nuclear risks.

(a) Indemnification requests.

(1) Contractor indemnification requests must be submitted to the cognizant contracting officer for the contract for which the indemnification clause is requested. Contractors shall submit a single request and shall ensure that duplicate requests are not submitted by associate divisions, subsidiaries, or central offices of the contractor.

(2) The contractor shall also provide evidence, such as a certificate of insurance or other customary proof of insurance, that such insurance is either in force or is available and will be in force during the indemnified period.

(b) Action on indemnification requests.

(1) If recommending approval, the contracting officer shall forward the required information to the Assistant Administrator for Procurement, Program Operations Division, along with the following:

(i) For contracts of five years duration or longer, a determination, with supporting rationale, whether the indemnification approval and insurance coverage and premiums should be reviewed for adequacy and continued validity at points in time within the extended contract period.

(ii) A recommended Memorandum of Decision. In addition to the applicable requirements of FAR 50.103–6, the Memorandum of Decision shall contain the following:

(A) The specific definition of the unusually hazardous risk to which the contractor is exposed in the performance of the contract(s);

(B) A complete discussion of the contractor's financial protection program; and

(C) The extent to, and conditions under, which indemnification is being approved for subcontracts.

(d) If approving subcontractor indemnification, the contracting officer shall document the file with a memorandum for record addressing the items set forth in FAR 50.104–3(b) and include an analysis of the subcontractor's financial protection program. In performing this analysis, the contracting officer shall take into consideration the availability, cost, terms and conditions of insurance in relation to the unusually hazardous risk.

1850.104–370 Subcontractor indemnification requests.

Subcontractors shall submit requests for indemnification to the prime

contractor and through higher tier subcontractor(s), as applicable. If the prime contractor agrees an indemnity clause should be flowed down to the subcontractor, the prime contractor shall forward its written request for subcontractor indemnification to the cognizant contracting officer for approval in accordance with FAR 50.104–3. The prime contractor's request shall provide information responsive to 1850.104–3, FAR 50.104–3, and FAR 50.104–3(b)(1)(i), (ii), (iv), (v), and (vii). The agreed upon definition of the unusually hazardous risk to be incorporated into the subcontract shall be the same as that incorporated in the prime contract.

1850.104–70 Lead NASA installation.

(a) Contractors applying for indemnification shall determine which NASA installation has the highest dollar amount of contracts for which indemnification is requested. The indemnification request should be submitted to the procurement officer for that installation, who will then designate a cognizant contracting officer. Contractors shall submit a single request and ensure duplicate requests are not submitted by associate divisions, subsidiaries, or central offices of the contractor.

(b) The receiving installation will become the lead installation and will remain so indefinitely. Lead installation designation may change to another installation if the affected procurement officers agree to the change. Should a change occur in the lead installation, all records related to indemnification of that contractor shall be transferred to the gaining installation.

PART 1852—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. In section 1852.215–84, the date clause and paragraph (b) are revised to read as follows:

1852.215–84 Ombudsman.

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OMBUDSMAN (NOV 2011)

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(b) If resolution cannot be made by the contracting officer, interested parties may contact the installation ombudsman, whose name, address, telephone number, facsimile number, and email address may be found at: http://prod.nais.nasa.gov/pub/pub_library/Omb.html. Concerns, issues, disagreements, and recommendations which cannot be resolved at the installation may be referred to the Agency ombudsman identified at the above URL. Please do not contact the ombudsman to request copies of the solicitation, verify offer due date, or clarify

technical requirements. Such inquiries shall be directed to the Contracting Officer or as specified elsewhere in this document.
(End of clause)

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1852.215-71 [Amended]

■ 4. In section 1852.217-71, paragraph (e) is amended by removing “Commerce Business Daily (CBD)” and adding “Governmentwide Point of Entry (GPE)” in its place.

1852.215-72 [Amended]

■ 5. In section 1852.217-72, paragraph (e) is amended by removing “Commerce Business Daily (CBD)” and adding “Governmentwide Point of Entry (GPE)” in its place.

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