## PART 1220—REGULATIONS UNDER THE TEA IMPORTATION ACT

**Part 1220 [Removed]**

1. Part 1220 is removed.

Dated: March 8, 1998.

**William K. Hubbard,**

*Associate Commissioner for Policy Coordination.*

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BILLING CODE 4160–01–F

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

## 48 CFR Parts 1806, 1807, 1816, 1819, and 1837

## Revisions to the NASA FAR Supplement on Performance-Based Contracting and Other Miscellaneous Revisions

**AGENCY:** National Aeronautics and Space Administration (NASA).

**ACTION:** Final rule.

**SUMMARY:** This is a final rule amending the NASA FAR Supplement (NFS) to clarify that Performance-Based Contracting (PBC) is the preferred contracting technique for the acquisition of all supplies and services at NASA; provide guidance on the appropriate contract type for PBC requirements; provide common sense guidance as to when positive and negative incentives should not be used; and clarify the use of award fee incentives in conjunction with other contract types. Other miscellaneous revisions are made to conform with recent FAR numbering changes.

**EFFECTIVE DATE:** March 17, 1998.

**FOR FURTHER INFORMATION CONTACT:** Kenneth A. Sateriale, NASA, Office of Procurement, Contract Management Division (Code HK), 202) 358–0491.

**SUPPLEMENTARY INFORMATION:**

### Background

Federal Acquisition Circular 97–1 revised FAR 7.105 and added FAR 37.6 to address Performance-Based Service Contracting. These changes obviate the need for similar coverage in the NFS, although coverage is added to clarify that NASA policy on use of PBC is not limited to service contracts. In addition, the following changes are made:

1. New guidance is added regarding the use of incentives in performance-based contracts. Included in this guidance is the addition of new sections discussing the use of a CPAF contract type for PBC requirements and the use of performance incentives. Previous restrictions on the use of CPAF for PBC requirements are deleted.

2. The requirement in 1806.302–470(b) for competition advocate approval of a memorandum justifying not preparing a justification for other than full and open competition pursuant to FAR 6.302–4, International Agreement, is deleted to reflect a statutory change made by section 841(b) of the Defense Authorization Act for Fiscal Year 1998.

3. Miscellaneous editorial changes are made to align the NFS with FAR section titles and numbers.

### Impact

NASA certifies that this regulation will not have a significant economic impact on a substantial number of small business entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This final rule does not impose any reporting or recordkeeping requirements subject to the Paperwork Reduction Act.

### List of Subjects in 48 CFR Parts 1806, 1807, 1816, 1819, and 1837

Government procurement.

**Tom Luedtke,**

*Deputy Associate Administrator for Procurement.*

Accordingly, 48 CFR Parts 1806, 1807, 1816, 1819, and 1837 are amended as follows:

1. The authority citation for 48 CFR Parts 1806, 1807, 1816, 1819, and 1837 continues to read as follows:

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

## PART 1806—COMPETITION REQUIREMENTS

**1806.302–470 [Amended]**

2. In section 1806.302–470, paragraph (b) is removed, and paragraph (c) is redesignated as paragraph (b).

## PART 1807—ACQUISITION PLANNING

**1807.105 [Amended]**

3. In the introductory text to section 1807.105, the following sentence is added to the end of the paragraph to read as follows:

**1807.105 Contents of written acquisition plans.**

* * * The requirements in FAR 7.105 regarding performance-based contracting methods shall not be limited to acquisition plans for service contracts.

## PART 1816—TYPES OF CONTRACTS

## Subpart 1816.1—[Added]

4. Subpart 1816.1 is added to read as follows:

## Subpart 1816.1—Selecting Contract Types

**1816.104 Factors in selecting contract types.**

**1816.104–70 Contract type for performance-based contracting (PBC).**

(a) PBC is defined in FAR 37.101 and discussed in FAR 37.6. Although FAR part 37 primarily addresses services contracts, PBC is not limited to these contracts. PBC is the preferred way of contracting for all supplies and services at NASA. Generally, when contract performance risk under a PBC specification can be fairly shifted to the contractor to allow for the operation of objective incentives, a contract type with objectively measurable incentives (e.g., FFP, FPIF, or CPIF) is appropriate. However, when contractor performance (e.g., cost control, schedule, or quality/technical) is best evaluated subjectively using quantitative measures, a CPAF contract may be used.

(b) A level-of-effort contract is not PBC.

**1816.402, 1816.402–2, 1816.402–70 [Amended]**

5. Sections 1816.402 and 1816.402–2 and the first sentence in paragraph (a) to section 1816.402–70 are revised to read as follows:

**1816.402 Application of predetermined, formula-type incentives. (NASA paragraphs 1, 2 and 3).**

When considering the use of a quality, performance, or schedule incentive, the following guidance applies.

(1) A positive incentive is generally not appropriate unless—

(i) Performance above the target (or minimum, if there are no negative incentives) level is of significant value to the Government;

(ii) The value of the higher level of performance is worth the additional cost/fee;

(iii) The attainment of the higher level of performance is clearly within the control of the contractor; and

(iv) An upper limit is identified, beyond which no further incentive is earned.

(2) A negative incentive is generally not appropriate unless—

(i) A target level of performance can be established, which the contractor can reasonably be expected to reach with a diligent effort, but a lower level of performance is also minimally acceptable;

(ii) The value of the negative incentive is commensurate with the lower level of performance and any additional administrative costs; and

(iii) Factors likely to prevent attainment of the target level of

performance are clearly within the control of the contractor.

(3) When a negative incentive is used, the contract must indicate a level below which performance is not acceptable.

**1816.402–2 Performance incentives.**

**1816.402–270 NASA technical performance incentives.**

(a) A performance incentive shall be included in all contracts based on performance-oriented documents (see FAR 11.101(a)) where the primary deliverable(s) is (are) hardware and where total value (including options) is greater than $25 million unless it is determined that the nature of the acquisition (for example, commercial off-the-shelf computers) would not effectively lend itself to a performance incentive. * * *

**1816.405–270 [Amended]**

6. Section 1816.405–270 is revised to read as follows:

**1816.405–270 CPAF contracts.**

(a) Use of an award fee incentive shall be approved in writing by the procurement officer. The procurement officer's approval shall include a discussion of the other types of contracts considered and shall indicate why an award fee incentive is the appropriate choice. Award fee incentives should not be used on contracts with a total estimated cost and fee less than $2 million per year. The procurement officer may authorize use of award fee for lower-valued acquisitions, but should do so only in exceptional situations, such as contract requirements having direct health or safety impacts, where the judgmental assessment of the quality of contractor performance is critical.

(b) Except as provided in paragraph (c) of this section, an award fee incentive may be used in conjunction with other contract types for aspects of performance that cannot be objectively assessed. In such cases, the cost incentive is based on objective formulas inherent in the other contract types (e.g., FPI, CPIF), and the award fee provision should not separately incentivize cost performance.

(c) Award fee incentives shall not be used with a cost-plus-fixed-fee (CPFF) contract.

**1816.405–274 [Amended]**

7. In section 1816.405–274, paragraph (e) is revised to read as follows:

**1816.405–274 Award fee evaluation factors.**

* * * * *

(e) When an AF arrangement is used in conjunction with another contract type, the award fee's cost control factor will only apply to a subjective assessment of the contractor's efforts to control costs and not the actual cost outcome incentivized under the basic contract type (e.g. CPIF, FPIF).

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## PART 1819—SMALL BUSINESS PROGRAMS

### Subpart 1819.6—[Amended]

8. Section heading ''Subpart 1819.6—Certificates of Competency'' is revised to read ''Subpart 1819.6—Certificates of Competency and Determinations of Responsibility''.

## PART 1837—SERVICE CONTRACTING

**1837.102, 1837.102–70 [Removed]**

9. Sections 1837.102 and 1837.102–70 are removed.

[FR Doc. 98–6674 Filed 3–16–98; 8:45 am]

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## DEPARTMENT OF TRANSPORTATION

### Research and Special Programs Administration

### 49 CFR Part 199

**[RSPA Docket PS–128; Amendment 199–15]**

**RIN 2137–AC84**

## Drug and Alcohol Testing; Substance Abuse Professional Evaluation for Drug Use

**AGENCY:** Research and Special Programs Administration, DOT.

**ACTION:** Final rule.

**SUMMARY:** In this final rule, the Research and Special Programs Administration (RSPA) modifies current procedures in its drug testing regulations by requiring a face-to-face evaluation by substance abuse professionals (SAP) for pipeline employees who have either received a positive drug test or have refused a drug test required by RSPA. In addition, the SAP could require a pipeline employee to complete a rehabilitation program before being eligible to return to duty. Similar requirements are included in the drug testing regulations of the other modal administrations. Adding these requirements will ensure conformity among the modal administrations which will assist with the overall management of RSPA's drug testing regulations.

**DATES:** This rule is effective April 16, 1998.

**FOR FURTHER INFORMATION CONTACT:** Catrina M. Pavlik, Drug/Alcohol Program Analyst, Research and Special Programs Administration, Office of Pipeline Safety, Room 2335, 400 Seventh Street, SW, Washington, DC 20590. Telephone: (202)366–6199, Fax: (202)366–4566, e-mail: catrina.pavlik@RSPA.dot.gov.

**SUPPLEMENTARY INFORMATION:**

### Background

In accordance with 49 U.S.C. 60601 of the pipeline safety law, RSPA administers drug testing regulations for pipeline operators.

On August 20, 1997, RSPA published in the **Federal Register** (62 FR 44250, Docket No. PS–128, Amendment 15) a notice of proposed rulemaking to modify current procedures in its drug testing regulations governing situations in which pipeline employees test positive on a drug test. Because similar requirements are found in the drug testing regulations of the other modal administrations, and in RSPA's alcohol testing regulations, RSPA proposed to make the procedures and policy in those regulations applicable to pipeline operators under the drug testing regulations. RSPA proposed to require pipeline operators to utilize a substance abuse professional (SAP) to evaluate pipeline employees who have either received a positive drug test or have refused a drug test required by RSPA. In addition, the SAP could require an employee to complete a rehabilitation program before being eligible to return to duty, if needed. RSPA also proposed to revise the word ''employee'' to ''covered employee'' and to add the definition for ''covered function.'' Comments to the notice of proposed rulemaking were due on or before October 20, 1997.

### Comments Received

RSPA received 10 comments: 6 from pipeline operators, 1 from a trade association and 3 from consortia. The comments fell within the following general categories: (1) Review of Drug Testing Results; (2) Drug Test Required—Return to Duty Testing; (3) SAP Determines Follow-up Testing; (4) Qualification for a SAP; and (5) Other Comments. The comments are addressed based on those categories.

*1. Review of Drug Testing Results*

The notice of proposed rulemaking proposed that if the Medical Review Officer (MRO) determines, after appropriate review, that there is no legitimate medical explanation for the confirmed positive test result, other than the unauthorized use of prohibited drug(s), the MRO shall verify the test result as positive. If unauthorized use is