

rule is discussed in the January 27, 2000 **Federal Register** document.

The Congressional Review Act (5 U.S.C. 801 *et seq.*), as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 808 allows the issuing agency to make a rule effective sooner than otherwise provided by the CRA if the agency makes a good cause finding that notice and public procedure is impracticable, unnecessary or contrary to the public interest. This determination must be supported by a brief statement. 5 U.S.C. 808(2). As stated previously, EPA has made such a good cause finding, including the reasons therefor, and established an effective date of November 22, 2000. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

#### List of Subjects in 40 CFR Part 444

Environmental protection, Hazardous waste, Incineration, Waste treatment and disposal, Water pollution control.

Dated: August 31, 2000.

**J. Charles Fox,**

*Assistant Administrator for Water.*

For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as follows:

1. The authority citation for part 444 continues to read as follows:

**Authority:** Secs. 301, 304, 306, 307, 308, 402, and 501 of the Clean Water Act, as amended; 33 U.S.C. 1311, 1314, 1316, 1317, 1318, 1342, and 1361.

#### § 444.12 [Amended]

2. Section 444.12 is amended by:
- Removing the paragraph designation for the first paragraph (b)(2) and designating the text as the last two sentences of paragraph (b)(1).
  - Redesignating the table entitled "List of Approved Inorganic Test Procedures" to paragraph (b)(1).
  - Amending the entry "2. Cadmium" in the table to paragraph (b)(1) by transferring "D3557-90(D)" from the entry for ICP/AES to the entry for AA furnace in the 4th column of the table.
  - Amending the entry "11. Zinc" in the table to paragraph (b)(1) by

transferring "D4190-82(88)" from the entry for Colorimetric (Dithizone) to the entry for DCP in the 4th column of the table.

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## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

### 48 CFR Parts 1807, 1815, 1816, 1823, 1849, and 1852

#### Risk Management

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

**ACTION:** Interim rule adopted as final with changes.

**SUMMARY:** This is a final rule amending the NASA FAR Supplement (NFS) to emphasize considerations of risk management, including safety, security (including information technology security), health, export control, and damage to the environment, within the acquisition process. This final rule addresses risk management within the context of acquisition planning, selecting sources, choosing contract type, structuring award fee incentives, administering contracts, and conducting contractor surveillance.

**EFFECTIVE DATE:** November 22, 2000.

**FOR FURTHER INFORMATION CONTACT:** James H. Dolvin, NASA Headquarters, Office of Procurement, Contract Management Division (Code HK), (202) 358-1279, email: jdolvin1@mail.hq.nasa.gov.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

NASA is adopting as final, with changes, the interim rule published in the **Federal Register** (65 FR 37057-37061, June 13, 2000) that revised various NFS Parts to refocus on risk as a core acquisition concern as part of NASA's risk-based acquisition management initiative. Comments were received from one company and an industry association. All comments were considered in the development of the final rule. Revisions primarily affect internal procedures and include the following: (1) In section 1807.105 the reference to a NASA document is revised; (2) in section 1815.203-72, the words "and RFOs" are added after "RFPs" to make it clear that the section applies to MidRange procurements; (3) in section 1816.405-274 and new section 1849.102-71, language is added to require the contracting officer to notify the Associate Administrator for

Procurement prior to the determination of a zero award fee in accordance with NFS 1816.405-274, and prior to exercising remedies under NFS clause 1852.223-75; (4) in section 1823.7001, the word at the end of paragraph (b)(1) is changed from "or" to "and", and the word "concurrence" in paragraph (b)(2) is changed to "approval", to enhance the role of installation safety officials in the application of the Safety and Health clause; and (5) in section 1852.223-75, the words "or mission failure" are added after "fatality" in paragraph (a), to achieve consistency with similar language in section 1816.405-274(c)(2).

#### B. Regulatory Flexibility Act

NASA certifies that this final rule 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.*) because this rule simply focuses attention on risk management, an existing business practice, and does not impose any significant new requirements which might have an economic impact.

#### C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the NFS do not impose recordkeeping or information collection requirements, or collection of information from offerors, contractors, or members of the public which require the approval of the Office of Management and Budget under 41 U.S.C. 3501, *et seq.*

### List of Subjects in 48 CFR Parts 1807, 1815, 1816, 1823, 1849, and 1852

Government procurement.

**Tom Luedtke,**

*Associate Administrator for Procurement.*

#### Interim Rule Adopted as Final With Changes.

Accordingly, the interim rule published at 65 FR 37057-37061, June 13, 2000, is hereby adopted as final with the following changes:

1. The authority citation for 48 CFR Parts 1807, 1815, 1816, 1823, 1849, and 1852 continues to read as follows:

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

#### PART 1807—ACQUISITION PLANNING

2. In section 1807.105, revise paragraph (a)(7) to read as follows:

##### 1807.105 Contents of written acquisition plans.

\* \* \* \* \*

(a) \* \* \*

(7) Discuss project/program risks (see NPG 7120.5, NASA Program and Project

Management Processes and Requirements). In addition to technical, schedule, and cost risks, the discussion shall include such considerations as: safety and security (including personnel, information technology, and facilities/property); the need to involve foreign sources (contractor and/or governmental), and risks of unauthorized technology transfer (see NPD 2110.1D and Export Control Program (http://www.hq.nasa.gov/office/codei/nasaecp/ecpolicy.html)); and resource risk, including the necessary level and expertise of NASA personnel resources available to manage the project/program. For each area of risk identified, the discussion shall include a quantification of the relative magnitude (e.g., high, medium, low) together with the specific actions taken to structure the acquisition approach to manage the risks throughout the acquisition process. For example, this discussion would identify those areas that have safety risk, discuss how safety is addressed in contract requirements and evaluated in the source selection, and how it will be managed and incentivized during contract performance. Decisions to accept, mitigate, track, and/or research risk factors shall be identified and documented as part of acquisition planning.

\* \* \* \* \*

**PART 1815—CONTRACTING BY NEGOTIATION**

3. Revise section 1815.203-72 to read as follows:

**1815.203-72 Risk management.**

In all RFPs and RFOs for supplies or services for which a technical proposal is required, proposal instructions shall require offerors to identify and discuss risk factors and issues throughout the proposal where they are relevant, and describe their approach to managing these risks.

**PART 1816—TYPES OF CONTRACTS**

4. In section 1816.405-274, add paragraph (c)(4) to read as follows:

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

\* \* \* \* \*

(c) \* \* \*

(4) The Associate Administrator for Procurement (Code HS) shall be notified prior to the determination of a zero award fee because of a major breach of safety or security.

\* \* \* \* \*

**PART 1823—ENVIRONMENT, CONSERVATION, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE**

5. In section 1823.7001, revise paragraphs (b)(1) and (b)(2) to read as follows:

**1823.7001 NASA solicitation provisions and contract clauses.**

(b) \* \* \*

(1) From any contract subject to the Walsh-Healey Public Contracts Act (see FAR subpart 22.6) or the Service Contract Act of 1965 (see FAR subpart 22.10) in which the application of either act and its implementing regulations constitute adequate safety and occupational health protection; and

(2) When the contracting officer, with the approval of the installation official(s) responsible for matters of safety and occupational health, makes a written determination that the clause is not necessary under the circumstances of the acquisition.

\* \* \* \* \*

**PART 1849—TERMINATION OF CONTRACTS**

6. Add section 1849.102-71 to read as follows:

**1849.102-71 Prior clearance of contract terminations resulting from a major breach of safety or security.**

The Associate Administrator for Procurement (Code HS) must be notified prior to taking any action to terminate because of a major breach of safety or security.

**PART 1852—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

7. In section 1852.223-70, revise the date of the clause and paragraph (c) to read as follows:

**1852.223-70 Safety and Health.**

\* \* \* \* \*

**Safety and Health, November 2000**

\* \* \* \* \*

(c) The Contractor shall immediately notify and promptly report to the Contracting Officer or a designee any accident, incident, or exposure resulting in fatality, lost-time occupational injury, occupational disease, contamination of property beyond any stated acceptable limits set forth in the contract Schedule; or property loss of \$25,000 or more, or Close Call (a situation or occurrence with no injury, no damage or only minor damage (less than \$1,000) but possesses the potential to cause any type mishap, or any injury, damage, or negative mission impact) that may be of immediate interest to NASA, arising out of work performed under this

contract. The Contractor is not required to include in any report an expression of opinion as to the fault or negligence of any employee. In addition, service contractors (excluding construction contracts) shall provide quarterly reports specifying lost-time frequency rate, number of lost-time injuries, exposure, and accident/incident dollar losses as specified in the contract Schedule.

\* \* \* \* \*

8. In section 1852.223-75, revise the date of the clause and paragraph (a) to read as follows:

**1852.223-75 Major Breach of Safety or Security.**

\* \* \* \* \*

**Major Breach of Safety or Security, November 2000**

(a) Safety is the freedom from those conditions that can cause death, injury, occupational illness, damage to or loss of equipment or property, or damage to the environment. Safety is essential to NASA and is a material part of this contract. A major breach of safety may constitute a breach of contract that entitles the Government to exercise any of its rights and remedies applicable to material parts of this contract, including termination for default. A major breach of safety must be related directly to the work on the contract. A major breach of safety is an act or omission of the Contractor that consists of an accident, incident, or exposure resulting in a fatality or mission failure; or in damage to equipment or property equal to or greater than \$1 million; or in any "willful" or "repeat" violation cited by the Occupational Health and Safety Administration (OSHA) or by a state agency operating under an OSHA approved plan.

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**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 229**

[Docket No. 991222346-0312-03; I.D. 111300E]

RIN 0648-AN40

**Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations; Remove and Reserve Gear Marking Requirements for Northeast U.S. Fisheries**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Final rule.

**SUMMARY:** This final rule removes and reserves the northeast U.S. fisheries gear