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NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1833 and 1852

RIN 2700-AC33

Approval Authority for Contract Actions Pending Resolution of an Agency Protest

AGENCY: National Aeronautics And Space Administration.

ACTION: Final rule.

SUMMARY: This final rule revises the NASA FAR Supplement (NFS) to specify the approval authority to award a contract or continue contract performance when a protest is filed directly with the agency. It also makes administrative changes to specify internal NASA distribution requirements for protest notifications and to correct a position title.

EFFECTIVE DATE: October 1, 2002.

FOR FURTHER INFORMATION CONTACT: Tom O'Toole, NASA, Office of Procurement, Contract Management Division (Code HK); (202) 358-0478; e-mail: thomas.otoole@hq.nasa.gov.

SUPPLEMENTARY INFORMATION:

A. Background

FAR 33.103 and 33.104 address protests to the agency and the General

Accounting Office (GAO), respectively. Both FAR sections allow an agency to establish an approval authority for awarding a contract when a protest is received prior to contract award and for continuing contract performance when a protest is received after award. NFS 1833.104(b)(1) and (c)(2) already specify that the Assistant Administrator for Procurement is the approval authority for those actions when a protest is filed with GAO, but no authority is specified relative to agency protests. To ensure the same degree of review and approval regardless of the forum where the protest is filed, this change to the NFS establishes the Assistant Administrator for Procurement as the approval authority for contract award and continuing contract performance for agency protests.

B. Regulatory Flexibility Act

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 Parts 1833 and 1852 in accordance with 5 U.S.C. 610.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes do not impose recordkeeping or information collection requirements which 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 1833 and 1852

Government Procurement.

Tom Luedtke,

Assistant Administrator for Procurement.

Accordingly, 48 CFR parts 1833 and 1852 are amended as follows:

1. The authority citation for 48 CFR parts 1833 and 1852 continues to read as follows:

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

PART 1833—PROTEST, DISPUTES, AND APPEALS

2. Amend section 1833.103 by deleting the word "Deputy" in paragraph (c), and by revising paragraph (f) to read as follows:

1833.103 Protests to the agency.

* * * * *

(f) Protests received at NASA offices or locations other than that of the cognizant contracting officer shall be immediately referred to the contracting officer for disposition (see 1833.106(a)). The contracting officer shall advise the

Headquarters Offices of Procurement (Code HS) and the General Counsel (Code GK) of the receipt of the protest and the planned and actual disposition. This paragraph does not apply when the protester has requested an independent review under the provision at 1852.233-70.

(1) The Assistant Administrator for Procurement (Code HS) is the approval authority for contract award.

(3) The Assistant Administrator for Procurement (Code HS) is the approval authority for authorizing continued contract performance.

PART 1852—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

1852.233-70 [Amended]

3. Amend section 1852.233-70 by revising the date of the provision to read "Oct. 2002" and by deleting the word "Deputy" each time it appears.

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NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1852 and 1872

RIN 2700-AC33

Broad Agency Announcements

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: This final rule adopts with changes the proposed rule published in the **Federal Register** on August 31, 2001. This final rule amends the NASA FAR Supplement (NFS) to require, when relevant, consideration of safety and risk-based acquisition management in NASA's broad agency announcements. This change will ensure consistency in the way safety and risk based acquisition management are treated in all NASA acquisitions.

EFFECTIVE DATE: October 1, 2002.

FOR FURTHER INFORMATION CONTACT: Paul Brundage, NASA, Office of Procurement, Analysis Division (Code HC), (202) 358-0481, or e-mail: paul.brundage@hq.nasa.gov.

SUPPLEMENTARY INFORMATION:

A. Background

NASA recently made several changes to the NFS to address safety and risk based acquisition management (RBAM) in the acquisition planning processes for

negotiated procurements. This final rule makes corresponding changes to the proposal preparation processes for NASA's broad agency announcements (BAA). Two types of BAAs used by NASA include the Announcement of Opportunity (AO) and the NASA Research Announcement (NRA). This final rule amends the NASA FAR Supplement (NFS) to require, when relevant, consideration of safety and risk-based acquisition management in NASA's broad agency announcements. This change allows NASA to consider safety and RBAM as part of the proposal selection done under NASA's broad agency announcements. This change will ensure consistency in the way safety and RBAM are treated in all NASA acquisitions.

NASA published a proposed rule in the **Federal Register** at 66 FR 45955 on August 31, 2001. NASA received one comment on the proposed rule. The commenter suggested that risk analysis should not be imposed at early stages of research solely for consistency when it is unlikely there will be any identifiable risk that could benefit from a premature risk analysis. The commenter further recommended that NASA not require RBAM on BAAs unless the statement of work involved procurement, development, manufacture, and operation of hardware and equipment.

NASA included the phrase "where they are relevant" in its proposed rule because it agrees that in some cases the proposed work in response to a BAA may be so early in the development cycle that identification and discussion of risk factors may not be possible. However, NASA disagrees with the suggestion that risk factor identification and discussion occur only when the statement of work involves procurement, development, manufacture, and operation of hardware and equipment.

To ensure that the identification and discussion of risk factors is conducted when appropriate, NASA's proposed rule required the identification and discussion of risk factors and issues throughout the proposal "where they are relevant."

Relevancy of risk should be easily determinable, even during the initial BAA process. For example, research involving flight hardware, hazardous material, or potentially dangerous operations includes identifiable risks. In other cases, it may indeed be too early in the research process to identify and discuss risk factors, so such a discussion would not be relevant.

Moreover, BAAs include information that will help a proposer in determining whether an identification and

discussion of risks may be relevant. For instance, AO's include, as applicable, safety, reliability, and quality assurance provisions. NRAs contain programmatic information and certain requirements and will generally specify topics for which additional information or greater detail is desirable. NASA is ensuring that areas that may involve potential risk are highlighted in AOs and NRAs by requiring the participation of the appropriate NASA Safety Offices in the NRA and AO (by this rule) processes.

It is anticipated and understood that the identification of risk factors where relevant will be consistent with the level of information available at the time of the proposal. Therefore, no change is being made as a result of comments received. Minor grammatical changes have been made to NFS section 1872.307.

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 it does not impose new requirements. Rather, it focuses attention on safety and risk management.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the NFS do not impose any record keeping or information collection requirements, or collections of information from offerors, contractors, or members of the public 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 1852 and 1872

Government procurement.

Tom Luedtke,

Assistant Administrator for Procurement.

Accordingly, 48 CFR parts 1852 and 1872 are amended as follows:

1. The authority citation for 48 CFR 1852 and 1872 continues to read as follows:

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

PART 1852—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

2. Amend the clause at section 1852.235-72 by revising the clause date, redesignating paragraph (c)(11)(ii) as (c)(11)(iii), and adding a new paragraph (c)(11)(ii) to read as follows:

1852.235-72 Instructions for responding to NASA Research Announcements.

* * * * *

Instructions for Responding to NASA Research Announcements (Oct. 2002)

* * * * *

(c) * * *
(11) * * *

(ii) Identify and discuss risk factors and issues throughout the proposal where they are relevant, and your approach to managing these risks.

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PART 1872 —ACQUISITION OF INVESTIGATIONS

3. Amend paragraph (b) of section 1872.303 by adding the words "Office of Safety and Mission Assurance," immediately after "Office of General Counsel,".

4. Amend section 1872.307 by adding the following sentence at the end of paragraph (b) to read as follows:

1872.307 Guidelines for proposal preparation.

* * * * *

(b) * * * Investigators shall be required to identify and discuss risk factors and issues throughout the proposal where they are relevant, and describe their approach to managing these risks.

5. Amend section 1872.402, by redesignating paragraph (b)(7) as (b)(8), and adding a new paragraph (b)(7) to read as follows:

1872.402 Criteria for evaluation.

* * * * *

(b) * * *

(7) The proposed approach to managing risk (*e.g.*, level of technology maturity being applied or developed, technical complexity, performance specifications and tolerances, delivery schedule, etc.).

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6. Amend section 1872.705 by redesignating sections II, III, IV, V, VI, VII, VIII, and IX as III, IV, V, VI, VII, VIII, IX, and X respectively, and adding a new section II to read as follows:

1872.705 Format of Announcement of Opportunity (AO).

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II. NASA's Safety Priority

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. NASA's safety priority is to protect:

(1) The public,

(2) Astronauts and pilots,
 (3) The NASA workforce (including NASA employees working under NASA instruments), and

(4) High-value equipment and property.

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DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 40

[Docket OST-2002-13431]

RIN 2105-AD13

Procedures for Transportation Workplace Drug and Alcohol Testing Programs; Procedures for Non-Evidential Alcohol Screening Devices

AGENCY: Office of the Secretary, DOT.

ACTION: Final rule.

SUMMARY: The Department of Transportation (DOT) originally established procedures for use of non-evidential alcohol screening devices (ASDs) in April, 1995. At that time, we indicated that as additional ASDs were determined by the National Highway Traffic Safety Administration (NHTSA) to be capable of detecting the presence of alcohol at the 0.02 or greater level of alcohol concentration, they would be suitable for use within DOT regulated industry testing programs. Because NHTSA has approved a device, the operating mechanism of which differs from other ASDs, the Department had no Part 40 procedures for its use. This rule establishes procedures for the use of this device.

DATES: This rule is effective October 31, 2002.

FOR FURTHER INFORMATION CONTACT: Jim L. Swart, Drug and Alcohol Policy Advisor at 202-366-3784 (voice), 202-366-3897 (fax), or at: jim.swart@ost.dot.gov (e-mail).

SUPPLEMENTARY INFORMATION:

Background

When the Department originally published its alcohol testing rules on February 15, 1994 (54 FR 7302 *et seq.*), the Department established breath testing using evidential breath testing devices (EBTs) as the method to be used. However, in response to comments requesting additional flexibility in testing methods the Department said that NHTSA would develop model specifications, evaluate

additional screening devices, and periodically publish a conforming products list of those additional screening devices that meet model specifications. The Department noted, too, that the Department would also have to undertake separate rulemaking proceedings to establish procedures for use by DOT-regulated industries of any devices after they are approved by NHTSA.

On April 20, 1995 (FR Vol. 60, No. 76), the Department published procedures for use of ASDs, both breath devices and saliva devices. At that time, the Department did not anticipate that additional devices would be developed that, while using breath or saliva as the means of obtaining a result, would necessitate new procedures for their use. As a result, the revised Part 40 (65 FR 79462) published December 19, 2000 stated, in part, that ASDs on the NHTSA conforming products list (CPL) could be used for Part 40 alcohol screening tests. Because NHTSA added an ASD to their CPL and the Department had no procedures for its use, we were forced to amend that rule. On August 9, 2001 (65 FR 41944) Part 40 was amended to read, "You may use an ASD that is on the NHTSA CPL for DOT alcohol tests only if there are instructions for its use in this part."

This effectively prevented use of this ASD for DOT testing purposes even though it was on NHTSA's CPL. The Department has taken steps to rectify this situation by developing procedures for this ASD's use and by amending the regulation accordingly. We have also taken the step to fine-tune the regulation to include in regulation text the fact that breath alcohol technicians (BAT), knowledgeable of how to use an ASD (or ASDs), can conduct screening tests using them.

Instructions for use of the breath tube are somewhat parallel to those for the saliva device. Both devices prohibit use of the device after the expiration date has been reached. Both have procedures for conducting additional tests if proper procedures cannot be followed. Both have some similar fatal flaw criteria.

The breath tube requires the STT or BAT to remove a tube from the box and break the device's ampule in the presence of the employee. The STT or BAT must then attach an inflation bag to the appropriate end of the tube. The employee is given the opportunity to hold the tube and provided instructions regarding how to blow (*i.e.*, forcefully and steadily for approximately 12 seconds) through the tube.

The rules also provide instructions for reading the results. In this case, the STT or BAT must compare the color of the

crystals in the breath tube with the colored crystals on manufacturer-produced control tube. Comparisons must take place within specific time frames.

Fatal Flaws" require tests to be cancelled. Problems with the breath tube which cause fatal flaws are: The STT or BAT reads the device either sooner or after than the time allotted; and the device is used after its expiration date.

The breath tube works this way. When a person's breath is blown through the tube it goes around and across the tube's crystals. If the person's breath contains no alcohol, the crystals remain their original color. However, if the person's breath contains alcohol, the alcohol causes a chemical reaction leading to a change in crystal color. A color change matching the color of crystals in the control tube is indicative of a screening test result that must subsequently be confirmed using an EBT. Such a color change indicates that the screening test result is 0.02 or above.

Regulatory Analyses and Notices

This rule is not a significant rule for purposes of Executive Order 12866 and DOT. It does not increase costs on regulated parties. In fact it may facilitate the use of a device that may increase flexibility, and decrease costs, for employers who choose to use them. There are not sufficient Federalism implications to warrant the preparation of a Federalism Assessment. The Department certifies that this rule will not have a significant economic impact on a substantial number of small entities. To the extent that there is any such impact, it is expected to be a small favorable impact, since some small entities may be able to conduct screening tests at a lower cost.

The Department is issuing this as a final rule without opportunity for notice and public comment. The Department determined that doing so would be impracticable, unnecessary, and contrary to the public interest because this breath device already appears on NHTSA's CPL and has, therefore, proven to be an accurate screening device for Part 40 alcohol screening tests.

List of Subjects in 49 CFR Part 40

Alcohol testing, Drug testing, laboratories, Reporting and recordkeeping requirements, Safety, Transportation.