

recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

The economic, interagency, budgetary, legal, and policy implications of this final rule have been examined and it has been determined not to be a significant regulatory action under Executive Order 12866.

### Regulatory Flexibility Act

The Secretary hereby certifies that this final rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This final rule affects only VA beneficiaries and their VA clinicians. Therefore, pursuant to 5 U.S.C. 605(b), this final rule is exempt from the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604. This final rule is also exempt from the regulatory flexibility analysis requirements of sections 603 and 604 because it was not preceded by a notice of proposed rulemaking.

### Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. John R. Gingrich, Chief of Staff, Department of Veterans Affairs, approved this document on February 2, 2011, for publication.

### List of Subjects in 38 CFR Part 1

Administrative practice and procedure, Archives and records, Cemeteries, Claims, Courts, Crime, Flags, Freedom of Information, Government contracts, Government employees, Government property, Infants and children, Inventions and patents, Parking, Penalties, Privacy, Reporting and recordkeeping requirements, Seals and Insignia, Security measures, Wages.

Dated: February 3, 2011.

**Robert C. McFetridge,**

Director, *Regulations Policy and Management, Department of Veterans Affairs.*

For the reasons set forth in the preamble, VA amends 38 CFR part 1 as follows:

### PART 1—GENERAL PROVISIONS

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

**Authority:** 38 U.S.C. 501(a), and as noted in specific sections.

■ 2. Amend § 1.460 by adding, in alphabetical order, the definitions of “decision-making capacity,” “practitioner,” and “surrogate,” and by revising the authority citation at the end of the section to read as follows:

#### § 1.460 Definitions.

\* \* \* \* \*

*Decision-making capacity.* The term “decision-making capacity” has the same meaning set forth in 38 CFR 17.32(a).

\* \* \* \* \*

*Practitioner.* The term “practitioner” has the same meaning set forth in 38 CFR 17.32(a).

\* \* \* \* \*

*Surrogate.* The term “surrogate” has the same meaning set forth in 38 CFR 17.32(a).

\* \* \* \* \*

(Authority: 38 U.S.C. 7332, 7334)

■ 3. Add § 1.484 after the undesignated center heading “Disclosures Without Patient Consent” preceding § 1.485, to read as follows:

#### § 1.484 Disclosure of medical information to the surrogate of a patient who lacks decision-making capacity.

A VA medical practitioner may disclose the content of any record of the identity, diagnosis, prognosis, or treatment of a patient that is maintained in connection with the performance of any VA program or activity relating to drug abuse, alcoholism or alcohol abuse, infection with the human immunodeficiency virus, or sickle cell anemia to a surrogate of the patient who is the subject of such record if:

(a) The patient lacks decision-making capacity; and

(b) The practitioner deems the content of the given record necessary for the surrogate to make an informed decision regarding the patient’s treatment.

(Authority: 38 U.S.C. 7331, 7332)

[FR Doc. 2011-2750 Filed 2-7-11; 8:45 am]

BILLING CODE 8320-01-P

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

### 48 CFR Part 1816

#### RIN 2700-AD69

### NASA Implementation of Federal Acquisition Regulation (FAR) Award Fee Language Revision

**AGENCY:** National Aeronautics and Space Administration.

**ACTION:** Interim rule.

**SUMMARY:** This interim rule revises the NASA FAR Supplement (NFS) to implement the FAR Award Fee revision issued in Federal Acquisition Circular (FAC) 2005-46.

**DATES:** *Effective Date:* February 8, 2011.

*Comment Date:* Interested parties should submit written comments to NASA at the address below on or before April 11, 2011 to be considered in the formulation of the final rule.

**ADDRESSES:** Interested parties may submit comments, identified by RIN number 2700-AD69, via the Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments. Comments may also be submitted to Bill Roets, NASA Headquarters, Office of Procurement, Contract Management Division, Washington, DC 20546. Comments may also be submitted by e-mail to [william.roets-1@nasa.gov](mailto:william.roets-1@nasa.gov).

**FOR FURTHER INFORMATION CONTACT:** Bill Roets, NASA, Office of Procurement, Contract Management Division (Suite 5G86); (202) 358-4483; e-mail: [william.roets-1@nasa.gov](mailto:william.roets-1@nasa.gov).

#### SUPPLEMENTARY INFORMATION:

##### A. Background

Federal Acquisition Circular (FAC) 2005-46 significantly revised FAR Parts 16.305, 16.401, and 16.405-2, incorporating new requirements relative to the use of award fee incentives. Specifically, this FAR rule implements section 814 of the John Warner 2007 National Defense Authorization Act (NDAA) and section 867 of the Duncan Hunter 2009 NDAA and requires agencies to:

(1) Link award fees to acquisition objectives in the areas of cost, schedule, and technical performance;

(2) Clarify that the base fee may be included in a cost plus award fee type contract at the discretion of the contracting officer;

(3) Prescribe narrative ratings when making a percentage of award fee available;

(4) Prohibit the issuance of award fees for a rating period if the contractor’s performance is judged to be below satisfactory;

(5) Conduct an analysis and consider the results of the analysis when determining whether to use an award fee type contract or not;

(6) Include specific content in the award fee plans; and

(7) Prohibit the rolling over of unearned award fees to subsequent rating periods.

These significant revisions in FAR award fee guidance resulted in the need

to make associated changes to the NFS award fee regulations.

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

NASA certifies that this interim rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, at 5 U.S.C. 601, *et seq.*, because it merely implements the FAR Award Fee revisions and does not impose an economic impact beyond that addressed in the FAC 2005–46 publication of the FAR final rule.

Therefore, an Initial Regulatory Flexibility Analysis has not been performed. NASA will consider comments from small entities concerning the affected NFS Part 1816 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* in correspondence.

## C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because this interim rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

## D. Determination to Issue an Interim Rule

In accordance with 41 U.S.C 418(d), NASA has determined that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary to harmonize the NFS Award Fee coverage with that in the FAR which was effective per FAC 2005–46. However, pursuant to Public Law 98–577 and FAR 1.501, NASA will consider public comments received in response to this interim rule in the formation of the final rule.

## List of Subjects in 48 CFR Part 1816

Government procurement.

**William P. McNally,**  
Assistant Administrator for Procurement.

Accordingly, 48 CFR part 1816 is amended as follows:

## PART 1816—TYPES OF CONTRACTS

■ 1. The authority citation for 48 CFR part 1816 continues to read as follows:

**Authority:** 42 U.S.C. 2455(a), 2473(c)(1).

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

### 1816.405–270 CPAF contracts.

(a) Use of an award fee incentive requires advance approval by the Assistant Administrator for Procurement. Requests for approval, that include Determination & Findings (D&F) cited in paragraph (b) of this section, shall be submitted to Headquarters Office of Procurement, Program Operations Division.

(b) Contracting officers shall prepare a D&F in accordance with FAR 16.401(d) prior to using an award fee incentive. In addition to the items identified in FAR 16.401(e)(1), D&Fs will 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. Use of award fee incentive for lower-valued acquisitions may be authorized 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.

(c) Except as provided in paragraph (d) 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.

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

■ 3. Section 1816.405–271 is revised to read as follows:

### 1816.405–271 Base fee.

(a) A base fee shall not be used on CPAF contracts for which the periodic award fee evaluations are final (1816.405–273(a)). In these circumstances, contractor performance during any award fee period is independent of and has no effect on subsequent performance periods or the final results at contract completion. For other contracts, such as those for hardware or software development, the procurement officer may authorize the use of a base fee not to exceed 3 percent. Base fee shall not be used when an award fee incentive is used in conjunction with another contract type (e.g., CPIF/AF).

(b) When a base fee is authorized for use in a CPAF contract, it shall be paid

only if the final award fee evaluation is “satisfactory” or better. (See 1816.405–273 and 1816.405–275) Pending final evaluation, base fee may be paid during the life of the contract at defined intervals on a provisional basis. If the final award fee evaluation is “unsatisfactory”, all provisional base fee payments shall be refunded to the Government.

■ 4. Section 1816.405–274 is revised to read as follows:

### 1816.405–274 Award fee evaluation factors.

(a) Explicit evaluation factors shall be established for each award fee period. Factors shall be linked to acquisition objectives which shall be defined in terms of contract cost, schedule, and technical performance. If used, subfactors should be limited to the minimum necessary to ensure a thorough evaluation and an effective incentive.

(b) Evaluation factors will be developed by the contracting officer based upon the characteristics of an individual procurement. Cost control, schedule, and technical performance considerations shall be included as evaluation factors in all CPAF contracts, as applicable. When explicit evaluation factor weightings are used, cost control shall be no less than 25 percent of the total weighted evaluation factors. The predominant consideration of the cost control evaluation should be a measurement of the contractor’s performance against the negotiated estimated cost of the contract. This estimated cost may include the value of undefinitized change orders when appropriate.

(c)(1) The technical factor must include consideration of risk management (including mission success, safety, security, health, export control, and damage to the environment, as appropriate) unless waived at a level above the contracting officer, with the concurrence of the project manager. The rationale for any waiver shall be documented in the contract file. When safety, export control, or security are considered under the technical factor, the award fee plan shall allow the following fee determinations, regardless of contractor performance in other evaluation factors, when there is a major breach of safety or security.

(i) For evaluation of service contracts under 1816.405–273(a), an overall fee rating of unsatisfactory for any evaluation period in which there is a major breach of safety or security.

(ii) For evaluation of end item contracts under 1816.405–273(b), an overall fee rating of unsatisfactory for

any interim evaluation period in which there is a major breach of safety or security. To ensure that the final award fee evaluation at contract completion reflects any major breach of safety or security, in an interim period, the overall award fee pool shall be reduced by the amount of the fee available for the period in which the major breach occurred if an unsatisfactory fee rating was assigned because of a major breach of safety or security.

(2) 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 Safety and Health Administration (OSHA) or by a state agency operating under an OSHA approved plan.

(3) A major breach of security may occur on or off Government installations, but must be directly related to the work on the contract. A major breach of security is an act or omission by the contractor that results in compromise of classified information, illegal technology transfer, workplace violence resulting in criminal conviction, sabotage, compromise or denial of information technology services, equipment or property damage from vandalism greater than \$250,000, or theft greater than \$250,000.

(4) The Assistant Administrator for Procurement shall be notified prior to the determination of an unsatisfactory award fee rating because of a major breach of safety or security.

(d) In rare circumstances, contract costs may increase for reasons outside the contractor's control and for which the contractor is not entitled to an equitable adjustment. One example is a weather-related launch delay on a launch support contract. The Government shall take such situations into consideration when evaluating contractor cost control.

(e) Emphasis on cost control should be balanced against other performance requirement objectives. The contractor should not be incentivized to pursue cost control to the point that overall performance is significantly degraded. For example, incentivizing an underrun that results in direct negative impacts on technical performance, safety, or other critical contract objectives is both undesirable and counterproductive. Therefore, evaluation of cost control shall conform to the following guidelines:

(1) Normally, the contractor should be given an unsatisfactory rating for cost control when there is a significant overrun within its control. However, the contractor may receive a satisfactory or higher rating for cost control if the overrun is insignificant. Award fee ratings should decrease sharply as the size of the overrun increases. In any evaluation of contractor overrun performance, the Government shall consider the reasons for the overrun and assess the extent and effectiveness of the contractor's efforts to control or mitigate the overrun.

(2) The contractor should normally be rewarded for an underrun within its control, up to the maximum award fee rating allocated for cost control, provided the adjectival rating for all other award fee evaluation factors is very good or higher (*see FAR 16.401(e)(iv)*).

(3) The contractor should be rewarded for meeting the estimated cost of the contract, but not to the maximum rating allocated for cost control, to the degree that the contractor has prudently managed costs while meeting contract requirements. No award shall be given in this circumstance unless the average adjectival rating for all other award fee evaluation factors is satisfactory or higher.

(f) 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*).

(g)(1) The contractor's performance against the subcontracting plan incorporated in the contract shall be evaluated. Emphasis may be placed on the contractor's accomplishment of its goals for subcontracting with small business, HUBZone small business, women-owned small business, veteran-owned small business, and service-disabled veteran-owned small business concerns.

(2) The contractor's performance against the contract target for participation as subcontractors by small disadvantaged business concerns in the NAICS Major Groups designated by the Department of Commerce (*see FAR 19.201(c)*) shall also be evaluated if the clause at FAR 52.219–26, Small Disadvantaged Business Participation-Incentive Subcontracting, is not included in the contract (*see FAR 19.1204(c)*).

(3) The contractor's achievements in subcontracting high technology efforts as well as the contractor's performance

under the Mentor-Protégé Program, if applicable, may also be evaluated.

(4) The evaluation weight given to the contractor's performance against the considerations in paragraphs (g)(1) through (g)(3) of this section should be significant (up to 15 percent of available award fee). The weight should motivate the contractor to focus management attention to subcontracting with small, HUBZone, women-owned, veteran-owned, and service-disabled veteran-owned small business concerns, and with small disadvantaged business concerns in designated NAICS Major Groups to the maximum extent practicable, consistent with efficient contract performance.

(h) When contract changes are anticipated, the contractor's responsiveness to requests for change proposals should be evaluated. This evaluation should include the contractor's submission of timely, complete proposals and cooperation in negotiating the change.

(i) Only the award fee performance evaluation factors set forth in the performance evaluation plan shall be used to determine award fee scores.

(j) The Government may unilaterally modify the applicable award fee performance evaluation factors and performance evaluation areas prior to the start of an evaluation period. The contracting officer shall notify the contractor in writing of any such changes 30 days prior to the start of the relevant evaluation period.

■ 5. Section 1816.405–275 is revised to read as follows:

#### **1816.405–275 Award fee evaluation rating.**

(a) All award fee contracts shall utilize the adjectival rating categories and associated descriptions as well as the award fee pool available to be earned percentages for each adjectival rating category contained in FAR 16.401(e)(iv).

(b) The following numerical scoring system shall be used in conjunction with the FAR adjectival rating categories and associated descriptions (*see FAR 16.401(e)(iv)*).

- (1) *Excellent* (100–91)
- (2) *Very good* (90–76)
- (3) *Good* (75–51)
- (4) *Satisfactory* (50)

(5) *Unsatisfactory* (less than 50) No award fee shall be paid for an unsatisfactory rating.

(c) As a benchmark for evaluation, in order to be rated “Excellent” overall, the contractor would typically be under cost, on or ahead of schedule, and providing outstanding technical performance.

(d) A weighted scoring system appropriate for the circumstances of the individual contract requirement should be developed. In this system, each evaluation factor (e.g., technical, schedule, cost control) is assigned a specific percentage weighting with the cumulative weightings of all factors totaling 100. During the award fee evaluation, each factor is scored from 0–100 according to the ratings defined in 1816.405–275(b). The numerical score for each factor is then multiplied by the weighting for that factor to determine the weighted score. For example, if the technical factor has a weighting of 60 percent and the numerical score for that factor is 80, the weighted technical score is 48 ( $80 \times 60$  percent). The weighted scores for each evaluation factor are then added to determine the total award fee score.

[FR Doc. 2011–2772 Filed 2–7–11; 8:45 am]

BILLING CODE 7510–01–P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 216

[Docket No. 110121052–1045–02]

RIN 0648–BA67

#### Taking and Importing Marine Mammals: U.S. Navy Training in the Hawaii Range Complex; U.S. Navy Training in the Southern California Range Complex; and U.S. Navy's Atlantic Fleet Active Sonar Training

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

**ACTION:** Interim final rule; request for comments and issuance of letters of authorization.

**SUMMARY:** In January 2009, pursuant to the Marine Mammal Protection Act (MMPA), NMFS issued three 5-year final regulations to govern the unintentional taking of marine mammals incidental to Navy training and associated activities conducted in the Hawaii Range Complex (HRC), the Southern California Range Complex (SOCAL Range Complex), and the Atlantic Fleet Active Sonar Training (AFAST) Study Area. These regulations, which allow for the issuance of "Letters of Authorization" (LOAs) for the incidental take of marine mammals during the specified activities and described timeframes, prescribe the permissible methods of taking and other

means of effecting the least practicable adverse impact on marine mammal species or stocks and their habitat, as well as requirements pertaining to the monitoring and reporting of such taking.

These rules quantify the specific amounts of individual sound source use that will occur over the course of the 5-year rules, and indicate that marine mammal take may only be authorized in an LOA incidental to the source types and amounts described. Specifically, no language was initially included expressly allowing for deviation from those precise levels of source use if the total number of takes remain within the analyzed and authorized limits. Since the issuance of the 2009 rules, the Navy realized that their evolving training programs, which are linked to real world events, necessitate greater flexibility in the types and amounts of sound sources that they use. In response to this need, when the Navy requested incidental take authorizations for other areas (e.g., the Mariana Islands and the Northwest Training Range Complexes), NMFS included language explicitly allowing for greater flexibility. NMFS has, through this interim final rule, amended the HRC, SOCAL Range Complex, and AFAST regulations to explicitly allow for greater flexibility in the types and amount of sound sources that they use.

NMFS has issued new LOAs for each of these actions, which supersede those issued in January 2011, and which authorize the Navy to take marine mammals incidental to their planned training in 2011, and reflect the greater flexibility addressed in this amendment. The take authorized in these LOAs does not exceed that analyzed and allowed by the original 2009 final rules.

**DATES:** Effective on February 7, 2011. Comments and information must be received no later than March 10, 2011.

**ADDRESSES:** You may submit comments, identified by 0648–BA67, by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal <http://www.regulations.gov>.

- Hand delivery or mailing of paper, disk, or CD–ROM comments should be addressed to Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3225.

**Instructions:** All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change. All Personal Identifying Information (for

example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter N/A in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

A copy of the Navy's applications, NMFS' Records of Decision (RODs), NMFS' proposed and final rules and subsequent LOAs, and other documents cited herein may be obtained by writing to Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3225 or by telephone via the contact listed here (*see FOR FURTHER INFORMATION CONTACT*).

**FOR FURTHER INFORMATION CONTACT:** Jolie Harrison, Office of Protected Resources, NMFS, (301) 713–2289, ext. 166.

#### SUPPLEMENTARY INFORMATION:

##### Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (Secretary) to allow, upon request, the incidental, but not intentional taking of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) during periods of not more than five consecutive years each if certain findings are made and regulations are issued or, if the taking is limited to harassment and of no more than 1 year, to issue a notice of proposed authorization for public review.

Authorization shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses, and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such taking are set forth.

NMFS has defined "negligible impact" in 50 CFR 216.103 as:

An impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

The National Defense Authorization Act (NDAA) (Pub. L. 108–136) removed the "small numbers" and "specified geographical region" limitations, and