ADRESSES: Submit your comments, identified by Docket ID Number EPA–R03–OAR–2007–0511 by one of the following methods:
   B. E-mail: fernandez.cristina@epa.gov.

   D. Hand Delivery: At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket’s normal hours of operation, and special arrangements should be made for deliveries of boxed information.

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   FOR FURTHER INFORMATION CONTACT: Martin Kotsch, (215) 814–3335, or by e-mail at kotsch.martin@epa.gov.

   SUPPLEMENTARY INFORMATION: For further information, please see the information provided in the direct final action, with the same title, that is located in the Rules and Regulations section of this Federal Register publication. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

Dated: August 29, 2011.

W.C. Early,
Acting Regional Administrator, Region III.

[FR Doc. 2011–23262 Filed 9–14–11; 8:45 am]
BILLING CODE 6560–50–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 1852
RIN 2700–AD70

Award Fee for Service and End-Item Contracts

AGENCY: National Aeronautics and Space Administration.
ACTION: Proposed rule.
SUMMARY: NASA proposes to revise the NASA FAR Supplement (NFS) to update the Award Fee for Service Contracts clause (NFS 1852.216–76) to clarify that the amount of award fee shall not exceed $100,000 for the contract revising paragraph (d) of 1852.216–76. As currently written, the clause specifies a not to exceed of 15 percent of the contract’s potential award fee, and on large multi-million dollar procurements, this reserve could total millions of dollars which would be excessive for the intended purpose of this reserve. By capping this reserve at $100,000, NASA will set the appropriate maximum dollar amount for this potential reserve and will align this clause with similar language in FAR clauses 52.216–8, Fixed-Fee, and 52.216–10, Incentive Fee.
Similar language relative to withholding a reserve amount of fee, not to exceed $100,000, to protect the Government’s interests relative to an orderly and timely closeout of the contract, is also being added to the
Award Fee for End Items clause (NFS 1852.216–77).

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 rule is not a major rule under 5 U.S.C. 804.

C. Regulatory Flexibility Act

NASA certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., because it merely updates, for clarification purposes, the maximum amount of award fee that can be withheld on a contract which will provide a benefit to all entities both large and small. In addition, award fee contracts are largely the province of large businesses with large dollar contracts and the changes promulgated in this proposed rule do not directly affect the current business processes of Federal contractors.

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 Part 1852

Government procurement.

William P. McNally, Assistant Administrator for Procurement.

Accordingly, 48 CFR part 1852 is proposed to be amended as follows:

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

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

PART 1852—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

2. Section 1852.216–76 is revised to read as follows:

1852.216–76 Award Fee for Service Contracts.

As prescribed in 1816.406–70(a), insert the following clause:

AWARD FEE FOR SERVICE CONTRACTS (XX/XX)

(a) The contractor can earn award fee from a minimum of zero dollars to the maximum stated in NASA FAR Supplement clause 1852.216–85, “Estimated Cost and Award Fee” in this contract.

(b) Beginning 6* months after the effective date of this contract, the Government shall evaluate the Contractor’s performance every 6* months to determine the amount of award fee earned by the contractor during the period. The Contractor may submit a self-evaluation of performance for each evaluation period under consideration. These self-evaluations will be considered by the Government in its evaluation. The Government’s Fee Determination Official (FD0) will determine the award fee amounts based on the Contractor’s performance in accordance with [identify performance evaluation plan]. The plan may be revised unilaterally by the Government prior to the beginning of any rating period to redirect emphasis.

(c) The Government will advise the Contractor in writing of the evaluation results. The [insert payment policy will make payment based on [insert method of authorizing award fee payment, e.g., issuance of unilateral modification by contracting officer].

(d) The Contracting Officer may direct the withholding of earned award fee payments until a reserve is set aside in an amount that the Contracting Officer considers necessary to protect the Government’s interest relative to an orderly and timely closeout of the contract. This reserve shall not exceed 15 percent of the contract’s total potential award fee or $100,000, whichever is less.

(e) The amount of award fee which can be awarded in each evaluation period is limited to the amounts self-identified in [identify location of award fee amounts]. Award fee which is not earned in an evaluation period cannot be reallocated to future evaluation periods.

(f)(1) Provisional award fee payments [insert “will” or “will not”, as applicable] be made under this contract pending the determination of the amount of fee earned for an evaluation period. If applicable, provisional award fee payments will be made to the Contractor on a [insert the frequency of provisional payments (not more often than monthly)] basis. The total amount of award fee available in an evaluation period that will be provisionally paid is the lesser of [insert a percent not to exceed 80 percent] or the prior period’s evaluation score.

(2) Provisional award fee payments will be superseded by the final award fee evaluation for that period. If provisional payments exceed the final evaluation score, the Contractor will either credit the next payment voucher for the amount of such overpayment or refund the difference to the Government, as directed by the Contracting Officer.

(3) If the Contracting Officer determines that the Contractor will not achieve a level of performance commensurate with the provisional rate, payment of provisional award fee will be discontinued or reduced in such amounts as the Contracting Officer deems appropriate. The Contracting Officer will notify the Contractor in writing if it is determined that such discontinuance or reduction is appropriate.

(g) Provisional award fee payments [insert “will” or “will not”, as applicable] be made prior to the first award fee determination by the Government.

(h) Award fee determinations are unilateral decisions made solely at the discretion of the Government.

* [A period of time greater or lesser than 6 months may be substituted in accordance with 1816.405–272(a).]

(End of clause)

3. Section 1852.216–77 is revised to read as follows:

1852.216–77 Award Fee for End Item Contracts.

As prescribed in 1816.406–70(b), insert the following clause:

AWARD FEE FOR END ITEM CONTRACTS (XX/XX)

(a) The contractor can earn award fee, or base fee, if any, from a minimum of zero dollars to the maximum stated in NASA FAR Supplement clause 1852.216–85, “Estimated Cost and Award Fee” in this contract. All award fee evaluations, with the exception of the last evaluation, will be interim evaluations. At the last evaluation, which is final, the Contractor’s performance for the entire contract will be evaluated to determine total earned award fee. No award fee or base fee will be paid to the Contractor if the final award fee evaluation is “poor/unsatisfactory.”

(b) Beginning 6* months after the effective date of this contract, the Government will evaluate the Contractor’s interim performance every 6* months to monitor Contractor performance prior to contract completion and to provide feedback to the Contractor. The evaluation will be performed in accordance with [identify performance evaluation plan] to this contract. The Contractor may submit a self-evaluation of performance for each period under consideration. These self-evaluations will be considered by the Government in its evaluation. The Government will advise the Contractor in writing of the evaluation results. The plan may be revised unilaterally by the Government prior to the beginning of any rating period to redirect emphasis.

(c)(1) Base fee, if applicable, will be paid in [insert “monthly”, or less frequent period] installments based on the percent of completion of the work as determined by the Contracting Officer.

(2) Interim award fee payments will be made to the Contractor based on each interim evaluation. The amount of the interim award fee payment is limited to the lesser of the interim evaluation score or 80 percent of the fee allocated to that period less any provisional payments made during the period. All interim award fee payments will be superseded by the final award fee determination.

(3) Provisional award fee payments will [insert “not” if applicable] be made under this contract pending each interim evaluation. If applicable, provisional award
fee payments will be made to the Contractor
on a [insert the frequency of provisional
payments (not more often than monthly)
basis. The amount of award fee which will
be provisionally paid in each evaluation
period is limited to [Insert a percent not to
exceed 80 percent] of the prior interim
evaluation score (see [insert applicable cite]).
Provisional award fee payments made each
evaluation period will be superseded by the
interim award fee evaluation for that period.
If provisional payments made exceed the
interim evaluation score, the Contractor will
either credit the next payment voucher for
the amount of such overpayment or refund
the difference to the Government, as directed
by the Contracting Officer. If the Government
determines that (i) The total amount of
provisional fee payments will apparently
substantially exceed the anticipated final
evaluation score, or (ii) the prior interim
evaluation is “poor/unsatisfactory,” the
Contracting Officer will direct the suspension
or reduction of the future payments and/or
request a prompt refund of excess payments
as appropriate. Written notification of the
determination will be provided to the
Contractor with a copy to the Deputy Chief
Financial Officer (Finance).
(4) All interim (and provisional, if
applicable) fee payments will be superseded
by the fee determination made in the final
award fee evaluation. The Government will
then pay the Contractor, or the Contractor
will refund to the Government the difference
between the final award fee determination
and the cumulative interim (and provisional,
if applicable) fee payments. If the final award
fee evaluation is “poor/unsatisfactory,” any
base fee paid will be refunded to the
Government.
(5) Payment of base fee, if applicable, will
be made based on submission of an invoice
by the Contractor. Payment of award fee will
be made by the [insert payment office] based
on [insert method of making award fee
payment, e.g., issuance of a unilateral
modification by the Contracting Officer].
(d) The Contracting Officer may direct the
withholding of interim award fee payments
until a reserve is set aside in an amount that
the Contracting Officer considers necessary
to protect the Government’s interest relative
to an orderly and timely closeout of the
contract. This reserve shall not exceed 15
percent of the contracts total potential award
fee or $100,000, whichever is less.
(e) Award fee determinations are unilateral
decisions made solely at the discretion of the
Government.
* [A period of time greater or lesser than 6
months may be substituted in accordance
with 1816.405–272(a).]
(End of clause)