



NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 1812

RIN 2700-AD64

Commercial Acquisition; Anchor Tenancy

AGENCY: National Aeronautics and Space Administration.

ACTION: Final rule.

SUMMARY: NASA has adopted as final, with minor changes, a proposed rule amending the NASA FAR Supplement (NFS) to include authority, under limited conditions, to issue Anchor Tenancy contracts. Anchor Tenancy means ``an arrangement in which the United States Government agrees to procure sufficient quantities of a commercial space product or service needed to meet Government mission requirements so that a commercial venture is made viable.''

EFFECTIVE DATE: [Insert date 30 days after publication in the Federal Register]

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SUPPLEMENTARY INFORMATION:

A. Background

NASA published a proposed rule in the Federal Register at 76 FR 30301 on May 25, 2011. NASA's Federal Acquisition Regulation Supplement (NFS) currently contains an inaccurate prohibition on anchor tenancy contracts. The prohibition is included in the NFS based on The Space Act, as amended by NASA's FY 1992 Appropriations Act (42 USC 2459d). The NFS states no appropriated funds may be used to enter into contracts, grants, or other agreements for more than 1 year if the primary effect is to provide a guaranteed customer base for or establish an anchor tenancy in new commercial space hardware or services unless an appropriations Act

specifies the new commercial space hardware or services to be developed/used or the contract, grant, or agreement is specified in an appropriations Act. However, subsequent to the prohibition, as part of NASA's FY 1993 Authorization Act, 15 U.S.C. 5806 was added to the Commercial Space Competitiveness Act (CSCA). The latter statute includes limited authority for NASA to enter into multi-year anchor tenancy contracts for the purchase of a good or service if the Agency receives an appropriation that 1) authorizes a multi-year anchor tenancy contract and 2) specifies the commercial space product or service to be developed or used. Furthermore, the NASA Administrator would be required to make a determination that addresses the following six criteria:

- 1) the good or service meets the mission requirements of NASA;
- 2) the commercially procured good or service is cost effective;
- 3) the good or service is procured through a competitive process;
- 4) existing or potential customers for the good or service other than the United States Government have been specified identified;
- 5) the long-term viability of the venture is not dependent upon a continued Government market or other nonreimbursable Government support; and
- 6) private capital is at risk in the venture.

The purpose of this final rule is to reconcile the NFS with the statutory authority for Anchor Tenancy contracts.

The due date for public comments in response to the proposed rule was July 25, 2011. NASA received general comments in support of the rule from one respondent. The respondent expressed support for NASA's rule, and noted that it reflects efforts aimed at achieving goals set forth in the Administration's 2010 National Space Policy to support growth in the commercial space sector.

During the comment period, NASA recognized a need to clarify the rule. Consequently, minor changes have been made to the proposed rule in this final rule, as follows:

The discussion of statutory authority has been consolidated and simplified; it is now discussed only in paragraph (a). The final rule identifies what is meant by an anchor tenancy whereas anchor tenancy was previously described in the background of the Federal Register Notice for the proposed rule.

B. Executive Orders 12866 and 13563

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. In accordance with Executive Order 13563, Improving Regulation and Regulatory Review, dated January 18, 2011, NASA determined that this rule is not excessively burdensome to the public, and is consistent with the administrative nature of rule. This is not a major rule under 5 U.S.C. 804.

C. Regulatory Flexibility Act

The final rule is not expected to 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 does not impose any new requirements on small entities. The rule clarifies NASA's authority to enter into Anchor Tenancy contracts, under limited conditions.

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 1812

Government procurement.

William P. McNally,
Assistant Administrator for Procurement.

Accordingly, 48 CFR part 1812 is amended as follows:

PART 1812--ACQUISITION OF COMMERCIAL ITEMS

1. The authority citation for 48 CFR parts 1812 continues to read as follows:

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

2. Section 1812.7000 is revised to read as follows.

1812.7000 Anchor tenancy contracts.

(a) Subject to receiving an appropriations that:

(1) Authorizes a multi-year anchor tenancy contract; and
(2) Specifies the commercial space product or service to be developed or used, NASA may enter into a multi-year anchor tenancy contract only if Administrator determines –

(i) The good or service meets the mission requirements of the National Aeronautics and Space Administration;

(ii) The commercially procured good or service is cost effective;

(iii) The good or service is procured through a competitive process;

(iv) Existing or potential customers for the good or service other than the United States Government have been specifically identified;

(v) The long-term viability of the venture is not dependent upon a continued Government market or other nonreimbursable Government support; and

(vi) Private capital is at risk in the venture.

(b) Contracts entered into under such authority may provide for the payment of termination liability in the event that the Government terminates such contracts for convenience.

(1) Contracts that provide for this payment of termination liability shall include a fixed schedule of such termination liability payments. Liability under such contracts shall not exceed the total payments which the Government would have made after the date of termination to purchase the good or service if the contract were not terminated.

(2) Subject to appropriations, funds available for such termination liability payments may be used for purchase of the good or service upon successful delivery of the good or service pursuant to the contract. In such case, sufficient funds shall remain available to cover any remaining termination liability.

(c) Limitations. (1) Contracts entered into under such authority shall not exceed 10 years in duration.

(2) Such contracts shall provide for delivery of the good or service on a firm, fixed price basis.

(3) To the extent practicable, reasonable performance specifications shall be used to define technical requirements in such contracts.

(4) In any such contract, the Administrator shall reserve the right to completely or partially terminate the contract without payment of such termination liability because of the contractor's actual or anticipated failure to perform its contractual obligations.

(d) The term "anchor tenancy" means an arrangement in which the United States Government agrees to procure sufficient quantities of a commercial space product or service needed to meet Government mission requirements so that a commercial venture is made viable.