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NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1816 and 1852

RIN 2700-AE31

NASA Federal Acquisition Regulation Supplement: Clarification of Award Fee evaluations and payments (NFS Case 2016-N008)

AGENCY: National Aeronautics and Space Administration.

ACTION: Final rule.

SUMMARY: NASA is issuing a final rule amending the NASA Federal Acquisition Regulation Supplement (NFS) to clarify NASA's award fee process by incorporating terms used in award fee contracting; guidance relative to final award fee evaluations; release of source selection information; and the calculation of the provisional award fee payment percentage in NASA end-item award fee contracts.

DATES: *Effective:* [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Mr. William Roets, telephone 202-358-4483.

SUPPLEMENTARY INFORMATION:

I. Background

NASA published a proposed rule in the Federal Register at 81 FR 23667 on April 22, 2016, to revise NFS 1816.4 and 1852.216-77 to

clarify NASA's award fee evaluation and payment processes. One public comment was received in response to the proposed rule.

II. Discussion and Analysis

NASA reviewed the public comment in the development of the final rule. A discussion of the comment and the changes made to the rule as a result of this comment is provided, as follows:

A. Changes

No change was made in the final rule in response to the public comment received.

B. Analysis of Public Comment

Comment: Respondent stated that they do not support this rule.

Response: The respondent did not identify any specific areas of concern. Accordingly, this rule provides needed clarification to NASA's award fee processes to enhance the efficient administration of award fee incentives.

III. 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 is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

A final regulatory flexibility analysis has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, and is summarized as follows:

NASA is amending the NFS to clarify award fee process by incorporating terms used in award fee contracting; guidance relative to final award fee evaluations; release of source selection information; and the calculation of the provisional award fee payment percentage in NASA end-item award fee contracts.

No changes were made to the proposed rule in developing the final rule. No comments from small entities were submitted in reference to the Regulatory Flexibility Act request in the proposed rule. Therefore, the proposed rule has been adopted as final.

NASA does not expect this final rule 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 the guidance largely clarifies aspects relative to the award fee evaluation and payment process resulting in a more consistent use and administration of award fees within NASA providing all entities both large and small a positive benefit. An analysis of data in the Federal Procurement Data System (FPDS) revealed that award fee contracts are primarily awarded to large businesses with large dollar contracts. An analysis of FPDS data over the past three years (FY2013 through FY2015) showed an average of 157 award fee contracts were awarded at NASA per year, of which 33 (approximately 20%) were awarded to small businesses. Thus, the application of the award fee revisions contained in this rule do not apply to a substantial number of small entities.

The rule imposes no reporting, recordkeeping, or other information collection requirements. There are no significant alternatives that could further minimize the already minimal impact on businesses, small or large.

V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 1816 and 1852

Government procurement.

Manuel Quinones,

NASA FAR Supplement Manager.

Accordingly, 48 CFR parts 1816 and 1852 are amended as follows:

1. The authority citation for parts 1816 and 1852 continues to read as follows:

Authority: 51 U.S.C. 20113(a) and 48 CFR chapter 1.

PART 1816—TYPES OF CONTRACTS

2. Add section 1816.001 to read as follows:

1816.001 Definitions.

As used in this part—

Earned award fee means the payment of the full amount of an award fee evaluation period's score/rating.

Unearned award fee means the difference between the available award fee pool amount for a given award fee evaluation period less the contractor's earned award fee amount for that same evaluation period.

1816.307 [Amended]

3. Amend section 1816.307 by removing paragraph (g) (1).

4. Amend section 1816.307-70 by revising paragraph (f) to read as follows:

1816.307-70 NASA contract clauses.

* * * * *

(f) When FAR clause 52.216-7, Allowable Cost and Payment, is included in the contract, as prescribed at FAR 16.307(a), the contracting officer should include the clause at 1852.216-89, Assignment and Release Forms.

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5. Amend section 1816.405-273 by revising paragraphs (b) and (c) to read as follows:

1816.405-273 Award fee evaluations.

* * * * *

(b) *End item contracts.* On contracts, such as those for end item deliverables, where the true quality of contractor performance cannot be measured until the end of the contract, only the last evaluation is final. At that point, the total contract award fee pool is available, and the contractor's total performance is evaluated against the award fee plan to determine total earned award fee. In addition to the final evaluation, interim evaluations are done to monitor performance prior to contract completion, provide feedback to the contractor on the Government's assessment of the quality of its performance, and establish the basis for making interim award fee payments (see 1816.405-276(a)). These interim evaluations and associated interim award fee payments are superseded by the fee determination made in the final evaluation at contract

completion. However, if the final award fee adjectival rating is higher or lower than the average adjectival rating of all the interim award fee periods, or if the final award fee score is eight base percentage points higher or lower than the average award fee score of all interim award fee periods (e.g. 80% to 88%), then the Head of the Contracting Activity (HCA) or the Deputy Chief Acquisition Officer (if the HCA is the Fee Determination Official) shall review and concur in the final award fee determination. 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 fee payments.

(c) *Control of evaluations.* Interim and final evaluations may be used to provide past performance information during the source selection process in future acquisitions and should be marked and controlled as "Source Selection Information - see FAR 3.104". See FAR 42.1503(h) regarding the requirements for releasing Source Selection Information included in the Contractor Performance Assessment Reporting System (CPARS).

6. Amend section 1816.405-276 by revising the last sentence of paragraph (b) to read as follows:

1816.405-276 Award fee payments and limitations.

* * * * *

(b) * * * For an end item contract, the total amount of provisional payments in a period is limited to a percentage not to exceed 80 percent of the prior interim period's evaluation score, except for the first evaluation period which is limited to 80 percent of the available award fee for that evaluation period.

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PART 1852—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

7. Amend section 1852.216-77 by revising the date of the clause and paragraph (c) (3) to read as follows:

1852.216-77 Award fee for end item contracts.

* * * * *

AWARD FEE FOR END ITEM CONTRACTS (**[Insert Abbreviated Month and Year 30 Days After Date of Publication in the Federal Register]**)

* * * * *

(c) * * *

(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]), except for the first evaluation period which is limited to [insert a percent not to exceed 80 percent] of the available award fee for that evaluation period. 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).

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8. Amend section 1852.216-89 by revising the date of the clause and the introductory text of the clause to read as follows:

1852.216-89 Assignment and release forms.

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**ASSIGNMENT AND RELEASE FORMS ([Insert Abbreviated Month and Year
30 Days After Date of Publication in the Federal Register])**

The Contractor shall use the following forms to fulfill the assignment and release requirements of FAR clause **52.216-7**,

Allowable Cost and Payment:

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