



## **ENVIRONMENTAL PROTECTION AGENCY**

### **48 CFR Parts 1516 and 1552**

**[EPA-HQ-OARM-2018-0610; FRL-9991-08-OARM]**

### **Environmental Protection Agency Acquisition Regulation (EPAAR); Award Term**

#### **Incentive**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is issuing a proposed rule to amend EPA Acquisition Regulation (EPAAR) award term incentive policy, procedures, and clauses to remove ambiguity and provide clarity with respect to what is required for a contractor to successfully earn award terms.

**DATES:** Comments must be received on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-HQ-OARM-2018-0610, at <https://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. The EPA may publish any comment received to its public docket. Do not submit any information electronically that you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (i.e. on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public

comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit: <http://www2.epa.gov/dockets/commenting-epa-dockets>.

**FOR FURTHER INFORMATION CONTACT:** Shakethia Allen, Policy, Training, and Oversight Division, Acquisition Policy and Training Service Center (3802R), Environmental Protection Agency, 1200 Pennsylvania Ave., NW, Washington, DC 20460; telephone number: 202-564-5157; email address: [allen.shakethia@epa.gov](mailto:allen.shakethia@epa.gov).

## **SUPPLEMENTARY INFORMATION:**

### **I. General Information**

1. *Submitting Classified Business Information.* Only submit CBI to the EPA by mail. Do not submit CBI to the EPA website, <https://www.regulations.gov>, or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI, and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, Federal Register date and page number).
- Follow directions -The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) Part or section number.

- Explain why you agree or disagree, suggest alternatives, and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

## **II. Background**

Award terms are a form of incentive contract, offering additional periods of performance without a new competition, rather than additional profit or fee as a reward for achieving prescribed performance measures. Award term incentives were developed in 1997 by the Department of the Air Force and are not described in the Federal Acquisition Regulation (FAR). In order to assist EPA contracting officers seeking to use award term incentives, it is necessary to amend the EPAAR to provide clear language of the requirements needed to successfully award and earn award terms.

## **III. Proposed Rule**

The proposed rule amends EPAAR part 1516—*Types of Contracts*, Subpart 1516.4—*Incentive Contracts*, 1516.406 *Contract Clauses*, 1516.401-70 *Award Term Incentives*, and 1516.401-270 *Definition*. The proposed rule also amends EPAAR part 1552—*Solicitation Provisions and Contract Clauses*, 1552.216-78 —*Award Term Incentive Plan*.

1. EPAAR § 1516.406 establishes the prescription for use of related EPAAR clauses, including

1552.216-77, *Award Term Incentive*, 1552.216-78, *Award Term Incentive Plan*, and 1552.216-79, *Award Term Availability of Funds*, in solicitations and contracts when award term incentives are contemplated.

2. EPAAR § 1516.401-270 defines *Acceptable Quality Level (AQL)* as the minimum percent of deliverables which are compliant with a given performance standard that would permit a contractor to become eligible for an award term incentive.

3. EPAAR § 1516.401-70 sets forth the overall framework governing award term incentives including the prescribed performance measures; i.e., the acceptable quality levels (AQL) which must be achieved by a contractor to become eligible for an award term.

4. EPAAR § 1552.216-78 sets forth the performance criteria and evaluation periods which will serve as the basis for the EPA's decision on whether the contractor is eligible for an award term incentive.

#### **IV. Statutory and Executive Order Reviews**

##### **A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review**

This action is not a "significant regulatory action" under the terms of Executive Order (EO) 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under the EO.

##### **B. Paperwork Reduction Act**

This action does not impose an information collection burden, as defined at 5 CFR 1320.3(b), under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

##### **C. Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 *et seq.***

The Regulatory Flexibility Act generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the

Administrative Procedure Act or any other statute; unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions. For purposes of assessing the impact of this final rule on small entities, “small entity” is defined as: (1) a small business that meets the definition of a small business found in the Small Business Act and codified at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. After considering the economic impacts of this rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. An agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule. Award term incentives will be available equally to large and small entities, so this rule will not have a significant economic impact on small entities. Also, this rule seeks to only clarify existing regulations. We continue to be interested in the potential impacts of the rule on small entities and welcome comments on issues related to such impacts.

#### **D. Unfunded Mandates Reform Act**

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA, Public Law 104-4), establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, Local, and Tribal governments and the private sector. This rule contains no Federal mandates (under the regulatory provisions of the Title II of the UMRA) for State, Local, and Tribal governments or the private sector. The rule imposes no enforceable duty on any State, Local or Tribal governments or the private sector. Thus, the rule is not subject to the requirements of sections

202 and 205 of the UMRA.

**E. Executive Order 13132: Federalism**

Executive Order 13132, entitled “Federalism” (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure “meaningful and timely input by State and Local officials in the development of regulatory policies that have federalism implications.” “Policies that have federalism implications” is defined in the Executive Order to include regulations that have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.” This rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government as specified in Executive Order 13132.

**F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments**

Executive Order 13175, entitled “Consultation and Coordination with Indian Tribal Governments” (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure “meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.” This rule does not have tribal implications as specified in Executive Order 13175.

**G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks**

Executive Order 13045, entitled “Protection of Children from Environmental Health and Safety Risks” (62 FR 19885, April 23, 1997), applies to any rule that: (1) is determined to be economically significant as defined under EO 12886, and (2) concerns an environmental health

or safety risk that may have a proportionate effect on children. This rule is not subject to EO 13045 because it is not an economically significant rule as defined by Executive Order 12866, and because it does not involve decisions on environment health or safety risks.

**H. Executive Order 13211: Actions that Significantly Affect Energy Supply, Distribution, or Use**

This action is not subject to Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use” (66 FR 28335 (May 22, 2001)), because it is not a significant regulatory action under Executive Order 12866.

**I. National Technology Transfer and Advancement Act of 1995 (NTTAA)**

Section 12(d) (15 U.S.C. § 272 note) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law No. 104-113, directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This action does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

**J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations**

Executive Order 12898 (59 FR 7629 (February 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by

identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States. EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment in the general public.

#### **K. Congressional Review Act**

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a major rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 804(2) defines a "major rule" as any rule that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in (1) an annual effect on the economy of \$100,000,000 or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. EPA is not required to submit a rule report regarding this action under section 801 as this is not a major rule by definition.

**List of Subjects in 48 CFR parts 1516 and 1552:** Government procurement, Reporting and recordkeeping requirements.

Dated: February 26, 2019.

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Kimberly Patrick,

Director, Office of Acquisition Management.

For the reasons stated in the preamble, 48 CFR parts 1516 and 1552 are proposed to be amended as set forth below:

## **PART 1516— TYPES OF CONTRACTS**

1. The authority citation for part 1516 continues to read as follows:

**Authority:** 5 U.S.C. 301 and 41 U.S.C. 418b.

2. Amend section 1516.401-70 by revising paragraph (b) to read as follows:

### **1516.401-70 Award term incentives.**

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(b) Award term incentives are designed to motivate contractors to provide superior performance. Superior performance must be defined in the Award Term Incentive Plan. Accordingly, the prescribed performance measures, i.e., acceptable quality levels (AQL), which must be achieved by a contractor to become eligible for an award term will be in excess of the AQLs necessary for Government acceptance of contract deliverables, unless rationale is documented that such service is beyond the contractor's capability or control.

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3. Revise section 1516.401-270 to read as follows:

### **1516.401-270 Definition.**

Acceptable quality level (AQL) as used in this subpart means the minimum percent of deliverables which are compliant with a given performance standard that would permit a contractor to become eligible for an award term incentive. The performance necessary for eligibility for the award term incentive must be in excess of that necessary for the Government acceptance of contract deliverables. The AQLs associated with the award term incentive shall exceed the AQLs associated with the acceptance of contract deliverables. For example, under contract X, acceptable performance is 75 percent of reports submitted to the Government within

five days. However, to be eligible for an award term incentive, 85 percent of reports must be submitted to the Government within five days.

4. Amend section 1516.406 by revising paragraphs (c) and (d) to read as follows:

**1516.406 Contract clauses.**

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(c) The Contracting Officer shall insert the clauses at 1552.216-77, Award Term Incentive, 1552.216-78, Award Term Incentive Plan, and 1552.216-79, Award Term Availability of Funds, in solicitations and contracts when award term incentives are contemplated. The clauses at 1552.216-77 and 1552.216-78 may be used on substantially the same-as basis.

(d) If the Contracting Officer wishes to use the ratings set forth in the Department of Defense Contractor Performance Assessment Reporting System on the contract at hand as the basis for contractor eligibility for an award term incentive, the Contracting Officer shall insert the clause at 1552.216-78.

**PART 1552—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

5. The authority citation for part 1552 continues to read as follows:

**Authority:** 5 U.S.C. 301 and 41 U.S.C. 418b.

6. Amend section 1552.216-78 by revising paragraph (e) to read as follows:

**1552.216-78 Award term incentive plan.**

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(e) [If the contract will contain a quality assurance surveillance plan (QASP), reference the QASP, e.g., attachment 2. Typically, the performance standards and AQLs will be defined in the QASP]

(End of clause)

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