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NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1823 and 1852

RIN 2700-AE16

NASA FAR Supplement: Safety and Health Measures and Mishap Reporting

AGENCY: National Aeronautics and Space Administration.

ACTION: Proposed rule.

SUMMARY: NASA proposes to amend the NASA FAR Supplement (NFS) to revise a current clause related to safety and health measures and mishaps reporting by narrowing the application of the clause, resulting in a decrease in the reporting burden on contractors while reinforcing the measures contractors at NASA facilities must take to protect the safety of their workers, NASA employees, the public, and high value assets. The revision to this proposed rule is part of NASA's retrospective plan under Executive Order (EO) 13563 completed in August 2011.

DATES: Interested parties should submit written comments to the address shown below on or before **[Insert 60 days after publication in the Federal Register]** to be considered in the formation of the final rule.

ADDRESSES: Interested parties may submit comments, identified by RIN number 2700-AE16 via the Federal eRulemaking Portal:

<http://www.regulations.gov>. Follow the instructions for submitting comments. Comments may also be submitted to Marilyn E. Chambers via email at marilyn.chambers@nasa.gov .

NASA's full plan can be accessed on the Agency's open government Web site at <http://www.nasa.gov/open/>.

FOR FURTHER INFORMATION CONTACT: Marilyn E. Chambers, NASA, Office of Procurement, via email at marilyn.chambers@nasa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

The NFS clause at 1852.223-70, Safety and Health, is currently used when the-

- Contractor's work will be conducted completely or partly on premises owned or controlled by the Government;
- Work includes construction, alteration, or repair of facilities in excess of the simplified acquisition threshold;
- Work, regardless of place of performance, involves hazards that could endanger the public, astronauts and pilots, the NASA workforce (including contractor employees working on NASA contracts), or high value equipment or property, and the hazards are not adequately addressed by Occupational

Safety and Health Administration (OSHA) or Department of Transportation (DOT) regulations (if applicable); or

- Assessed risk and consequences of a failure to properly manage and control the hazard(s) warrants use of the clause.

The clause may be excluded, regardless of place of performance, when the contracting officer, with the approval of the installation official(s) responsible for matters of safety and occupational health, determines that the application of OSHA and DOT regulations constitutes adequate safety and occupational health protection. Similar requirements apply to the flow down of the clause to subcontracts.

In addition to requiring the contractor to report certain mishaps or close calls, the clause currently requires the contractor to investigate these incidents and provide a report to the contracting officer both reporting on the incident and corrective action taken in response to the incident. The clause also contains reporting requirements related to the contract safety and health plan which is required under certain NASA contracts as set forth in 1823.7001(c).

While the clause requires the contractor to take all reasonable safety and occupational health measures in performing this contract, it does not specify what these measures should include. Additionally, while the clause provides for remedies

available to the Government in the event of the contractor's failure or refusal to comply with safety and health measures and to institute prompt corrective action, it does not specify applicable remedies.

This proposed rule addresses both reducing the burden on contractors under the current clause, being more specific on the safety and health measures the contractor must take when working on a Federal facility, and the remedies the Government may take for failure to maintain an effective safety and health program.

The clause title is revised from "Safety and Health" to "Safety and Health Measures and Mishap Reporting" to emphasize the purpose of the clause, which is to ensure contractors working at Federal facilities are taking appropriate measures to protect the safety of their workers, other individuals working at the facility, and the public. The new title will also distinguish this clause from a similarly entitled provision at 1852.223.73, Safety and Health Plans, which has caused some confusion in the past. To reduce the burden on contractors, the clause prescription is revised to require it in solicitations and contracts above the simplified action threshold and to require it only for contracts involving performance at a Federal facility. The applicability to subcontracts is also revised to apply to subcontracts above the simplified action threshold where performance is at a Federal facility.

II. Discussion and Analysis

NASA is proposing to amend NFS 1823.7001(a) to revise the title of the clause at 1852.223-70 from Safety and Health to Safety and Health Measures and Mishap Reporting. The clause prescription will be revised to apply only to solicitations and contracts above the simplified action threshold and to require it only for contracts involving performance at a Federal facility. The flow down to subcontracts is also revised to apply to subcontracts above the simplified action threshold where performance is at a Federal facility.

Paragraph (b) of the clause is expanded to list safety and occupational health measures a contractor shall take in performing the contract. The contractor shall maintain an effective worksite safety and health program with organized and systematic methods to—

1. Comply with Federal, State, and local safety and occupational health laws and with the safety and occupational health requirements of this contract;
 2. Describe and assign the responsibilities of managers, supervisors, and employees;
 3. Inspect regularly for and identify, evaluate, prevent, and control hazards;
 4. Orient and train employees to eliminate or avoid hazards;
- and

5. Periodically review the program's effectiveness.

These measures are recognized by the Office of Safety and Health Administration and industry as standards for finding hazards and developing a workplace plan for prevention and control of those hazards. Additionally, paragraph (b) is revised to add wording concerning authorized Government representatives rights to have access to and to examine the work site and related records under the contract in order to determine the adequacy of the Contractor's safety and occupational health measures.

Paragraph (d) is revised to remove text describing various accidents, incidents, or exposures which constitute a mishap or close call in favor of a reference to NASA Procedural Requirement (NPR) 8621.1, Mishap and Close Call Reporting, Investigating, and Recordkeeping, which contains a listing and description of the types of mishaps (types A, B, C, or D) or close calls the contractor must report to the contracting officer. NPR 8621.1 can be accessed at

<http://nodis3.gsfc.nasa.gov/displayDir.cfm?t=NPR&c=8621&s=1B>.

To reduce the burden on contractors, paragraph (e) is revised to eliminate a requirement for the contractor to investigate all work-related incidents, accidents, and close calls, to determine their causes and furnish a report to the contracting officer and replace with a requirement to cooperate with any Government-authorized investigation by providing access to their employees

and relevant information in the possession of the contractor regarding the mishap or close call.

Paragraph (f) is revised to eliminate the requirement for the contracting officer to notify the contractor "in writing" of any noncompliance. Emergency circumstances may necessitate that this communication be done orally. Additionally, the term "this clause" is removed and replaced with "the health and safety requirements of this contract" to include any health or safety requirements contained elsewhere in the schedule. To reduce the burden on contractors, the requirement to report corrective action to the contracting officer is removed. In addition to a stop work order currently addressed in section (2) of paragraph (f), the remedies available to the Government when the contractor fails or refuses to take action to correct a serious or imminent danger to safety and health are revised to include requiring the contractor to remove and replace any contractor or subcontractor personnel performing under this contract who fail to comply with or violate applicable requirements of the clause; and that the contractor's failure to comply with the requirements of this clause may be included in appropriate databases of past performance and may be considered in any responsibility determination or evaluation of past performance.

The clause flow down requirements in paragraphs (g) and (h) are simplified and reduced to apply only to subcontracts above

the simplified acquisition threshold when the work will be conducted completely or partly on Federally-controlled facilities.

Paragraph (i) is deleted. The requirement to provide Government representatives access to and the right to examine the work site in order to determine the adequacy of the contractor's safety and occupational health measures under this clause has been moved to paragraph (e).

Paragraph (j) is deleted. Safety and health plan requirements are addressed elsewhere in the NFS.

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

IV. Regulatory Flexibility Act

NASA does not expect this proposed 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 changes in the proposed rule reduce the burden on contractors. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

This proposed revision to NFS clause 1852.223-70 is undertaken to reduce burden on contractors by (1) changing the applicability of the NFS clause to only contracts over the simplified acquisition threshold and to only those performed on Federal facilities, and (2) by removing reporting requirements relating to mishap investigations and health and safety plans.

The objective of this proposed rule is to (1) set forth safety program requirements for contractors performing on a Federal facility and (2) to protect the public, Agency and contractor workforce and assets from harm and manage the risk to which they are exposed by preventing the recurrence of close calls and mishaps. NASA's constant attention to safety is the cornerstone upon which we build mission success. NASA is committed to protecting the safety and health of the public, team members, and those assets that the Nation entrusts to NASA. It is NASA policy to report and track to resolution all corrective actions resulting from investigations of mishaps, incidents,

nonconformances, anomalies, and safety and mission assurance audits and to distribute and use lessons learned to improve activities and operations. This is a vital component of NASA's safety program. The legal basis for this proposed rule is Executive Order 13563, Improving Regulation and Regulatory Review, as part of its retrospective analysis of existing rules.

This proposed rule will apply to small entities performing contracts with an estimated values over the simplified acquisition threshold on Federal Facilities. The System for Award Management (SAM) data shows approximately 154 firms receive contracts to which NFS clause 1852.223-70 will apply. Of those 154 firms, 84 were identified as small businesses.

Two reporting requirements are contained in the proposed clause. One is to notify the contracting officer of mishaps (types A, B, C, or D) or close calls as described in NASA Procedural Requirement (NPR) 8621.1, Mishap and Close Call Reporting, Investigating, and Recordkeeping. The other is to provide a quarterly report on the number of mishaps, specifying lost time frequency rate, number of lost time injuries, exposure, and accident/incident dollar losses. This information is collected so that NASA can analyze mishap data to look for mishap trends and determine ways to improve the safety of its workforce and high-value assets and reduce the risk to its missions. This mishap information would be initially collected

a company manager or supervisor. It may be reviewed by the firm's official responsible for safety, usually an occupational health and safety. Lost time frequency rate, number of lost time injuries, exposure, and accident/incident dollar losses reports would be prepared by a safety official.

The proposed rule does not duplicate, overlap, or conflict with any other Federal rules.

Proposed changes to NFS clause 1852.223-70 were designed to reduce burden on contractors by reducing the applicability of the clause and reducing the paperwork burden. The information requested in the clause is essential to the NASA health and safety program. Further and differing compliance or reporting requirements or timetables for small entities are not feasible. Having an effective safety program is crucial to all businesses as it reduces injuries, lost time, property damage and creates a more safe and effective workplace for employees.

NASA invites comments from small business concerns and other interested parties on the expected impact of this proposed rule on small entities concerning the existing regulations in subparts affected by this proposed rule consistent with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 in correspondence.

V. Paperwork Reduction Act

The proposed rule contains information collection requirements that require the approval of the Office of Management and Budget (OMB) under the Paperwork Reduction Act (44 U.S.C. chapter 35). This information collection is in use without an OMB Control Number. Accordingly, NASA has submitted a request to OMB for approval of an information collection concerning Safety and Health Measures and Mishap Reporting that the Agency has begun.

A. Public reporting burden for this collection of information is estimated to be approximately 5 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. It is estimated that approximately 154 respondents will provide a total of 308 notifications of Type A, B, C, or D Mishap, or Close Call notifications (approximately 2 notifications per respondent per year). Additionally, each of 154 respondents will submit one quarterly report four times a year. Thus, responses from respondents are estimated to include 2 mishap notifications and 4 quarterly reports for a total of 6 responses annually per respondent. Based on these figures, the combined total number of responses per year for all respondents will be 308 mishap reports and 616 quarterly reports for a total of 924 total responses for all respondents. It is estimated to take a respondent approximately 4 hours to gather the required

information and notify the contracting officer of a Type A, B, C, or D Mishap or Close Call. It is estimated to take respondents approximately 5 hours to prepare and submit each quarterly report specifying lost-time frequency rate, number of lost-time injuries, exposure, and accident/incident dollar losses. The annual reporting burden is estimated as follows:

Estimated Number of Respondents: 154

Responses per respondent: 6

Total annual responses: 924

Estimated Hours per Response: 4.67

Estimated Total Annual Burden Hours: 4,312

B. Request for Comments Regarding Paperwork Burden.

Public comments are particularly invited on: whether this collection of information is necessary for the proper performance of functions of the NFS, and will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

List of Subjects in 48 CFR 1823 and 1852

Government procurement.

Cynthia Boots

Alternate Federal Register Liaison.

Accordingly, 48 CFR parts 1823 and 1852 are proposed to be amended as follows:

PART 1823—ENVIRONMENT, ENERGY AND WATER EFFICIENCY, RENEWABLE ENERGY TECHNOLOGIES, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

1. The authority citation for part 1823 is revised to read as follows:

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

2. Revise section 1823.7001 to read as follows:

1823.7001 NASA solicitation provisions and contract clauses.

(a) Insert the clause at 1852.223-70, Safety and Health Measures and Mishap Reporting, in solicitations and contracts above the simplified acquisition threshold when the work will be conducted completely or partly on federally-controlled facilities.

(b) The clause prescribed in paragraph (a) of this section may be excluded, with the approval of the installation official(s) responsible for matters of safety and occupational health.

(c) The contracting officer shall insert the provision at 1852.223-73, Safety and Health Plan, in solicitations containing

the clause at 1852.223-70. This provision may be modified to identify specific information that is to be included in the plan. After receiving the concurrence of the center safety and occupational health official(s), the contracting officer shall include the plan in any resulting contract. Insert the provision with its Alternate I, in Invitations for Bid containing the clause at 1852.223-70.

(d) (1) The contracting officer shall insert the clause at 1852.223-75, Major Breach of Safety or Security, in all solicitations and contracts with estimated values of \$500,000 or more, unless waived at a level above the contracting officer with the concurrence of the project manager and the installation official(s) responsible for matters of security, export control, safety, and occupational health.

(2) Insert the clause with its Alternate I if -

(i) The solicitation or contract is with an educational or other nonprofit institution and contains the termination clause at FAR 52.249-5; or

(ii) The solicitation or contract is for commercial items and contains the clause at FAR 52.212-4.

(3) For contracts with estimated values below \$500,000, use of the clause is optional.

(e) For all solicitations and contracts exceeding the micro-purchase threshold that do not include the clause at 1852.223-

70, Safety and Health, the contracting officer shall insert the clause at 1852.223-72, Safety and Health (Short Form).

PART 1852—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

3. The authority citation for part 1852 continues to read as follows:

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

4. Revise section 1852.223-70 to read as follows:

1852.223-70 Safety and health measures and mishap reporting.

As prescribed in 1823.7004(1)(a), insert the following clause:

Safety and Health Measures and Mishap Reporting

(XX/XX)

(a) Safety is the freedom from those conditions that can cause death, injury, occupational illness, damage to or loss of equipment or property, or damage to the environment. NASA's safety priority is to protect: (1) The public, (2) astronauts and pilots, (3) the NASA workforce (including contractor employees working on NASA contracts), and (4) high-value equipment and property.

(b) The Contractor shall take all reasonable safety and occupational health measures in performing this contract. The Contractor shall maintain an effective worksite safety and health program with organized and systematic methods to—

(1) Comply with Federal, State, and local safety and occupational health laws and with the safety and occupational health requirements of this contract;

(2) Describe and assign the responsibilities of managers, supervisors, and employees;

(3) Inspect regularly for and identify, evaluate, prevent, and control hazards;

(4) Orient and train employees to eliminate or avoid hazards; and

(5) Periodically review the program's effectiveness.

Authorized Government representatives shall have access to and the right to examine the work site and related records under this contract in order to determine the adequacy of the Contractor's safety and occupational health measures.

(c) The Contractor shall take, or cause to be taken, any other safety, and occupational health measures the Contracting Officer may reasonably direct. To the extent that the Contractor may be entitled to an equitable adjustment for those measures under the terms and conditions of this contract, the equitable adjustment shall be determined pursuant to the procedures of the changes clause of this contract; provided, that no adjustment shall be made under this Safety and Health clause for any change for which an equitable adjustment is expressly provided under any other clause of the contract.

(d) The Contractor shall immediately notify the Contracting Officer or a designee of any Type A, B, C, or D Mishap, or close calls as defined in NASA Procedural Requirement (NPR) 8621.1, Mishap and Close Call Reporting, Investigating, and Recordkeeping. In addition, service contractors (excluding construction contracts) shall provide quarterly reports specifying lost-time frequency rate, number of lost-time injuries, exposure, and accident/incident dollar losses.

(e) The Contractor shall cooperate with any Government-authorized investigation of Type A, B, C, or D Mishaps, or Close Calls reported pursuant to paragraph (d) of this clause by providing access to employees; and relevant information in the possession of the Contractor regarding the mishap or close call.

(f) (1) The Contracting Officer may notify the Contractor in writing of any noncompliance with the health and safety requirements of this contract and specify corrective actions to be taken. When the Contracting Officer becomes aware of noncompliance that may pose a serious or imminent danger to safety and health of the public, astronauts and pilots, the NASA workforce (including contractor employees working on NASA contracts), or high value mission critical equipment or property, the Contracting Officer shall notify the Contractor orally, with written confirmation. The Contractor shall promptly take corrective action.

(2) If the Contractor fails or refuses to institute prompt corrective action, the Contracting Officer may invoke the stop-work order clause in this contract. In addition to other remedies available to the Government—

(i) The Contractor shall remove and replace any Contractor or subcontractor personnel performing under this contract who fail to comply with or violate applicable requirements of this clause; and

(ii) The Contractor's failure to comply with the requirements of this clause may be included in the appropriate databases of past performance and may be considered in any responsibility determination or evaluation of past performance.

(g) The Contractor shall insert the substance of this clause, including this paragraph (g) in all subcontracts above the simplified acquisition threshold when the work will be conducted completely or partly on federally-controlled facilities.

(End of clause)

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