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NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1823, 1846, and 1852

RIN 2700-AE17

NASA Federal Acquisition Regulation Supplement: Drug- and Alcohol-Free Workforce and Mission Critical Systems Personnel Reliability Program (NFS Case 2015-N002)

AGENCY: National Aeronautics and Space Administration.

ACTION: Final rule.

SUMMARY: NASA is issuing a final rule amending the NASA FAR Supplement (NFS) to remove requirements related to the discontinued Space Flight Mission Critical Systems Personnel Reliability Program and to revise requirements related to contractor drug and alcohol testing.

DATES: Effective [Insert date 30 days after publication in the Federal Register.]

FOR FURTHER INFORMATION CONTACT: Marilyn Chambers, NASA, Office of Procurement, email: Marilyn.Chambers@nasa.gov, or 202-358-5154.

SUPPLEMENTARY INFORMATION:

I. Background

The revision to this rule is part of NASA's retrospective plan under Executive Order (EO) 13563 completed in August 2011. NASA published a proposed rule in the Federal Register at 80 FR 26519 on May 8, 2015, to amend the NASA FAR Supplement (NFS) to remove 1846.370, NASA contract clauses, and the related clause at 1852.246-70, Mission Critical Space System Personnel Reliability Program. Additionally, Subpart 1823.5, Drug-Free Workplace, and the associated clause at 1852.223-74, Drug- and Alcohol-Free Workforce are amended to make revisions related to the removal of the Mission Critical Space System Personnel Reliability Program and also to clarify and update the clause and its prescription. One respondent submitted public comments on the proposed rule.

II. Discussion and Analysis

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

A. Changes

There is one minor change made in the final rule in response to the public comment received.

B. Analysis of public comment

One respondent submitted five comments.

Comment: The respondent found the policy on the use of a controlled substance to be extremely limited and with additional

monitoring requirements to ensure proper monitoring or assignment to a less critical position during the term of usage.

Response: The policy on the use of a controlled substance has not been changed in this rule. It permits the use of such substances when a doctor prescribes their use or for other uses authorized by law.

Comment: The respondent recommended referencing Appendix C, in addition to Appendices A and B of NASA Procedural Requirements (NPR) 3792.1, NASA's Plan for a Drug Free Workplace, for use as a guide for contractors to use when determining if an employee is in a sensitive position and subject to drug and alcohol testing. Appendix C of the Procedural Requirements provides the most detailed guidance, and should be included in the revised section. Additionally, the respondent stated that contractors should be required to follow the NPR and not use the NPR as guidance only.

Response: NASA agrees the policy should have referenced Appendix C, NASA Guidelines for Determining Testing Designated Positions (TDPs) Subject to Random Drug Testing, of NPR 3792.1. To avoid future errors when the NPR is updated resulting in changes to specific appendices, 1852.223-74 Drug- and alcohol-free workforce, paragraph (b)(2), is revised to generically reference the guidance on designating TDP contained in the NPR rather than referencing a specific appendix. While the guidance

on designating TDP is helpful information for contractors, the NPR is a NASA-internal policy, which applies only to NASA civil servants. Therefore, contractors must make TDP determinations for their employees as part of complying with the requirements set forth in NFS 1852.223-17.

Comment: The respondent recommended that the list of substances tested for be updated a minimum of every six months or as necessary.

Response: The NASA drug testing program in this rule follows the "Mandatory Guidelines for Federal Workplace Drug Testing Programs" published by the Department of Health and Human Services, 73 FR 71858, and the procedures in 49 CFR part 40, "Procedures for Transportation Workplace Drug and Alcohol Testing Programs." These regulations list which substances will be tested for. Changes to these regulations are outside the scope of this rule.

Comment: The respondent recommends a variety of changes to the post-accident drug testing requirements of the rule, including expanding it to when there is any injury or property damage over \$500; requiring the contractor always submit post-accident drug test results and requiring identification of the individual tested to the Government. Additionally, the respondent recommends hair follicle testing in lieu of urine testing.

Response: NASA does not concur with these recommended changes. The requirements for post-accident drug testing in the rule were thoughtfully considered to balance the seriousness of the accident, the contributing factors, the privacy of individuals tested, and the burden to contractors in conducting drug tests. The method of testing, i.e., hair follicle versus urine, is determined by the Department of Health and Human Services and Department of Transportation regulations referenced previously.

Comment: The respondent recommends that the rule include a requirement for a drug-free workplace policy with the following components: A written policy, access to employee assistance, employee education, supervisor training, and drug testing.

Response: This rule sets forth NASA's contractor drug testing policy, based on Department of Health and Human Services and Department of Transportation regulations referenced previously. The other elements listed are required under the Federal Acquisition Regulation clause at 52.223-6, Drug-Free Workplace.

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 rule is not a significant regulatory action under section 6(b) of Executive Order 12866. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

NASA has prepared a Final Regulatory Flexibility Analysis consistent with the Regulatory Flexibility Act (FRFA), 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

This rule is necessary to amend the NASA FAR Supplement (NFS) to remove requirements related to the Mission Critical Space System Personnel Reliability Program, which was discontinued effective April 8, 2014. The NFS contained a clause at 1852.246-70, Mission Critical Space System Personnel Reliability Program, which implemented the requirements of the Program on NASA contracts involving critical positions designated in accordance with 14 CFR 1214.5, Mission Critical Space System Personnel Reliability Program. With the discontinuance of the Program, the clause is no longer necessary and is removed.

Removal of the NFS clause at 1852.246-70 necessitated changes to the prescription at NFS 1823.570-2, Contract clause and to the clause at 1852.223-74, Drug- and Alcohol-Free Workforce. The NFS clause at 1852.223-74 directed the inclusion of the Drug-

and Alcohol-Free Workforce clause at 1852.223-74 in all solicitations and contracts containing the clause at 1852.246-70, Mission Critical Space Systems Personnel Reliability Program. Because NASA's contractor drug and alcohol testing requirements are based on the statutory requirements of the Civil Space Employee Testing Act of 1991, Public Law 102-195, sec. 21, 105 Stat. 1616 to 1619, the terms ``mission critical space systems'' and ``mission critical positions/duties,'' used in the Act, and previously used in the Program, were carried over to the drug and alcohol testing clause as a point of reference for defining contract personnel and contract functions which come under the civil space employee testing requirements. Other revisions to correct and clarify the requirements in 1852.223-74, Drug- and Alcohol-Free Workforce, include-

- Moving the guidance on the use of a controlled substance from the definition to a separate paragraph;
- Referencing NASA Procedural Requirements (NPR) 3792.1, NASA's Plan for a Drug Free Workplace, on ``Testing Designated Positions'' (TDPs) for federal employees, as a guide for contractors to use when designating ``sensitive'' positions;
- Updating outdated references to the Mandatory Guidelines for Federal Workplace Drug Testing Programs, published by the Department of Health and Human Services and Department of

Transportation's procedures at 49 CFR part 40 and updating the list of drugs required to be tested in accordance with the Mandatory Guidelines for Federal Workplace Drug Testing Programs; and

- Clarifying that post-accident testing is required when the contractor determines the employee's actions are reasonably suspected of having caused or contributed to an accident resulting in death or personal injury requiring immediate hospitalization or damage to Government or private property estimated to exceed \$20,000 and that the contracting officer may request the results of this post-accident testing.

The rule does not change the application of the clause at 1852.223-74, Drug- and Alcohol-Free Workforce. This proposed rule imposes no new reporting requirements.

This rule does not duplicate, overlap, or conflict with any other Federal rules. No alternatives were identified that would meet the objectives of the rule. Excluding small business concerns that may be subject to the rule would not be in the best interest of the small business concerns or the Government, because drug and alcohol testing of contractors performing functions related to mission critical space systems is statutorily mandated and is necessary in order to protect human life and the nation's civil space assets.

V. Paperwork Reduction Act

The final rule does not contain 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 1823, 1846, and 1852

Government procurement.

Manuel Quinones,

Federal Register Liaison.

Accordingly, 48 CFR parts 1823, 1846, and 1852 are 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. 20113(a) and 48 CFR chapter 1.

1823.570-1

2. Section 1823.570-1 is revised to read as follows:

1823.570-1 Definitions.

Employee in a sensitive position means a contractor or subcontractor employee who has been granted access to classified

information; a contractor or subcontractor employee in other positions that the contractor or subcontractor determines could reasonably be expected to affect safety, security, National security, or functions other than the foregoing requiring a high degree of trust and confidence; and includes any employee performing in a position designated ``mission critical'' or performing mission-critical duties. The term also includes any applicant who is tentatively selected for a position described in this paragraph.

Mission Critical Space Systems means the collection of all space-based and ground-based systems used to conduct space missions or support activity in space, including, but not limited to, the crewed space system, space-based communication and navigation systems, launch systems, and mission/launch control.

Mission Critical Positions/Duties means positions or duties which, if performed in a faulty, negligent, or malicious manner, could jeopardize mission critical space systems and/or delay a mission.

Use, in violation of applicable law or Federal regulation, of alcohol includes having, while on duty or during a preemployment interview, an alcohol concentration of 0.04 percent by weight or more in the blood, as measured by chemical test of the individual's breath or blood. An individual's refusal to submit

to such test is presumptive evidence of use, in violation of applicable law or Federal regulation, of alcohol.

3. Section 1823.570-2 is revised to read as follows:

1823.570-2 Contract clause.

The contracting officer shall insert the clause at 1852.223-74, Drug- and Alcohol-Free Workforce, in all solicitations and contracts exceeding \$5 million in which work is performed by an employee in a sensitive position. However, the contracting officer shall not insert the clause at 1852.223-74 in solicitations and contracts for commercial items.

PART 1846—QUALITY ASSURANCE

4. The authority citation for part 1846 is revised to read as follows:

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

5. Section 1846.370 is revised to read as follows:

1846.370 NASA contract clauses

The contracting officer shall insert the clause at 1852.246-73, Human Space Flight Item, in solicitations and contracts for human space flight hardware and flight-related equipment if the highest available quality standards are necessary to ensure astronaut safety.

PART 1852—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

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

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

7. Amend section 1852.223-74 by revising the date of the clause and paragraphs (a) and (b) to read as follows:

1852.223-74 Drug- and alcohol-free workforce.

* * * * *

DRUG- and ALCOHOL-FREE WORKFORCE

([INSERT ABBREVIATED MONTH/YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER])

(a) Definitions.

Employee in a sensitive position means a contractor or subcontractor employee who has been granted access to classified information; a contractor or subcontractor employee in other positions that the contractor or subcontractor determines could reasonably be expected to affect safety, security, National security, or functions other than the foregoing requiring a high degree of trust and confidence; and includes any employee performing in a position designated mission critical or performing mission critical duties. The term also includes any applicant who is tentatively selected for a position described in this paragraph.

Mission Critical Space Systems means the collection of all space-based and ground-based systems used to conduct space

missions or support activity in space, including, but not limited to, the crewed space system, space-based communication and navigation systems, launch systems, and mission/launch control.

Mission Critical Positions/Duties means positions or duties which, if performed in a faulty, negligent, or malicious manner, could jeopardize mission critical space systems and/or delay a mission.

(b) (1) The Contractor shall institute and maintain a program for achieving a drug- and alcohol-free workforce. As a minimum, the program shall provide for pre-employment, reasonable suspicion, random, post-accident, and periodic recurring (follow-up) testing of contractor employees in sensitive positions for use, in violation of applicable law or Federal regulation, of alcohol or a controlled substance. The Contractor may establish its testing or rehabilitation program in cooperation with other contractors or organizations.

(2) In determining which positions to designate as ``sensitive,`` the contractor may use the guidelines for determining testing designated positions in NASA Procedural Requirements (NPR) 3792.1, NASA's Plan for a Drug Free Workplace, as a guide for the criteria and in designating ``sensitive`` positions for contractor employees.

(3) This clause neither prohibits nor requires the Contractor to test employees in a foreign country. If the Contractor chooses to conduct such testing, this does not authorize the Contractor to violate foreign law in conducting such testing.

(4) The Contractor's program shall conform to the ``Mandatory Guidelines for Federal Workplace Drug Testing Programs'' published by the Department of Health and Human Services (73 FR 71858) and the procedures in 49 CFR part 40, ``Procedures for Transportation Workplace Drug and Alcohol Testing Programs.''

(i) The Contractor shall test for the following drugs: Marijuana, Cocaine, Amphetamines, Opiates and Phencyclidine (PCP) in accordance with the Mandatory Guidelines for Federal Workplace Drug Testing Programs Mandatory Guidelines, Section 3.1, and 49 CFR 40.85.

(ii) The contractor shall comply with the requirements and procedures for alcohol testing at 49 CFR part 40.

(iii) The use of a controlled substance in accordance with the terms of a valid prescription, or other uses authorized by law shall not be subject to the requirements this clause.

(5) The contractor shall conduct post-accident testing when the contractor determines the employee's actions are reasonably suspected of having caused or contributed to an accident resulting in death or personal injury requiring immediate hospitalization or damage to Government or private property

estimated to exceed \$20,000. Upon request, the Contractor shall provide the results of post-accident testing to the Contracting Officer.

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1852.246-70 [Removed and Reserved]

8. Section 1852.246-70 is removed and reserved.

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