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**Authority:** 15 U.S.C. 2607(a).

Dated: May 4, 2015.

**Maria J. Doa,**

*Director, Chemical Control Division, Office of Pollution Prevention and Toxics.*

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## **NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

### **48 CFR Parts 1823, 1846, and 1852**

**RIN 2700-AE17**

#### **Drug- and Alcohol-Free Workforce and Mission Critical Systems Personnel Reliability Program**

**AGENCY:** National Aeronautics and Space Administration.

**ACTION:** Proposed rule.

**SUMMARY:** NASA is proposing to amend 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:** Interested parties should submit comments to NASA at the address below on or before July 7, 2015 to be considered in formulation of the final rule.

**ADDRESSES:** Interested parties may submit comments, identified by RIN number 2700-AE17 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](mailto:marilyn.chambers@nasa.gov).

#### **SUPPLEMENTARY INFORMATION:**

##### **A. Background**

NASA is proposing to revise the NASA FAR Supplement (NFS) to remove policy at 1846.370 NASA contract clauses, and the related clause at 1852.246-70, Mission Critical Space System Personnel Reliability Program. Additionally, other revisions, partially related to the removal of the Mission Critical Space System Personnel Reliability Program, and to clarify and update the guidance, are proposed to Subpart 1823.5, Drug-Free Workplace, and the associated clause at 1852.223-74, Drug- and Alcohol-Free Workforce.

NASA discontinued the Mission Critical Space System Personnel Reliability Program (the Program)

effective April 8, 2014. As stated at 79 FR 7391, the Agency conducted an analysis of its existing regulations and determined that 14 CFR part 1214, entitled “Space Flight Mission Critical Systems Personnel Reliability Program,” was obsolete and had been replaced by other measures to ensure that contractor employees assigned to mission-critical positions meet established screening requirements. Accordingly, NFS policy implementing the Program is no longer needed. However, the Program was linked to the prescription for the Drug- and Alcohol-Free Workforce clause which directed contracting officers to use the clause in all solicitations and contracts containing the clause at 1852.246-70, “Mission Critical Space Systems Personnel Reliability Program.” With the discontinuance of the Program, the prescription for this clause must be revised.

NASA’s authority to require contractor alcohol and drug testing is derived from the Civil Space Employee Testing Act of 1991, Public Law 102-195, sec. 21, 105 Stat. 1616 to 1619. The Act states the success of the United States civil space program is contingent upon the safe and successful development and deployment of the many varied components of that program and that the greatest efforts must be expended to eliminate the abuse of alcohol and use of illegal drugs. To this end, NASA is authorized to prescribe regulations which require contractors to conduct preemployment, reasonable suspicion, random, and post-accident testing of contractor employees responsible for safety-sensitive, security, or national security functions for use, in violation of applicable law or Federal regulation, of alcohol or a controlled substance. While the NFS drug and alcohol testing requirements are partially tied to the Mission Critical Space System Personnel Reliability Program, rescission of the program does not remove the need for such testing. Furthermore, 14 CFR, subpart 1214.5, contained two key terms and their definitions that will be helpful to Agency contracting officers in determining which contracts should include the drug and alcohol testing requirements. These terms are “mission critical space system” and “mission critical positions/duties.” This rule proposes to add these terms to NFS 1823.570, Drug- and Alcohol-free Workplace, and the associated clause at 1852.223-74, Drug- and Alcohol-Free Workforce.

Two other terms, “employee” and “controlled substance,” are referenced, but not defined at 1823.570-1. These terms are defined at FAR 23.503.

Additionally, NFS 1823.570-1 contained the statement, “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 of 1823.570 to 1823.570-3 and the clause at 1852.223-74.” This exemption of a controlled substance used in accordance with the terms of a valid prescription, or other uses authorized by law was removed from the definitions and added to paragraph (c)(1) of the clause, so that contractors may easily see when use of a controlled substance may be permitted.

A revised section (b)(2) to the clause adds a reference to NASA Procedural Requirements (NPR) 3792.1, NASA’s Plan for a Drug Free Workplace, Appendices A and B on “Testing Designated Positions” (TDPs) for federal employees, as a guide for contractors to use when determining if an employee is in a sensitive position and subject to drug and alcohol testing.

The most recent titles and references for the applicable Federal drug testing programs are added: “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. Additionally, the rule expands the list of drugs required to be tested for from “marijuana and cocaine” to add 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.

Based on the Civil Space Employee Testing Act requirements, the current clause at 1852.223-74 requires contractors to conduct “post-accident” drug and alcohol testing. A new paragraph (5) is added to specify 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. Additionally, the contractor is advised that the contracting officer may request the results of this post-accident testing. The purpose of this is to inform any accident investigation NASA may conduct. The contractor is required to provide only information on whether the testing was conducted and whether results showed any evidence of drug or

alcohol use in violation of the clause. The contractor is not required to provide the names of individuals tested or of individual employee's test results.

#### **B. 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 3(f) of Executive Order 12866. This proposed rule is not a major rule under 5 U.S.C. 804.

#### **C. 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.* However, an Initial Regulatory Flexibility Analysis has been performed and is summarized as follows:

- This proposed rule amends the NFS to remove requirements related to the Mission Critical Space System Personnel Reliability Program which was discontinued effective April 8, 2014. The NFS contains 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.

- NFS 1823.570–2, Contract clause, requires the contracting officer to insert the clause at 1852.223–74, Drug- and Alcohol-Free Workforce, in all solicitations and contracts containing the clause at 1852.246–70, “Mission Critical Space Systems Personnel Reliability Program.” With the discontinuance of the Program, the prescription for this is revised to remove the reference to the Program. However, 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,” previously used in the Program, are 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. While the term “mission critical space systems” is carried over, the definition is revised from “The Space Shuttle and other critical space systems, including Space Station Freedom, designated Expendable Launch Vehicles (ELV's), designated payloads, Shuttle Carrier Aircraft and other designated resources that provide access to space” to “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.” The revised definition deletes obsolete references such as the “Space Station Freedom” and “Shuttle Carrier Aircraft” and characterizes the systems which are critical to NASA's space mission.

- The statement that use of a controlled substance in accordance with a valid prescription or otherwise authorized by law is moved from the definitions to 1823.570–1 to paragraph (c)(1) of the clause, so that contractors may readily see when use of a controlled substance may be permitted.

- A reference is added to NASA Procedural Requirements (NPR) 3792.1, NASA's Plan for a Drug Free Workplace, Appendices A and B on “Testing Designated Positions” (TDPs) for federal employees, as a guide for contractors to use when designating “sensitive” positions. This is intended as a guide and does not change the application of the policy.

- The clause contained an outdated **Federal Register** reference to the Mandatory Guidelines for Federal Workplace Drug Testing Programs, published by the Department of Health and Human Services. The reference to the Department of Transportation's procedures at 49 CFR part 40 is revised to include the appropriate title, Procedures for Transportation Workplace Drug and Alcohol Testing Programs.

- The list of drugs required to be tested is revised from marijuana and cocaine to add 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 part 40 Section 40.85.

- A new paragraph (5) is added to specify 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. Additionally, the contractor is informed that the contracting officer may request the results of this post-accident testing.

The proposed rule will not change the application of the clause. This proposed rule imposes no new reporting requirements. This proposed 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. NASA invites comments from small business concerns and other interested parties on the expected impact of this proposed rule on small entities. NASA will also consider comments from small entities concerning the existing regulations in subparts affected by this proposed rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 and RIN number 2700–AE17 in correspondence.

#### **D. Paperwork Reduction Act**

The proposed 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 1823, 1846, and 1852**

Government procurement.

**Cynthia D. Boots,**

*Alternate Federal Register Liaison.*

Accordingly, 48 CFR parts 1823, 1846, 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 continues to read as follows:

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

### 1823.570–1 [Revised]

- 2. Section 1823.570–1 is revised by:
- a. Removing the introductory paragraph,
  - b. Revising the definition for “Employee in a sensitive position”, and
  - c. Adding the definitions for “Mission Critical Space Systems” and “Mission Critical Positions/Duties” to read as follows:

### Subpart 1823.5—Drug-Free Workplace

\* \* \* \* \*

#### 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.

\* \* \* \* \*

### 1823.570–2 [Revised]

- 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 continues to read as follows:

Authority: U.S.C. 2473(c)(1).

### 1846.370 [Revised]

- 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.

### 1852.223–74 [Revised]

- 7. Section 1852.223–74 is revised by:
- a. Amending paragraph (a),
  - b. Amending paragraphs (b)(2) through (b)(4)
  - c. Adding a new paragraph (b)(5) to read as follows:

#### 1852.223–74 Drug- and alcohol-free workforce.

As prescribed in 1823.570–2, insert the following clause:

#### Drug- and Alcohol-Free Workforce (XX/XXXX)

(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) \* \* \*

(2) In determining which positions to designate as “sensitive,” the contractor may use NASA Procedural Requirements (NPR) 3792.1, NASA’s Plan for a Drug Free Workplace, Appendices A and B on “Testing Designated Positions” (TDPs) for Federal employees, 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]

- 8. Section 1852.246–70 is removed.

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