

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R03–OAR–2007–0511 by one of the following methods:

A. <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.

B. E-mail: fernandez.cristina@epa.gov.

C. Mail: EPA–R03–OAR–2011–0511, Cristina Fernandez, Associate Director, Office of Air Program Planning, Mailcode 3AP30, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. *Hand Delivery:* At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R03–OAR–2007–0511. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through <http://www.regulations.gov> or e-mail. The <http://www.regulations.gov> Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through <http://www.regulations.gov>, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the <http://www.regulations.gov> index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose

disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in <http://www.regulations.gov> or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the West Virginia Department of Environmental Protection, Division of Air Quality, 601 57th Street, SE., Charleston, West Virginia 25304.

FOR FURTHER INFORMATION CONTACT: Martin Kotsch, (215) 814–3335, or by e-mail at kotsch.martin@epa.gov.

SUPPLEMENTARY INFORMATION: For further information, please see the information provided in the direct final action, with the same title, that is located in the Rules and Regulations section of this **Federal Register** publication. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

Dated: August 29, 2011.

W.C. Early,
Acting Regional Administrator, Region III.

[FR Doc. 2011–23262 Filed 9–14–11; 8:45 am]

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NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 1852

RIN 2700–AD70

Award Fee for Service and End-Item Contracts

AGENCY: National Aeronautics and Space Administration.

ACTION: Proposed rule.

SUMMARY: NASA proposes to revise the NASA FAR Supplement (NFS) to update the Award Fee for Service Contracts clause (NFS 1852.216–76) to clarify that the amount of award fee held in reserve, if any, shall not exceed \$100,000 for the contract. The purpose of this reserve is to protect the Government's interests relative to an orderly and timely closeout of the contract. In addition, the Award Fee for End Item Contracts clause (NFS 1852.216–77) is being updated to add

language similar to that contained in the Award Fee for Service Contracts clause to allow the contracting officer to withhold fee payments, at a not to exceed amount of \$100,000 for the contract, to protect the Government's interests relative to an orderly and timely closeout of the contract.

DATES: Interested parties should submit comments to NASA at the address below on or before November 14, 2011 to be considered in formulation of the final rule.

ADDRESSES: Interested parties may submit comments to include any comments relative to the cost associated with complying with this requirement, identified by RIN number 2700–AD70, via the Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments. Comments may also be submitted to Bill Roets, NASA Headquarters, Office of Procurement, Contract Management Division, Washington, DC 20546. Comments may also be submitted by e-mail to william.roets-1@nasa.gov.

FOR FURTHER INFORMATION CONTACT: Bill Roets, NASA, Office of Procurement, Contract Management Division (Suite 5G86); (202) 358–4483; e-mail: william.roets-1@nasa.gov.

SUPPLEMENTARY INFORMATION:

A. Background

In accordance with FAR 16.406(e), the NFS clause 1852.216–76 was created and required for all solicitations and contracts when an award fee contract was contemplated and the contract deliverable was the performance of a service. This clause delineates the award fee evaluation and payment process that will be followed in the contract. NASA is updating this clause to clarify that the amount of withheld award fee shall not exceed \$100,000 for the contract revising paragraph (d) of 1852.216–76. As currently written, the clause specifies a not to exceed of 15 percent of the contract's potential award fee, and on large multi-million dollar procurements, this reserve could total millions of dollars which would be excessive for the intended purpose of this reserve. By capping this reserve at \$100,000, NASA will set the appropriate maximum dollar amount for this potential reserve and will align this clause with similar language in FAR clauses 52.216–8, Fixed-Fee, and 52.216–10, Incentive Fee.

Similar language relative to withholding a reserve amount of fee, not to exceed \$100,000, to protect the Government's interests relative to an orderly and timely closeout of the contract, is also being added to the

Award Fee for End Items clause (NFS 1852.216–77).

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 major rule under 5 U.S.C. 804.

C. Regulatory Flexibility Act

NASA certifies that this proposed rule will not 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 it merely updates, for clarification purposes, the maximum amount of award fee that can be withheld on a contract which will provide a benefit to all entities both large and small. In addition, award fee contracts are largely the province of large businesses with large dollar contracts and the changes promulgated in this proposed rule do not directly affect the current business processes of Federal contractors.

D. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 104–13) is not applicable because the NFS changes do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Part 1852

Government procurement.

William P. McNally,

Assistant Administrator for Procurement.

Accordingly, 48 CFR part 1852 is proposed to be amended as follows:

1. The authority citation for 48 CFR part 1852 continues to read as follows:

Authority: 42 U.S.C. 2455(a), 2473(c)(1).

PART 1852—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

2. Section 1852.216–76 is revised to read as follows:

1852.216–76 Award Fee for Service Contracts.

As prescribed in 1816.406–70(a), insert the following clause:

AWARD FEE FOR SERVICE CONTRACTS (XX/XX)

(a) The contractor can earn award fee from a minimum of zero dollars to the maximum stated in NASA FAR Supplement clause 1852.216–85, “Estimated Cost and Award Fee” in this contract.

(b) Beginning 6* months after the effective date of this contract, the Government shall evaluate the Contractor’s performance every 6* months to determine the amount of award fee earned by the contractor during the period. The Contractor may submit a self-evaluation of performance for each evaluation period under consideration. These self-evaluations will be considered by the Government in its evaluation. The Government’s Fee Determination Official (FDO) will determine the award fee amounts based on the Contractor’s performance in accordance with *[identify performance evaluation plan]*. The plan may be revised unilaterally by the Government prior to the beginning of any rating period to redirect emphasis.

(c) The Government will advise the Contractor in writing of the evaluation results. The *[insert payment office]* will make payment based on *[Insert method of authorizing award fee payment, e.g., issuance of unilateral modification by contracting officer]*.

(d) The Contracting Officer may direct the withholding of earned award fee payments until a reserve is set aside in an amount that the Contracting Officer considers necessary to protect the Government’s interest relative to an orderly and timely closeout of the contract. This reserve shall not exceed 15 percent of the contract’s total potential award fee or \$100,000, whichever is less.

(e) The amount of award fee which can be awarded in each evaluation period is limited to the amounts set forth at *[identify location of award fee amounts]*. Award fee which is not earned in an evaluation period cannot be reallocated to future evaluation periods.

(f)(1) Provisional award fee payments *[insert “will” or “will not”, as applicable]* be made under this contract pending the determination of the amount of fee earned for an evaluation period. 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 total amount of award fee available in an evaluation period that will be provisionally paid is the lesser of *[Insert a percent not to exceed 80 percent]* or the prior period’s evaluation score.

(2) Provisional award fee payments will be superseded by the final award fee evaluation for that period. If provisional payments exceed the final 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.

(3) If the Contracting Officer determines that the Contractor will not achieve a level of performance commensurate with the provisional rate, payment of provisional award fee will be discontinued or reduced in such amounts as the Contracting Officer deems appropriate. The Contracting Officer

will notify the Contractor in writing if it is determined that such discontinuance or reduction is appropriate.

(4) Provisional award fee payments *[insert “will” or “will not”, as appropriate]* be made prior to the first award fee determination by the Government.

(g) Award fee determinations are unilateral decisions made solely at the discretion of the Government.

* [A period of time greater or lesser than 6 months may be substituted in accordance with 1816.405–272(a).]

(End of clause)

3. Section 1852.216–77 is revised to read as follows:

1852.216–77 Award Fee for End Item Contracts.

As prescribed in 1816.406–70(b), insert the following clause:

AWARD FEE FOR END ITEM CONTRACTS (XX/XX)

(a) The contractor can earn award fee, or base fee, if any, from a minimum of zero dollars to the maximum stated in NASA FAR Supplement clause 1852.216–85, “Estimated Cost and Award Fee” in this contract. All award fee evaluations, with the exception of the last evaluation, will be interim evaluations. At the last evaluation, which is final, the Contractor’s performance for the entire contract will be evaluated to determine total earned award fee. No award fee or base fee will be paid to the Contractor if the final award fee evaluation is “poor/unsatisfactory.”

(b) Beginning 6* months after the effective date of this contract, the Government will evaluate the Contractor’s interim performance every 6* months to monitor Contractor performance prior to contract completion and to provide feedback to the Contractor. The evaluation will be performed in accordance with *[identify performance evaluation plan]* to this contract. The Contractor may submit a self-evaluation of performance for each period under consideration. These self-evaluations will be considered by the Government in its evaluation. The Government will advise the Contractor in writing of the evaluation results. The plan may be revised unilaterally by the Government prior to the beginning of any rating period to redirect emphasis.

(c)(1) Base fee, if applicable, will be paid in *[Insert “monthly”, or less frequent period]* installments based on the percent of completion of the work as determined by the Contracting Officer.

(2) Interim award fee payments will be made to the Contractor based on each interim evaluation. The amount of the interim award fee payment is limited to the lesser of the interim evaluation score or 80 percent of the fee allocated to that period *less* any provisional payments made during the period. All interim award fee payments will be superseded by the final award fee determination.

(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]*). 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).

(4) All interim (and provisional, if applicable) fee payments will be superseded by the fee determination made in the final award fee evaluation. 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 (and provisional, if applicable) fee payments. If the final award fee evaluation is "poor/unsatisfactory," any base fee paid will be refunded to the Government.

(5) Payment of base fee, if applicable, will be made based on submission of an invoice by the Contractor. Payment of award fee will be made by the *[insert payment office]* based on *[Insert method of making award fee*

payment, e.g., issuance of a unilateral modification by the Contracting Officer].

(d) The Contracting Officer may direct the withholding of interim award fee payments until a reserve is set aside in an amount that the Contracting Officer considers necessary to protect the Government's interest relative to an orderly and timely closeout of the contract. This reserve shall not exceed 15 percent of the contracts total potential award fee or \$100,000, whichever is less.

(e) Award fee determinations are unilateral decisions made solely at the discretion of the Government.

* [A period of time greater or lesser than 6 months may be substituted in accordance with 1816.405–272(a).]

(End of clause)

[FR Doc. 2011–23703 Filed 9–14–11; 8:45 am]

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