

to be used in all decisions involved in promulgating and implementing a policy action. This interim final rule, when finalized, will revise certain policy and procedural requirements. States which contract with DOE will be subject to this rule. However, DOE has determined that this rule will not have a substantial direct effect on the institutional interests or traditional functions of the States.

**List of Subjects in 48 CFR Parts 915, 916, and 970**

Government procurement.

**Richard H. Hopf,**

*Deputy Assistant Secretary for Procurement and Assistance Management.*

For the reasons set out in the preamble, Chapter 9 of Title 48 of the Code of Federal Regulations is amended as set forth below.

1. The authority citations for Parts 915 and 916 continue to read as follows:

**Authority:** 42 U.S.C. 7254; 40 U.S.C. 486(c).

**PART 915—CONTRACTING BY NEGOTIATION**

2. Subsection 915.804-70 is revised to read as set forth below:

**915.804-70 Uncertified cost or pricing data.**

Anytime an offeror or contractor is not required to submit certified cost or pricing data, the contracting officer may require the offeror or contractor to submit uncertified cost or pricing data. The amount of data required to be submitted should be limited to that data necessary to allow the contracting officer to determine the reasonableness of the price.

**PART 916—TYPES OF CONTRACTS**

**916.301-3 [Removed]**

3. Subsection 916.301-3, Limitations, is removed.

**PART 970—DOE MANAGEMENT AND OPERATING CONTRACTS**

4. The authority citation for Part 970 is revised to read as follows:

**Authority:** Sec. 161 of the Atomic Energy Act of 1954 (42 U.S.C. 2201), sec. 644 of the Department of Energy Organization Act, Public Law 95-91 (42 U.S.C. 7254).

5. Subsection 970.5204-24 is amended by revising paragraphs (a), (a)(2), (c), (d), (f), (g), and paragraph (b) following "NOTE" at the end of the clause to read as set forth below:

**970.5204-24 Subcontractor cost or pricing data.**

\* \* \* \* \*

(a) The following clause shall be inserted in all subcontracts where such subcontracts, and any modifications thereto, exceed the cost or pricing data threshold at FAR 15.804-2(a)(1), even though the original amount of the subcontract was below the threshold.

\* \* \* \* \*

(2) Except as provided in (a)(3) of this clause, certified cost or pricing data shall be submitted prior to (i) award of each sub-subcontract, the price of which is expected to exceed the cost or pricing data threshold at FAR 15.804-2(a)(1), and (ii) the negotiation of the price of each change or modification to the sub-subcontract under this subcontract for which the price adjustment is expected to exceed the cost or pricing data threshold at FAR 15.804-2(a)(1).

\* \* \* \* \*

(c) For purposes of verifying that certified cost or pricing data submitted in conjunction with the negotiation of this subcontract change or other modification involving an amount in excess of the cost or pricing data threshold at FAR 15.804-2(a)(1) were accurate, complete, and current, DOE shall, until the expiration of 3 years from the date of final payment under this subcontract, have the right to examine those books, records, documents, papers, and other supporting data which involve transactions related to this subcontract or which will permit adequate evaluation of the cost or pricing data submitted, along with the computations and projections used therein.

(d) If the original price of this subcontract exceeds the cost or pricing data threshold at FAR 15.804-2(a)(1) or the price of any change or other modification to this subcontract is expected to exceed the cost or pricing data threshold at FAR 15.804-2(a)(1), the subcontractor agrees to furnish the contractor certified cost or pricing data, using the certificate set forth in paragraph (b) of this clause, unless the price is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation.

\* \* \* \* \*

(f) The subcontractor agrees to insert paragraph (c) of this clause, without change, and the substance of paragraphs (a), (b), (d), (e), and (f) of this clause in each sub-subcontract hereunder in excess of the cost or pricing data threshold at FAR 15.804-2(a)(1) and in each sub-subcontract that is less than the threshold when making a change or other modification thereto in excess of the cost or pricing data threshold at FAR 15.804-2(a)(1).

(g) If the prime contractor determines that any price, including profit or fee, negotiated in connection with this subcontract or any cost reimbursable under this subcontract was increased by any significant sum because the subcontractor or any sub-subcontractor, pursuant to this clause or any sub-subcontract clause herein required, furnished incomplete or inaccurate cost or pricing data or data not current as certified in the subcontractor's certificate of current cost or pricing data, then such price or cost shall be reduced accordingly and the contract shall be modified in writing to reflect such reduction.

\* \* \* \* \*

**Note.** \* \* \*

(b) This clause may also be used for subcontracts in which the amount of the subcontract is less than the cost or pricing data threshold at FAR 15.804-2(a)(1), if a certificate of cost or pricing data is obtained; if so used, the amount stated in the clause should be modified appropriately.

\* \* \* \* \*

6. Subsection 970.7104-11 is amended by revising paragraphs (a)(1)(i) and (ii) to read as set forth below:

**970.7104-11 Cost or pricing data.**

(a) \* \* \*

(1) \* \* \*

(i) Award of a negotiated subcontract when the price is expected to exceed the threshold for cost or pricing data at 48 CFR (FAR) 15.804-2(a)(1), or

(ii) Modifications of any subcontract when the price adjustment is expected to exceed the threshold for cost or pricing data at 48 CFR (FAR) 15.804-2(a)(1), unless unrelated and separately priced changes, for which certified cost or pricing data would not otherwise be required, are included.

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**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Parts 1802, 1850, and 1852**

**Indemnification under Public Law 85-804**

**AGENCY:** Office of Procurement, National Aeronautics and Space Administration (NASA).

**ACTION:** Final rule.

**SUMMARY:** This rule amends the NASA policy and approval process on indemnifying contractors. This revision is part of NASA's efforts to simplify its regulations. The streamlined policy relies more on Federal-wide policies.

**EFFECTIVE DATE:** April 10, 1995.

**FOR FURTHER INFORMATION CONTACT:** Harold Nelson, (202) 358-0436.

**SUPPLEMENTARY INFORMATION:**

**Background**

NASA is reviewing and rewriting 48 CFR chapter 18, the NASA FAR Supplement, in its entirety in order to implement recommendations of the National Performance Review. During this review, NASA is eliminating reporting requirements and making other changes in order to reduce and simplify the regulation. This final rule 48 CFR parts 1802, 1850, and 1852 for the following reasons.

Section 1802.101 is revised in order to define the acronym "FAR."

Section 1850.202 is revised in order to add a reference to 14 CFR subpart 1209.3 on the Contract Adjustment Board.

Until now, requests for indemnification under Public Law 85-804 have been processed using a two-step approach. Under the first step, the Administrator signed a "Memorandum Decision Under Public Law 85-804" which recognized a class of contracts for which the statutory criteria for approving such requests could be met. Specifically, this document described the existence of the unusually hazardous risk, explained how approval of requests would facilitate the national defense, and set any other conditions for approval of requests to incorporate the indemnification clause in specific NASA prime contracts. Two Memorandum Decisions, one applicable to contracts under the Shuttle Program and the other applicable to contracts for launch services using expendable launch vehicles have been signed.

The second step of the process involved the submission of an approval package for specific contracts, citing the pertinent Memorandum Decision. The Administrator signed a second document, an "Approval Under Public Law 85-804", to grant approval to include the indemnification clause in designated contracts. 48 CFR 1850.402 also envisioned circumstances where a combined Memorandum Decision and Approval Under Public Law 85-804 could be signed by the Administrator in instances where requests were not covered by a current Memorandum Decision.

The above described two-step approach is not required by 48 CFR (FAR) part 50, which prescribes a single document approach. Since one of the above mentioned Decision Memorandums expired in September 1994 and the other is due to expire in July 1995, NASA Headquarters reviewed continuation of the two step approach. Based on this review, it has been decided to abandon the two step approach in favor of following the FAR procedure. Upon issuance of this notice, when NASA contractors request indemnification, the contracting officer will take the actions set forth in 48 CFR (FAR) 50.403. The contracting officer will also submit a "Memorandum of Decision Under Public Law 85-804" for each contract, or group of contracts, for which indemnification is being sought. This Memorandum of Decision will contain all the required information which has been previously distributed between the two documents, the

Memorandum Decision Under Pub. L. 85-804 and the Approval Under Pub. L. 85-804.

The need for separate NASA clauses covering indemnification—48 CFR 1852.250-70, Indemnification Under Public Law 85-804, and 48 CFR 1852.250-72, Space Activity—Unusually Hazardous Risks, was also reviewed. 48 CFR 1852.250-70 was extremely similar to the existing FAR clause (48 CFR 52.250-1, Indemnification Under Public Law 85-804). However, the NASA clause differed in ways that were not consistent with Executive Order 10789, as amended, which implements the statutory authority (50 U.S.C. 1431-1435) authorizing indemnification. Therefore, it was determined that the clause should be deleted and the FAR clause used. Also, practically from the time that 48 CFR 1852.250-72, Space Activity—Unusually Hazardous Risks, was adopted; it was recognized that the contractors could not merely cite the clause to substantiate their requests for the indemnification clause. Contractors are required to describe the nature of the unusually hazardous risk associated with performance of the specific contract in detail. Therefore, it has been determined that the standard clause be deleted and the definition and description of the unusually hazardous risks be addressed on a case by case basis.

#### Impact

NASA certifies that this regulation will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This rule does not impose any reporting or record keeping requirements subject to the Paperwork Reduction Act.

#### Lists of Subjects in 48 CFR Parts 1802, 1850 and 1852

Government procurement.

**Tom Luedtke,**  
Deputy Associate Administrator for Procurement.

Accordingly, 48 CFR parts 1802, 1850 and 1852 are amended as follows.

1. The authority citation for 48 CFR parts 1802, 1850 and 1852 continues to read as follows:

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

#### PART 1802—DEFINITIONS OF WORDS AND TERMS

2. Section 1802.101 is amended by adding the following definition in alphabetical order in paragraph (b):

#### 1802.101 Definitions.

\* \* \* \* \*

(b) \* \* \*

FAR means the Federal Acquisition Regulation as codified at 48 CFR chapter 1.

\* \* \* \* \*

#### PART 1850—EXTRAORDINARY CONTRACTUAL ACTIONS

3. Section 1850.202 is revised to read as follows:

##### 1850.202 Contract adjustment boards.

NMI 1152.5, 14 CFR part 1209, subpart 3, Contract Adjustment Board, establishes the Contract Adjustment Board as the approving authority to consider and dispose of requests from NASA contractors for extraordinary contractual actions.

4. Section 1850.402 is removed.

5. Section 1850.403-1 is revised to read as follows:

##### 1850.403-1 Indemnification requests.

In addition to the information required by 48 CFR (FAR) 50.403-1(a), the contractor shall provide evidence, such as a certificate of insurance or other customary proof of insurance, that such insurance is either in force or is available and will be in force during the indemnified period.

6. Section 1850.403-2 is revised to read as follows:

##### 1850.403-2 Action on indemnification requests.

(a) The Administrator will execute a Memorandum of Decision to approve a request to use the indemnification clause in a contract or group of contracts.

(b) For contracts of five years duration or longer, in addition to information required to be submitted by the contracting officer under 48 CFR (FAR) part 50, the submission should include discussion and determination on whether the indemnification approval and insurance coverage and premiums should be reviewed for adequacy and continued validity at points in time within the extended contract period.

(c) If a contracting officer recommends that a request for indemnification be approved, the required information specified in 48 CFR (FAR) 50.403-2(a) shall be forwarded to the Associate Administrator for Procurement (Code HS) for review and processing to the Administrator. The contracting officer shall also provide a recommended Memorandum of Decision. This document provides the specific approval to include an indemnification clause in a NASA contract, or group of

contracts. In addition to the applicable requirements of 48 CFR (FAR) 50.306, the Memorandum of Decision shall contain the following:

(1) The specific definition of the unusually hazardous risk to which the contractor is exposed in the performance of the contract(s).

(2) A complete discussion of the contractor's financial protection program that the Administrator will review in order to approve the request for indemnification.

(3) As appropriate, the extent to, and conditions under, which indemnification is being approved for subcontracts.

(d) Before presentation to the Administrator, Code HS will obtain concurrences from the General Counsel, Comptroller, Associate Administrator for Procurement, Associate Deputy Administrator and Deputy Administrator, as appropriate.

(e) Since indemnification coverage must flow through the prime contractor, subcontractors shall submit requests for indemnification to the prime contractor and through higher tier subcontractor(s),

as applicable. If the prime contractor agrees indemnity should be flowed down to the subcontractor, the prime contractor shall forward its written request for subcontractor indemnification to the cognizant contracting officer for approval. The prime contractor's request shall provide information responsive to 1850.403-1, and 48 CFR (FAR) 50.403-1 and 50.403-2(a) (1), (2), (4), (5) and (7). The agreed upon definition of the unusually hazardous risk to be incorporated into the subcontract shall be the same as that incorporated in the prime contract.

(f) If the contracting officer approves indemnification of a subcontractor by the prime, the contracting officer shall document the file with a memorandum for record addressing the items set forth in 48 CFR (FAR) 50.403-2(a). This memorandum shall address the items set forth in 48 CFR (FAR) 50.403-2(a) and contain an analysis of the subcontractor's financial protection program. In performing this analysis, the contracting officer shall take into consideration the availability, cost, terms and conditions of insurance in

relation to the unusually hazardous risk. The contracting officer may rely on the analysis of the prime contractor's financial protection program in relation to the approval of indemnification of the prime contractor, to the extent this analysis is applicable.

(g) Code HS will maintain records of each Memorandum of decision executed by the Administrator.

7. Sections 1850.403-3, 1850.403-370, and 1850.403-70 are removed.

**1850.403-3—[Removed]**

**1850.403-370—[Removed]**

**1850.403-70—[Removed]**

#### **PART 1852—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

8. Sections 1852.250-70 and 1852.250-72 are removed.

**1852.250-72—[Removed]**

**1852.250-72—[Removed]**

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