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*Acting Regional Administrator, Region III.*

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## **NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

### **48 CFR Parts 1809, 1837, and 1852**

**RIN 2700-AC60**

#### **Contractor Access to Confidential Information**

**AGENCY:** National Aeronautics and Space Administration (NASA).

**ACTION:** Proposed rule.

**SUMMARY:** This rule proposes to amend the NASA Federal Acquisition Regulation (FAR) Supplement (NFS) to provide guidance on how NASA will acquire services to support management activities and administrative functions, when performing those services requires the contractor to have access to confidential information submitted by other contractors. NASA's increased use of contractors to support management activities and administrative functions, coupled with implementing Agency-wide electronic information systems, requires establishing consistent procedures for protecting confidential information from unauthorized use or disclosure.

**DATES:** Comments should be submitted on or before February 3, 2004 to be considered in the formulation of a final rule.

**ADDRESSES:** Interested parties should submit written comments to David Forbes, NASA Headquarters, Office of Procurement, Contract Management Division (Code HK), Washington, DC 20546. Comments may also be submitted by e-mail to: [David.P.Forbes@nasa.gov](mailto:David.P.Forbes@nasa.gov).

**FOR FURTHER INFORMATION CONTACT:** David Forbes, (202) 358-2051, e-mail: [David.P.Forbes@nasa.gov](mailto:David.P.Forbes@nasa.gov).

#### **SUPPLEMENTARY INFORMATION:**

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

In accomplishing its mission, NASA expends about eighty-five percent of its appropriations through contracts. As part of the process of awarding and performing contracts, offerors and contractors must provide information, some of which they claim to have developed at private expense and that may embody trade secrets or constitute commercial or financial and confidential information ("confidential

information"). Confidential information includes technical, financial, proprietary, commercial, privileged, or otherwise sensitive business information. As a result, NASA receives and retains a substantial amount of confidential information, contained in paper files and electronic administrative systems.

Generally, the information in question is not in the public domain and may be subject to the Trade Secrets Act, the Procurement Integrity Act (FAR 3.104), and other laws and regulations relating to ethics, organizational conflicts of interest, and corruption in the Federal procurement process. To the extent that an exception to the Freedom of Information Act applies, government agencies may also generate confidential information, including pre-negotiation analyses and positions and pre-decisional advice on a variety of subjects. NASA has long recognized a responsibility to protect this type of information from unauthorized use and disclosure. To this end, NASA has traditionally allowed only civil servants to have access to confidential information in the Government's possession. Practical realities, coupled with new policy initiatives compel NASA to reconsider its approach to managing contractor-related information.

The practical pressure to reconsider NASA's approach has emerged from years of "downsizing" the civil service workforce. Simply put, NASA no longer has enough employees to manage and safeguard all of the information in question. Of necessity, NASA is increasing its use of service contractors to assist in performing many administrative, financial, and technical functions that had been performed previously by government employees only. The types of services NASA will be procuring run the gamut from routine clerical support such as data entry and invoice processing, to more complex in-plant reviews, contract closeout processing, system administration, and safety and quality assurance activities. Service contractors may soon be supporting most of these activities and functions throughout the Agency. NASA must, therefore, find new, more streamlined ways to receive from offerors and contractors confidential information that may be entitled to protection and to disclose it to third party service providers, without compromising the information received.

As NASA releases more confidential information provided by offerors or contractors to other contractors, the risk increases that unauthorized uses and disclosures will occur. One aspect of

this increased risk is the potential that organizational conflicts of interest may arise when the Agency discloses one contractor's confidential information to another contractor. FAR Subpart 9.5 prescribes general rules for managing organizational conflicts of interest and gives four specific examples of situations that may give rise to problems. One of those examples deals directly with NASA's current dilemma, that is, providing one contractor access to other contractors' confidential information. Specifically, when one contractor gains access to other companies' "proprietary" information, FAR 9.505-4 directs the service provider to enter into agreement(s) with the other companies to protect their information from unauthorized use or disclosure and to refrain from using the information for any purpose other than that for which it was furnished. Additionally, FAR 9.505-4 requires the contracting officer to obtain copies of these third party agreements and ensure that they are properly executed.

In the past, NASA contracts rarely required access to another contractor's proprietary or other forms of confidential information, making this FAR procedure quite manageable. The current environment, however, raises the question whether use of FAR 9.505-4 continues to be workable for NASA. For example, in providing contract closeout services, the contractor and its employees may have access to hundreds of contract files, each of which should document all pre and post award activities for a particular contract. Typically, the contracts to be closed out will include multiple subcontractors. Many subcontractors will also have lower-tier subcontracts. To ensure that all of these companies have properly executed "non-disclosure agreements" among themselves could result in a huge number of interrelated agreements. Moreover, the contract closeout function is but one example of the types of services that may require one NASA contractor to have access to another contractor's confidential information before performance can proceed. Without obtaining even more support services, NASA cannot be responsible for managing this potentially enormous universe of interrelated non-disclosure agreements.

In today's environment, NASA must rely heavily on private sector service contractors for support in performing essential management activities and administrative functions. For contracts requiring this type of support, the Assistant Administrator for Procurement has determined that it is not in the NASA's interest to follow the