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FOR FURTHER INFORMATION CONTACT:
Leigh Pomponio, NASA, Office of Procurement, (202) 358-0592; e-mail: leigh.pomponio@nasa.gov.

SUPPLEMENTARY INFORMATION:

A. Background

NASA is proposing to amend the NASA FAR Supplement to include a requirement for contracting officers to notify prospective contractors if they are found non-responsible for award. Such notification permits potential contractors to improve their opportunities for future awards by addressing the non-responsibility issues. This proposed rule is consistent with FAR 9.104-6, Federal Awardee Performance and Integrity Information System (FAPIIS). Because contracting officers use FAPIIS to obtain pre-award information, and to enter determinations of non-responsibility for public display, it is a good practice to personally notify contractors of non-responsibility findings and the basis of the finding in an effort to afford potential contractors an opportunity to improve the underlying causes for a non-responsibility determination and to promote maximum competition for future awards.

B. Executive Order 12866 and Executive Order 13563

Executive Orders 13563 and 12866 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). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of

reducing costs, of harmonizing rules, and of promoting flexibility. This proposed rule has NOT been designated a "significant regulatory action" under section 3(f) of Executive Order 12866. This is not a major rule under 5 U.S.C. 804.

C. Regulatory Flexibility Act

This final rule is not expected 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.* because it does not impose any new requirements on small entities. This rule only imposes requirements on Government personnel; the impact on the public, including small entities, is the receipt of additional information.

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 1809

Government procurement.

William P. McNally,
Assistant Administrator for Procurement.

Accordingly, 48 CFR Part 1809 is amended as follows:

1. The authority citation for 48 CFR Part 1809 continues to read as follows:

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

PART 1809—CONTRACTOR QUALIFICATIONS

2. Section 1809.105-2 is added to Subpart 1809.1 to read as follows:

1809.105-2 Determinations and documentation.

(a) The contracting officer shall provide written notification to a prospective contractor determined not responsible, which includes the basis for the determination. Notification provides the prospective contractor with the opportunity to take corrective action prior to future solicitations.

[FR Doc. 2011-10919 Filed 5-4-11; 8:45 am]

BILLING CODE 7510-01-P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1812, 1828, and 1852

RIN 2700-AD55

Cross-Waiver of Liability Clauses

AGENCY: National Aeronautics and Space Administration.

ACTION: Proposed rule.

SUMMARY: NASA proposes to revise the NASA FAR Supplement (NFS) to consolidate and make changes to three currently-existing cross-waiver of liability clauses. The changes include consolidation of the three clauses into two clauses and retitling the two clauses to more closely align the clauses with current mission programs including International Space Station (ISS) activities, and Science or Space Exploration activities unrelated to the ISS. The existing Expendable Launch Vehicle (ELV) clause will be broadened to apply to contracts and subcontracts related to a launch of any kind other than one involving the International Space Station. The International Space Station (ISS) activities cross-waiver of liability clause is revised and its applicability broadened to include Space Shuttle activities related to the ISS. Accordingly, the Space Shuttle services clause will be deleted in its entirety with all Space Shuttle activity falling under one of the two remaining clauses. These proposed changes to the NFS are being made to align contract clauses with the regulatory authority established by a final rule published February 26, 2008, which established NASA's cross-waiver of liability authority in two categories of NASA agreements.

DATES: Interested parties should submit comments on or before July 5, 2011 to be considered in formulation of the final rule.

ADDRESSES: Interested parties may submit comments, identified by RIN number 2700-AD55, via the Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments. Comments may also be submitted to R. Todd Lacks (Mail Stop 5J75), NASA Headquarters, Office of Procurement, Contract Management Division, Washington, DC 20546. Comments may also be submitted by e-mail to todd.lacks@nasa.gov.

FOR FURTHER INFORMATION CONTACT: R. Todd Lacks, NASA, Office of Procurement, Contract Management Division (Suite 5J75); (202) 358-0799; e-mail: todd.lacks@nasa.gov.

SUPPLEMENTARY INFORMATION: These proposed changes to the NFS are being made to align contract clauses with the regulatory authority established by the final rule published at 73 FR 10143–50, dated 26 February 2008. The February 2008 rule established NASA's cross-waiver of liability authority in two categories of NASA agreements: (1) Agreements for ISS activities pursuant to the "Agreement Among the Government of Canada, Governments of Member States of the European Space Agency, the Government of Japan, the Government of the Russian Federation, and the Government of the United States of America concerning Cooperation on the Civil International Space Station" (commonly referred to as the ISS Intergovernmental Agreement, or IGA); and (2) launch agreements involving science or space exploration activities unrelated to the ISS. Sections 1812.301(f)(i)(K), (L), and (M) and 1828.371 of the NFS are being changed to reflect the new titles for clauses 1852.228–76 and 1852.228–78 and deletion of 1852.228–72.

A. Background

NASA has been including cross-waivers of liability in its launch services agreements with U.S. and foreign parties since NASA's original cross-waiver regulations were published in 1991. By incorporating the cross-waivers of liability into agreements for International Space Station (ISS) activities and Science or Space Exploration activities unrelated to the ISS that involve a launch, each Party, as defined in the cross-waiver, agree to waive all claims against any entity or person defined in the cross-waiver for damage to their property arising out of Protected Space Operations. These cross-waivers also require the parties to extend these cross-waivers to their related entities ensuring those related entities also waive all claims against any entity or person defined in the cross-waiver for damages arising out of Protected Space Operations.

B. Executive Orders 13563 and 12866

Executive Orders 13563 and 12866 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). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not

a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review dated September 30, 1993. 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 the rule does not impose any additional requirements on small businesses. This proposed rule updates and clarifies already-existing requirements.

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 Parts 1812, 1828, and 1852

Government procurement.

William P. McNally,
Assistant Administrator for Procurement.

Accordingly, 48 CFR parts 1812, 1828, and 1852 are proposed to be amended as follows:

1. The authority citation for 48 CFR parts 1812, 1828, and 1852 continues to read as follows:

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

PART 1812—ACQUISITION OF COMMERCIAL ITEMS

2. In section 1812.301, paragraph (f)(i)(K) is removed and reserved, and paragraphs (f)(i)(L) and (f)(i)(M) are revised to read as follows:

1812.301 Solicitation provisions and contract clauses for the acquisition of commercial items. (NASA supplements paragraph (f))

(f)(i) * * *

(L) 1852.228–76, Cross-Waiver of Liability for International Space Station Activities.

(M) 1852.228–78, Cross-Waiver of Liability for Science or Space Exploration Activities unrelated to the International Space Station.

* * * * *

PART 1828—BONDS AND INSURANCE

3. Section 1828.371 is revised to read as follows:

1828.371 Clauses incorporating cross-waivers of liability for International Space Station activities and Science or Space Exploration activities unrelated to the International Space Station.

(a) In contracts covering International Space Station activities, or Science or Space Exploration activities unrelated to the International Space Station that involve a launch, NASA shall require the contractor to agree to waive all claims against any entity or person defined in the clause based on damage arising out of Protected Space Operations. This cross-waiver shall apply only if the person, entity, or property causing the damage is involved in Protected Space Operations and the person, entity, or property damaged is damaged by virtue of its involvement in Protected Space Operations. The cross-waivers will require the contractor to extend the cross-waiver provisions to their subcontractors at any tier and related entities ensuring those subcontractors and related entities also waive all claims against any entity or person defined in the clause for damages arising out of Protected Space Operations. The purpose of the clauses prescribed in this section is to extend the cross-waivers under other agreements to NASA contractors that perform work in support of NASA's obligations under these agreements.

(b) The contracting officer shall insert the clause at 1852.228–78, Cross-Waiver of Liability for Science or Space Exploration Activities unrelated to the International Space Station, in solicitations and contracts above the simplified acquisition threshold for the acquisition of launches for science or space exploration activities unrelated to the International Space Station or for acquisitions for science or space exploration activities that are not related to the International Space Station but involve a launch. If Space Shuttle services under a contract are being conducted in support of science or space exploration activities not related to the International Space Station, the contracting officer shall insert the clause prescribed by this paragraph and designate application of the clause to those particular activities. If a science or space exploration activity is in support of the International Space Station, the contracting officer shall insert the clause prescribed by paragraph (c) of this section and designate its application to that particular launch.

(c) The contracting officer shall insert the clause at 1852.228–76, Cross-Waiver of Liability for International Space Station Activities, in solicitations and contracts above the simplified acquisition threshold when the work to

be performed involves Protected Space Operations, as that term is defined in the clause, relating to the International Space Station. If Space Shuttle services under a contract are being conducted in support of International Space Station activities, the contracting officer shall insert the clause prescribed by this paragraph and designate application of the clause to those particular activities.

(d) At the contracting officer's discretion, the clauses prescribed by paragraphs (b) and (c) of this section may be used in solicitations, contracts, new work modifications, or extensions to existing contracts under the simplified acquisition threshold involving science or space exploration activities unrelated to the International Space Station, or International Space Station activities, respectively, in appropriate circumstances. Examples of such circumstances are when the value of contractor property on a Government installation used in performance of the contract is significant, or when it is likely that the contractor or subcontractor will have its valuable property exposed to risk or damage caused by other participants in the science or space exploration activities unrelated to the International Space Station, or International Space Station activities.

PART 1852—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

1852.228–72 [Removed]

4. Section 1852.228–72 is removed.

5. Section 1852.228–76 is revised to read as follows:

1852.228–76 Cross-Waiver of Liability for International Space Station Activities.

As prescribed in 1828.371(c) and (d), insert the following clause:

CROSS-WAIVER OF LIABILITY FOR INTERNATIONAL SPACE STATION ACTIVITIES

[XX/XX]

(a) The Intergovernmental Agreement Among the Government of Canada, Governments of Member States of the European Space Agency, the Government of Japan, the Government of the Russian Federation, and the Government of the United States of America concerning Cooperation on the Civil International Space Station (IGA) for the International Space Station (ISS) contains a cross-waiver of liability provision to encourage participation in the exploration, exploitation, and use of outer space through the ISS. The objective of this clause is to extend this cross-waiver of liability to NASA contracts in the interest of encouraging participation in the exploration, exploitation, and use of outer space through the International Space Station (ISS). The

Parties intend that this cross-waiver of liability be broadly construed to achieve this objective.

(b) As used in this clause, the term:

(1) “*Agreement*” refers to any NASA Space Act agreement that contains the cross-waiver of liability provision authorized by 14 CFR Part 1266.102.

(2) “*Damage*” means:

(i) Bodily injury to, or other impairment of health of, or death of, any person;

(ii) Damage to, loss of, or loss of use of any property;

(iii) Loss of revenue or profits; or

(iv) Other direct, indirect, or consequential Damage.

(3) “*Launch Vehicle*” means an object, or any part thereof, intended for launch, launched from Earth, or returning to Earth which carries Payloads or persons, or both.

(4) “*Partner State*” includes each Contracting Party for which the IGA has entered into force, pursuant to Article 25 of the IGA or pursuant to any successor agreement. A Partner State includes its Cooperating Agency. It also includes any entity specified in the Memorandum of Understanding (MOU) between NASA and the Government of Japan to assist the Government of Japan's Cooperating Agency in the implementation of that MOU.

(5) “*Party*” means a party to a NASA Space Act agreement involving activities in connection with the ISS and a party that is neither the prime contractor under this contract nor a subcontractor at any tier.

(6) “*Payload*” means all property to be flown or used on or in a Launch Vehicle or the ISS.

(7) “*Protected Space Operations*” means all Launch or Transfer Vehicle activities, ISS activities, and Payload activities on Earth, in outer space, or in transit between Earth and outer space in implementation of the IGA, MOUs concluded pursuant to the IGA, implementing arrangements, and contracts to perform work in support of NASA's obligations under these Agreements. It includes, but is not limited to:

(i) Research, design, development, test, manufacture, assembly, integration, operation, or use of Launch or Transfer Vehicles, the ISS, Payloads, or instruments, as well as related support equipment and facilities and services; and

(ii) All activities related to ground support, test, training, simulation, or guidance and control equipment and related facilities or services. “*Protected Space Operations*” also includes all activities related to evolution of the ISS, as provided for in Article 14 of the IGA. “*Protected Space Operations*” excludes activities on Earth which are conducted on return from the ISS to develop further a Payload's product or process for use other than for ISS-related activities in implementation of the IGA.

(8) “*Related Entity*” means:

(i) A contractor or subcontractor of a Party or a Partner State at any tier;

(ii) A user or customer of a Party or a Partner State at any tier; or

(iii) A contractor or subcontractor of a user or customer of a Party or a Partner State at any tier.

The terms “*contractor*” and “*subcontractor*” include suppliers of any kind.

(9) “*Transfer Vehicle*” means any vehicle that operates in space and transfers Payloads or persons or both between two different space objects, between two different locations on the same space object, or between a space object and the surface of a celestial body. A Transfer Vehicle also includes a vehicle that departs from and returns to the same location on a space object.

(c) Cross-waiver of liability:

(1) The Contractor agrees to a cross-waiver of liability pursuant to which it waives all claims against any of the entities or persons listed in paragraphs (c)(1)(i) through (c)(1)(iv) of this clause based on Damage arising out of Protected Space Operations. This cross-waiver shall apply only if the person, entity, or property causing the Damage is involved in Protected Space Operations and the person, entity, or property damaged is damaged by virtue of its involvement in Protected Space Operations. The cross-waiver shall apply to any claims for Damage, whatever the legal basis for such claims, against:

(i) A Party as defined in (b)(5) of this clause;

(ii) A Partner State other than the United States of America;

(iii) A Related Entity of any entity identified in paragraph (c)(1)(i) or (c)(1)(ii) of this clause; or

(iv) The employees of any of the entities identified in paragraphs (c)(1)(i) through (c)(1)(iii) of this clause.

(2) In addition, the contractor shall, by contract or otherwise, extend the cross-waiver of liability set forth in paragraph (c)(1) of this clause to its subcontractors at any tier by requiring them, by contract or otherwise, to:

(i) Waive all claims against the entities or persons identified in paragraphs (c)(1)(i) through (c)(1)(iv) of this clause; and

(ii) Require that their subcontractors waive all claims against the entities or persons identified in paragraphs (c)(1)(i) through (c)(1)(iv) of this clause.

(3) For avoidance of doubt, this cross-waiver of liability includes a cross-waiver of claims arising from the *Convention on International Liability for Damage Caused by Space Objects*, which entered into force on September 1, 1972, where the person, entity, or property causing the Damage is involved in Protected Space Operations and the person, entity, or property damaged is damaged by virtue of its involvement in Protected Space Operations.

(4) Notwithstanding the other provisions of this clause, this cross-waiver of liability shall not be applicable to:

(i) Claims between the Government and its own contractors or between its own contractors and subcontractors;

(ii) Claims made by a natural person, his/her estate, survivors or subrogees (except when a subrogee is a Party to an Agreement or is otherwise bound by the terms of this cross-waiver) for bodily injury to, or other impairment of health of, or death of, such person;

(iii) Claims for Damage caused by willful misconduct;

(iv) Intellectual property claims;

(v) Claims for Damage resulting from a failure of the contractor to extend the cross-waiver of liability to its subcontractors and related entities, pursuant to paragraph (c)(2) of this clause;

(vi) Claims by the Government arising out of or relating to the contractor's failure to perform its obligations under this contract.

(5) Nothing in this clause shall be construed to create the basis for a claim or suit where none would otherwise exist.

(6) This cross-waiver shall not be applicable when 49 U.S.C. Subtitle IX, Chapter. 701 is applicable.

(End of clause)

6. Section 1852.228-78 is revised to read as follows:

1852.228-78 Cross-Waiver of Liability for Science or Space Exploration Activities Unrelated to the International Space Station.

As prescribed in 1828.371(b) and (d), insert the following clause:

CROSS-WAIVER OF LIABILITY FOR SCIENCE OR SPACE EXPLORATION ACTIVITIES UNRELATED TO THE INTERNATIONAL SPACE STATION

[XX/XX]

(a) The purpose of this clause is to extend a cross-waiver of liability to NASA contracts for work done in support of Agreements between Parties involving Science or Space Exploration activities that are not related to the International Space Station (ISS) but involve a launch. This cross-waiver of liability shall be broadly construed to achieve the objective of furthering participation in space exploration, use, and investment.

(b) As used in this clause, the term:

(1) "Agreement" refers to any NASA Space Act agreement that contains the cross-waiver of liability provision authorized in 14 CFR 1266.104.

(2) "Damage" means:

(i) Bodily injury to, or other impairment of health of, or death of, any person;

(ii) Damage to, loss of, or loss of use of any property;

(iii) Loss of revenue or profits; or

(iv) Other direct, indirect, or consequential Damage;

(3) "Launch Vehicle" means an object, or any part thereof, intended for launch, launched from Earth, or returning to Earth which carries Payloads or persons, or both.

(4) "Party" means a party to a NASA Space Act agreement for Science or Space Exploration activities unrelated to the ISS that involve a launch and a party that is neither the prime contractor under this contract nor a subcontractor at any tier hereof.

(5) "Payload" means all property to be flown or used on or in a Launch Vehicle.

(6) "Protected Space Operations" means all Launch or Transfer Vehicle activities and Payload activities on Earth, in outer space, or in transit between Earth and outer space in implementation of an Agreement for Science or Space Exploration activities unrelated to the ISS that involve a launch. Protected Space Operations begins at the signature of

the Agreement and ends when all activities done in implementation of the Agreement are completed. It includes, but is not limited to:

(i) Research, design, development, test, manufacture, assembly, integration, operation, or use of Launch or Transfer Vehicles, Payloads, or instruments, as well as related support equipment and facilities and services; and

(ii) All activities related to ground support, test, training, simulation, or guidance and control equipment, and related facilities or services.

Protected Space Operations excludes activities on Earth which are conducted on return from space to develop further a payload's product or process other than for the activities within the scope of an Agreement.

(7) "Related entity" means:

(i) A contractor or subcontractor of a Party at any tier;

(ii) A user or customer of a Party at any tier; or

(iii) A contractor or subcontractor of a user or customer of a Party at any tier.

The terms "contractors" and "subcontractors" include suppliers of any kind.

(8) "Transfer Vehicle" means any vehicle that operates in space and transfers Payloads or persons or both between two different space objects, between two different locations on the same space object, or between a space object and the surface of a celestial body. A Transfer Vehicle also includes a vehicle that departs from and returns to the same location on a space object.

(c) Cross-waiver of liability:

(1) The Contractor agrees to a waiver of liability pursuant to which it waives all claims against any of the entities or persons listed in paragraphs (c)(1)(i) through (iv) of this clause based on Damage arising out of Protected Space Operations. This cross-waiver shall apply only if the person, entity, or property causing the Damage is involved in Protected Space Operations and the person, entity, or property damaged is damaged by virtue of its involvement in Protected Space Operations. The waiver shall apply to any claims for Damage, whatever the legal basis for such claims, against:

(i) A Party;

(ii) A Party to another NASA Agreement or contract that includes flight on the same Launch Vehicle;

(iii) A Related Entity of any entity identified in paragraphs (c)(1)(i) or (ii) of this clause; or

(iv) The employees of any of the entities identified in (c)(1)(i) through (iii) of this clause.

(2) The Contractor agrees to extend the cross-waiver of liability as set forth in paragraph (c)(1) of this clause to its own subcontractors at all tiers by requiring them, by contract or otherwise, to:

(i) Waive all claims against the entities or persons identified in paragraphs (c)(1)(i) through (iv) of this clause; and

(ii) Require that their Related Entities waive all claims against the entities or persons identified in paragraphs (c)(1)(i) through (iv) of this clause.

(3) For avoidance of doubt, this cross-waiver of liability includes a cross-waiver of claims arising from the *Convention on International Liability for Damage Caused by Space Objects*, entered into force on 1 September 1972, in which the person, entity, or property causing the Damage is involved in Protected Space Operations and the person, entity, or property damaged is damaged by virtue of its involvement in Protected Space Operations.

(4) Notwithstanding the other provisions of this clause, this cross-waiver of liability shall not be applicable to:

(i) Claims between the Government and its own contractors or between its own contractors and subcontractors;

(ii) Claims made by a natural person, his/her estate, survivors, or subrogees (except when a subrogee is a Party to an Agreement or is otherwise bound by the terms of this cross-waiver) for bodily injury to, or other impairment of health, or death of such person;

(iii) Claims for Damage caused by willful misconduct;

(iv) Intellectual property claims;

(v) Claims for damages resulting from a failure of the contractor to extend the cross-waiver of liability to its subcontractors and related entities, pursuant to paragraph (c)(2) of this clause; or

(vi) Claims by the Government arising out of or relating to a contractor's failure to perform its obligations under this contract.

(5) Nothing in this clause shall be construed to create the basis for a claim or suit where none would otherwise exist.

(6) This cross-waiver shall not be applicable when 49 U.S.C. Subtitle IX, Chapter 701 is applicable.

(End of clause)

[FR Doc. 2011-10903 Filed 5-4-11; 8:45 am]

BILLING CODE 7510-01-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 226

[Docket No. 110407235-1242-01]

RIN 0648-XA349

Endangered and Threatened Wildlife; Notice of 90-Day Finding on a Petition to Revise Critical Habitat for the Endangered Leatherback Sea Turtle Under the Endangered Species Act

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce.

ACTION: Notice of 90-day petition finding.

SUMMARY: We, NMFS, announce a 90-day finding on a petition to revise critical habitat for the endangered