

**DEPARTMENT OF ENERGY****48 CFR Chapter 9**

RIN 1991-AB49

**Department of Energy Acquisition Regulation; Rewrite of Regulations Governing Management and Operating Contracts****AGENCY:** Department of Energy.**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Department of Energy (DOE) proposes to amend its Acquisition Regulation to streamline the policies, procedures, provisions and clauses that are applicable to its management and operating contracts. This rulemaking proposes to eliminate coverage that is obsolete or which duplicates the Federal Acquisition Regulation (FAR), and retain only that coverage which either implements or supplements the FAR for the award and administration of the Department's management and operating contracts. The rule also proposes the addition of four new clauses, and amendments to several existing clauses which will promote more uniform application of the Department's award and administration policies for management and operating contracts.

**DATES:** Written comments (see Section III., Public Comments) must be submitted no later than May 12, 2000.

**ADDRESSES:** Comments (3 copies) should be addressed to: John R. Bashista, Office of Procurement and Assistance Management, Office of Procurement and Assistance Policy (MA-51), Department of Energy, 1000 Independence Avenue SW., Washington, D.C. 20585.

**FOR FURTHER INFORMATION CONTACT:** John R. Bashista (202) 586-8192; e-mail john.bashista@pr.doe.gov; fax (202) 586-0545.

**SUPPLEMENTARY INFORMATION:**

- I. Background
- II. Section by Section Analysis
- III. Public Comments
- IV. Procedural Requirements
  - A. Review Under Executive Order 12866
  - B. Review Under Executive Order 12988
  - C. Review Under the Regulatory Flexibility Act
  - D. Review Under the Paperwork Reduction Act
  - E. Review Under the National Environmental Policy Act
  - F. Review Under Executive Order 12612
  - G. Review Under the Unfunded Mandates Reform Act of 1995
  - H. Review Under the Treasury and General Government Appropriations Act, 1999

**I. Background**

Over the past several years, DOE has achieved significant improvements in

the way it conducts business with its management and operating (M&O) contractors. Contract management policies and practices have been strengthened and new processes implemented throughout the Department complex. In its report entitled "Making Contracting Work Better and Cost Less," dated February 1994, the DOE Contract Reform Team recommended a number of changes for improving the Department's acquisition system. New policies were implemented in the Department of Energy Acquisition Regulation (DEAR) to provide for a more uniform contract management approach in the award and administration of the Department's major contracts.

The Department's Office of Procurement and Assistance Management recently completed a review of additional policies and procedures which had been in place for decades. These policies had been developed over many years to provide contract terms and conditions applicable to the unique M&O contracting environment. Further, these policies implement and supplement Subpart 17.6 of the FAR. The purpose of the review was to determine whether the Department's unique regulatory coverage for M&O contracts is still necessary, and if so, what improvements are required to maintain the credibility of the system.

In general, the conclusion of the review was that DEAR Part 970 should be retained and that most of the Department's procurement regulations pertaining to the award and administration of its M&O contracts implement statutory, regulatory or current DOE policy requirements that are not addressed in other Federal regulations. However, the review also concluded that certain policy and procedural requirements should be eliminated, and that several contract clauses are considered unnecessary or redundant of coverage already prescribed in the FAR. Notable recommendations include: (1) Developing guidance and establishing an internal control system to better manage deviations from or modifications to regulatorily prescribed clauses while ensuring that the flexibility exists to do so when necessary; (2) eliminating most of the DOE cost principles that are used for determining the allowability of costs under M&O contracts as they are largely redundant of the cost principles set forth in the FAR; (3) clarifying the applicability of the Uniform Contract Format for M&O contracts pursuant to FAR requirements; (4) clarifying the applicability of FAR provisions, and

developing a clause matrix to be used by DOE's contracting professionals as the primary source of guidance for determining the applicability of FAR and DEAR clauses to M&O contracts; and (5) codifying commonly used, but unprescribed, terms and conditions unique to M&O contracts. Implementation of the recommendations resulting from the review will be accomplished through the issuance of internal Departmental guidance, as well as through amendment of the DEAR.

This rule proposes to rewrite DEAR Part 970, in its entirety, to streamline the policies, procedures, provisions and clauses that are applicable to the Department's M&O contracts. The rule proposes to eliminate coverage that is obsolete or that unnecessarily duplicates coverage contained in the FAR. The rule also proposes updates and revisions to the prescriptions and text of certain clauses that will provide greater flexibility for DOE contracting personnel to make administrative modifications to the text of these clauses and to eliminate the need for commonly used deviations to such clauses. Four new clauses are also proposed for inclusion in the DEAR. The new clauses will prescribe uniform Departmental policies concerning: (1) Cooperation between the Department and its contractors in disseminating information to the public; (2) technical direction provided to contractors by a designated Contracting Officer's Representative; (3) collaborating to identify, evaluate, and institutionalize processes that will improve the effectiveness or efficiency of any aspect of contract performance, and collaboration regarding such improvements with the Department and other major site and facility management contractors; (4) implementation of FAR 35.017 regarding the establishment, use, review, and termination of Federally Funded Research and Development Centers which are sponsored by the Department; and (5) outreach to the local communities in which DOE conducts business.

Moreover, it is proposed that Part 970 be reorganized and renumbered so that the coverage corresponds, to the extent practicable, with the FAR Part, subpart, section, and subsection(s) being implemented or supplemented, as appropriate, in Part 970. Accordingly, technical and conforming amendments to DEAR Part 970 and other DEAR Parts are also proposed.

A separate rulemaking will be issued to implement certain recommendations concerning the amendment or removal

of certain DEAR Part 970 cost principles and related provisions and clause. It is anticipated that the final rules for both proposed rulemakings will be issued concurrently.

## II. Section by Section Analysis

1. Several sections of Parts 901 through 952 are amended to revise cross-references to coverage that is contained in Part 970 to conform with the new Part 970 numbering system proposed in this rule.

2. Section 902.200 is amended by correcting paragraph citations, and adding a sentence that authorizes the contracting officer to include additional definitions to those contained in the prescribed clause.

3. Part 903 is amended by adding subpart 903.9 to relocate and consolidate coverage currently contained in subpart 922.71 and section 970.2274. New subpart 903.9 will include new section 903.902, which provides a cross-reference to the definition for Contractor which is contained in 10 CFR 708.2, and which is specific to DOE's Employee Protection Program.

4. Subpart 904.72 is added to prescribe a uniform Departmental policy regarding the release of unclassified information relating to M&O contracts to the public and the news media.

5. Section 911.604 is amended to revise the prescription for the use of the clauses at 48 CFR 952.211–70 and 48 CFR 952.211–71 to conform to changes proposed to 48 CFR 970.5204–33.

6. Subsection 915.408–70 is added to prescribe the use of a new clause at 48 CFR 952.215–70, Key Personnel. The new clause will accommodate both M&O and other than M&O contracts, thus replacing the two clauses currently prescribed at 48 CFR 952.235–70 (for other than M&O contracts) and 48 CFR 970.5204–42 (for M&O contracts).

7. Section 917.600 is amended to clarify the scope of Subpart 917.6.

8. Section 917.601 is amended to revise the definition of performance-based contracting to cross-reference the definition of the term that is already contained in the FAR.

9. Section 917.602 is amended to add a new paragraph (a), which contains certain text that is currently contained in section 970.0000 that implements FAR 17.602.

10. Section 917.604 is removed as unnecessary.

11. Section 917.605 is removed and the coverage is relocated to proposed new subsection 970.1706–1(c) consistent with the reorganization and renumbering of Part 970.

12. Subpart 922.71 is removed due to amendments addressed in paragraph 3.

13. Section 927.303 is amended by revising paragraph (a) to prescribe the use of the clauses at 952.227–11 and 952.227–13 for M&O contracts pursuant to the removal of sections 970.5204–71 and 970.5204–72 from Part 970 proposed in this rule. Proposed new Alternate I to the clause at 952.227–11, and proposed new Alternate I for the clause at 952.227–13 contain, verbatim, the text currently in 970.5204–71 and 970.5204–72, respectively.

14. Section 935.070 is removed due to the amendments addressed in paragraph 6.

15. Subpart 942.2 is added to prescribe uniform DOE policy regarding technical direction that is provided to contractors by a designated Contracting Officer's Representative.

16. Subpart 947.70 is added to incorporate guidance in the DEAR regarding contractor foreign travel and to add a prescription for the use of the clause that is currently contained in section 952.247–70, Foreign Travel. Currently, there is no policy section in the regulation to prescribe the basis and use of the existing clause.

17. Section 952.203–70 is added to accommodate the proposed redesignation of section 970.5204–59 as section 952.203–70.

18. Section 952.204–75 is added to prescribe a uniform clause pertaining to the dissemination of unclassified information relating to M&O contracts to the public and the news media (see paragraph 4.).

19. Section 952.215–70 is added to provide for a single clause which will accommodate M&O and other than M&O contracts (see paragraph 6.).

20. Section 952.222–70 is removed due to amendments addressed in paragraph 3.

21. Section 952.227–11 is amended by revising the prescription and clause date and adding an Alternate I to provide a single clause for M&O and other than M&O contracts (see paragraph 13.).

22. Section 952.227–13 is amended by revising the prescription and clause date and adding an Alternate I to provide a single clause for M&O and other than M&O contracts (see paragraph 13.).

23. Section 952.242–70 is added to prescribe a uniform clause pertaining to Contracting Officer's Representative authorities and limitations in providing technical direction to DOE contractors (see paragraph 15.).

24. Section 952.247–70 is amended by revising the prescription in the preface to the clause pursuant to the addition of new Subpart 947.70 (see paragraph 16.).

25. Section 952.250–70 is amended to revise an incorrect clause reference in paragraph (h) of the clause.

26. The table below provides a crosswalk reflecting, by section, the proposed reorganization and redesignation of Part 970, and descriptions of the amendments being proposed. The Department is seeking comments on only those changes marked with an "✓" in the comments column. The "Remarks" column of the table explains the specific changes to the section. Comments are not solicited on the amendments addressed in the table which are not marked with an "✓" since they are technical and conforming changes only.

### PART 970 REWRITE

New citation	Current citation	Title	Remarks	Comments
970.01 .....	N/A .....	Management and Operating Contract Regulatory System.	Subpart number and title are added for organizational purposes.	✓
970.0100 .....	970.0000 .....	Scope of Part .....	970.0000 is redesignated as 970.0100 and the text revised to clarify the scope of Part 970.	✓
N/A .....	970.0001 .....	[Reserved] .....	Section is removed as unnecessary.	✓
970.0103 .....	N/A .....	Publication and Codification .....	Section number, title and text are added. The new coverage in this section supplements FAR 1.303 to describe the new organization and numbering system for Part 970.	✓

## PART 970 REWRITE—Continued

New citation	Current citation	Title	Remarks	Comments
970.03 .....	970.03 [Note: Current 970.03 is reserved].	Improper Business Practices and Personal Conflicts of Interest.	Subpart number and title are added for organizational purposes.	✓
970.0309 .....	970.2274 .....	Whistleblower Protection of Contractor Employees.	970.2274 is redesignated as 970.0309..	
970.0309–1 .....	970.2274–1(a) .....	Applicability .....	Section is added to prescribe the applicability of the coverage contained in new subpart 903.9, as proposed in this rule, to management and operating contracts. New subpart 903.9 contains coverage currently contained in sections 970.2274–1 and 970.2274–2 which is proposed for relocation to subpart 903.9.	✓
970.0370 .....	970.0901 (Title) .....	Management Controls and Improvements	970.0901 (Title only) is redesignated as 970.0370 and amended. The new subsections of this section contain the text of 970.0901 as described below.	
970.0370–1 .....	970.0901(a), (b), and (c).	Policy .....	970.0901, paragraphs (a), (b) and (c), is redesignated as 970.0370–1. The subsection is also amended to add new paragraph (d) to implement new DOE policy to facilitate collaboration of improvements in any aspect of performance among the contractor, DOE, and other major facility contractors.	✓
970.0370–2 .....	N/A .....	Contract Clause .....	Subsection is added to prescribe the use of the existing clause at 970.5204–20, Management Controls. Although use of the clause is prescribed in the preface to the clause itself, there is no coverage in the policy section of the regulation to prescribe the basis and use of the clause. The subsection also prescribes the use of new clause 970.5203–2, Performance Improvement and Collaboration, to implement the policy proposed at new 970.0370–1(d).	✓
970.0371 .....	970.2272 (Title) .....	Conduct of Employees of DOE Management and Operating Contractors.	970.2272 (Title only) is redesignated as 970.0371 and modified to remove the term “Consultants.” The subsections of this section contain the text of 970.2272, as amended (see following subsections for summary of amendments).	✓
970.0371–1 .....	970.2272(a) .....	Scope of Section .....	Contains coverage codified at 970.2272, paragraph (a).	✓
970.0371–2 .....	970.2272(b)(1) .....	Applicability .....	Contains coverage codified at 970.2272, subparagraph (b)(1). The text is revised to remove the prescription for the use of DEAR clauses 970.5204–27(a) and (b) which are proposed for removal.	✓
970.0371–3 .....	N/A .....	Definition .....	Subsection is added to clarify the definition of “Employee” for the purposes of the policies contained in section 970.0371.	✓
970.0371–4 .....	970.2272(c) .....	Gratuities .....	Contains coverage codified at 970.2272, paragraph (c). Text is revised to remove the reference to “41 U.S.C. 51–54” and to substitute in lieu thereof a reference to “FAR 3.502.”	✓
970.0371–5 .....	970.2272(d) .....	Use of Privileged Information .....	Contains coverage codified at 970.2272, paragraph (d).	✓
970.0371–6 .....	970.2272(g) .....	Incompatibility Between Regular Duties and Private Interests.	Contains coverage codified at 970.2272, paragraph (g).	✓
970.0371–7 .....	970.2272(e) .....	Outside Employment of Contractor Employees.	Contains coverage codified at 970.2272, paragraph (e).	✓

## PART 970 REWRITE—Continued

New citation	Current citation	Title	Remarks	Comments
970.0371–8 .....	970.2272(f) .....	Employee Disclosure Concerning Other Employment Service.	Contains coverage codified at 970.2272, paragraph (f). Title and text are revised to prescribe a requirement for a disclosure (previously required by 970.5204–27) in lieu of an information statement.	✓
970.0371–9 .....	970.2272(b)(2) and (3).	Contract Clause .....	Contains coverage codified at 970.2272, subparagraph (b)(2). Prescription at 970.2272(b)(3) is removed.	✓
970.04 .....	970.04 .....	Administrative Matters .....	No change.	
970.0404 .....	970.0404 .....	Safeguarding Classified Information .....	No change.	
970.0404–1 .....	970.0404–1 .....	Definitions .....	No change.	
970.0404–2 .....	970.0404–2 .....	General .....	No change.	
970.0404–3 .....	970.0404–3 (a) and (b) 970.0404–4 (d).	Responsibilities of Contracting Officers ...	970.0404–3, paragraphs (a) and (b) are unchanged. 970.0404–4, paragraph (d) is redesignated as 970.0404–3, paragraph (c).	
970.0404–4 .....	970.0404–4 (a), (b) and (c).	Solicitation Provision and Contract Clauses.	Subsection is amended to revise the title, and to: (a) remove the redundant prescription for the use of several DEAR 952 clauses which are already prescribed in 904.404 and 904.7103; and (b) substitute a cross-reference to these sections. The prescription for the clause entitled Counterintelligence is retained.	✓
N/A .....	970.0406 .....	[Reserved] .....	Section is removed	
970.0407 .....	N/A .....	Contractor Records Retention .....	Section number and title are added for organizational purposes. The subsections of this section contain coverage relocated from 970.0407.	
970.0407–1 .....	970.0407 .....	Applicability .....	970.0407 is redesignated as 970.0407–1 and the title revised to conform with related FAR coverage.	
970.0407–1–1 .....	970.0407–1 .....	Alternate Retention Schedules .....	970.0407–1 is redesignated as 970.0407–1–1 and revised to update the DOE directive reference.	
970.0407–1–2 .....	970.0407–2 .....	Access to and Ownership of Records .....	970.0407–2 is redesignated as 970.0407–1–2.	
970.0407–1–3 .....	970.0407–3 .....	Contract Clause .....	970.0407–3 is redesignated as 970.0407–1–3.	
970.0470 .....	970.0470 .....	Department of Energy Directives .....	No change.	
970.0470–1 .....	970.0470–1 .....	General .....	Subsection is revised to prescribe DOE policy pertaining to requirements addressed in paragraphs (a) and (c) of the clause at 970.5204–78, Laws, Regulations and DOE Directives. Current coverage addresses only requirements addressed in paragraph (b) of the clause.	✓
970.0470–2 .....	970.0470–2 .....	Contract Clause .....	No change.	
970.08 .....	970.08 .....	Required Sources of Supplies and Services.	No change	
970.0801 .....	970.0801 (Title) .....	Excess Personal Property .....	No change (Title only).	
970.0801–1 .....	970.0801 (Text) .....	Policy .....	Section and title are added. Contains text of coverage currently codified at 970.0801.	
970.0808 .....	N/A .....	Acquisition of Printing. ....	Section number and title are added for organizational purposes. Currently, there is no coverage in the policy section of the regulation to prescribe the basis and use of the clause entitled "Printing."	
970.0808–1 .....	N/A .....	Scope of Section .....	Section number and title are added for organizational purposes (see 970.0808 above).	
970.0808–2 .....	N/A .....	Policy .....	Section number and title are added for organizational purposes (see 970.0808 above).	
970.0808–3 .....	N/A .....	Contract Clause .....	Section number and title are added (see 970.0808 above).	
970.09 .....	970.09 .....	Contractor Qualifications .....	No change.	

## PART 970 REWRITE—Continued

New citation	Current citation	Title	Remarks	Comments
970.0905 .....	970.0905 .....	Organizational Conflicts of Interest .....	No change.	
970.0970 .....	N/A .....	Performance Guarantees .....	Section number and title are added for organizational purposes.	
970.0970-1 .....	970.0902(a), (b) and (c) .....	Determination of Responsibility .....	970.0902, paragraphs (a), (b) and (c) are redesignated as 970.0970-1.	
970.0970-2 .....	970.0902(d) .....	Solicitation Provision .....	970.0902, paragraph (d), is redesignated as 970.0970-2.	
970.11 .....	970.10 .....	Describing Agency Needs .....	970.10 is redesignated as 970.11.	
970.1100 .....	N/A .....	Policy .....	Section number and title are added for organizational purposes.	
970.11.00-1 .....	970.1001 .....	Performance-based Contracting .....	970.1001 is redesignated as 970.1100-1.	
970.11.00-2 .....	970.1002 .....	Additional Considerations .....	970.1002 is redesignated as 970.1100-2.	
970.15 .....	970.15 .....	Contracting by Negotiation .....	No change.	
970.1504 .....	N/A .....	Contract Pricing .....	Section number and title are added for organizational purposes.	
970.1504-1 .....	N/A .....	Price Analysis .....	Subsection number and title are added for organizational purposes.	
970.1504-1-1 .....	970.15404-4 .....	Fees for Management and Operating Contracts.	970.15404-4 is redesignated as 970.1504-1-1.	
970.1504-1-2 .....	970.15404-4-1 .....	Fee Policy .....	970.15404-4-1 is redesignated as 970.1504-1-2.	
970.1504-1-3 .....	970.15404-4-2 .....	Special Considerations: Laboratory Management and Operation.	970.15404-4-2 is redesignated as 970.1504-1-3.	
970.1504-1-4 .....	970.15404-4-3 .....	Types of Contracts and Fee Arrangements.	970.15404-4-3 is redesignated as 970.1504-1-4.	
970.1504-1-5 .....	970.15404-4-4 .....	General Considerations and Techniques for Determining Fixed Fees.	970.15404-4-4 is redesignated as 970.1504-1-5.	
970.1504-1-6 .....	970.15404-4-5 .....	Calculating Fixed Fee .....	970.15404-4-5 is redesignated as 970.1504-1-6.	
970.1504-1-7 .....	970.15404-4-6 .....	Fee Base .....	970.15404-4-6 is redesignated as 970.1504-1-7.	
970.1504-1-8 .....	970.15404-4-7 .....	Special Equipment Purchases .....	970.15404-4-7 is redesignated as 970.1504-1-8.	
970.1504-1-9 .....	970.15404-4-8 .....	Special Considerations: Cost-plus-award-fee.	970.15404-4-8 is redesignated as 970.1504-1-9.	
970.1504-1-10 .....	970.15404-4-9 .....	Special Considerations: Fee Limitations	970.15404-4-9 is redesignated as 970.1504-1-10.	
970.1504-1-11 .....	970.15404-4-10 .....	Documentation .....	970.15404-4-10 is redesignated as 970.1504-1-11.	
970.1504-2 .....	970.15405 .....	Price Negotiation .....	970.15405 is redesignated as 970.1504-2.	
970.1504-3 .....	N/A .....	Documentation .....	Subsection number and title are added for organizational purposes.	
970.1504-3-1 .....	970.15406-2 .....	Cost or Pricing Data .....	970.15406-2 is redesignated as 970.1504-3-1.	
970.1504-4 .....	N/A .....	Special Cost or Pricing Areas .....	Subsection number and title are added for organizational purposes.	
970.1504-4-1 .....	970.15407-2 .....	Make-Or-Buy Plans .....	970.15407-2 is redesignated as 970.1504-4-1.	
970.1504-4-2 .....	970.15407-2-1 .....	Policy .....	970.15407-2-1 is redesignated as 970.1504-4-2.	

## PART 970 REWRITE—Continued

New citation	Current citation	Title	Remarks	Comments
970.1504-4-3 .....	970.15407-2-2 .....	Requirements .....	970.15407-2-2 is redesignated as 970.1504-4-3. The section is also amended in paragraph (a) to specifically assign to the Head of the Contracting Activity (HCA) the responsibility for ensuring that program specific make-or-buy criteria are developed and provided to the contractor for use in its make-or-buy plan administration activities for the facility, site, or specific program, as appropriate. It is recognized that the HCA must rely on program, technical, and business specialists within the agency for the actual development of the program specific make-or-buy criteria so that the criteria appropriately reflect program considerations applicable to the contractor's make-or-buy decisions. The section also is being amended by adding language recognizing the collaboration needed to develop effective program specific make-or-buy criteria.	✓
970.1504-5 .....	970.15404-4-11, 970.15407-2-3.	Solicitation Provision and Contract Clauses.	970.15404-11 is redesignated as 970.1504-5, paragraphs (a), (c), (d) and (e). 970.15407-2-3 is redesignated as 970.1504-5, paragraph (b), and amended to revise the clause prescription to authorize an administrative modification to the clause.	
970.17 .....	970.17 .....	Special Contracting Methods .....	No change.	
970.1706 .....	N/A .....	Management and Operating Contracts ...	Section number and title are added for organizational purposes.	
970.1706-1 .....	970.1702-1 .....	Award, Renewal, and Extension .....	970.1702-1, paragraphs (a) and (b), is redesignated as 970.1706-1, paragraphs (a) and (b), and the title revised. Coverage contained at 970.605 is redesignated as 970.1706-1, paragraph (c).	
970.1706-2 .....	970.1702-2 .....	Contract Clause .....	970.1702-2 is redesignated as 970.1706-2 and the title revised. The subsection is further revised to: (a) remove the prescription for use of the provision at 970.5204-73 and the clause at 970.5204-74, which are proposed for removal under this rule; and (b) add supplemental coverage to FAR 17.208(g) to prescribe the use of FAR clause 52.217-9 in DOE M&O contracts..	✓
970.19 .....	970.19 .....	Small, Small Disadvantaged and Women-owned Small Business Concerns.	No change.	
970.1907 .....	N/A .....	Subcontracting with Small Business, Small Disadvantaged Business and Woman-owned Small Business Concerns.	Section number and title are added for organizational purposes.	
970.1907-1 .....	970.1901 .....	Subcontracting Plan Requirements .....	970.1901 is redesignated as 970.1907-1. Section is revised to remove paragraph (a) in favor of existing FAR coverage (FAR 19.708)..	✓
N/A .....	970.20 .....	[Reserved] .....	Subpart is removed.	
970.22 .....	970.22 .....	Application of Labor Policies .....	No change.	
970.2200 .....	N/A .....	Scope of Subpart .....	Section number and title are added for organizational purposes.	
970.2201 .....	970.2201 .....	Basic Labor Policies. ....	No change.	
970.2201-1 .....	N/A .....	Labor Relations .....	Section number and title are added for organizational purposes.	
970.2201-1-1 .....	970.2201(a) .....	General .....	Contains coverage codified at 970.2201, paragraph (a).	

## PART 970 REWRITE—Continued

New citation	Current citation	Title	Remarks	Comments
970.2201–1–2 .....	970.2201(b) .....	Policies .....	Contains coverage codified at 970.2201, paragraph (b).	
970.2201–1–3 .....	970.2201(b)(5) (ii) ...	Contract Clause .....	Contains coverage codified at 970.2201, last sentence of paragraph (b)(5)(ii).	
970.2201–2 .....	970.2275 .....	Overtime Management .....	970.2275 is redesignated as 970.2201–2.	
970.2201–2–1 .....	970.2275–1 .....	Policy. ....	970.2275–1 is redesignated as 970.2201–2–1.	
970.2201–2–2 .....	970.2275–2 .....	Contract Clause .....	970.2275–2 is redesignated as 970.2201–2–2.	
N/A .....	970.2206 .....	Walsh-Healey Public Contracts Act .....	Section is removed. Coverage to be re-issued as internal DOE guidance..	✓
970.2204 .....	N/A .....	Labor Standards for Contracts Involving Construction.	Subpart number and title are added for organizational purposes. The subordinate sections/subsections of this Subpart contain coverage codified at 970.2273. These changes conform the numbering of supplemental DEAR coverage with related FAR coverage to the extent practicable.	
970.2204–1 .....	N/A .....	Statutory and Regulatory Requirements	Section number and title are added for organizational purposes.	
970.2204–1–1 .....	970.2273 .....	Administrative Controls and Criteria for Application of the Davis-Bacon Act in Operational or Maintenance Activities.	Section 970.2273 is redesignated as 970.2204–1–1.	
970.2208 .....	970.2208 .....	Equal Employment Opportunity .....	No change.	
970.2210 .....	970.2210 .....	Service Contract Act .....	No change.	
970.2270 .....	970.2270 .....	Unemployment Compensation .....	No change.	
970.23 .....	970.23 .....	Environmental, Conservation, and Occupational Safety Programs.	No change.	
970.2303 .....	970.2303 .....	Hazardous Materials Identification and Material Safety.	No change.	
970.2303–1 .....	970.2303–1 .....	General .....	No change.	
970.2303–2 .....	970.2303–2 .....	Clauses .....	No change.	
970.2304 .....	970.2304 .....	Use of Recovered/Recycled Materials ....	No change.	
970.2304–1 .....	970.2304–1 .....	General .....	No change.	
970.2304–2 .....	970.2304–2 .....	Contract Clause .....	No change.	
970.2305 .....	970.2305 .....	Workplace Substance Abuse Programs—Management and Operating Contracts.	No change.	
970.2305–1 .....	970.2305–1 .....	General .....	No change.	
970.2305–2 .....	970.2305–2 .....	Applicability .....	No change.	
970.2305–3 .....	970.2305–3 .....	Definitions .....	No change.	
970.2305–4 .....	970.2305–4 .....	Solicitation Provision and Contract Clause.	No change.	
970.2306 .....	970.2305–5 .....	Suspension of Payments, Termination of Contract, and Debarment and Suspension Actions.	970.2305–5 is redesignated as 970.2306.	
N/A .....	970.25 .....	Foreign Acquisition .....	Subpart is removed. The coverage codified at 970.2501 is relocated to new subsection 970.3701–1(see below).	
970.26 .....	970.26 .....	Other Socioeconomic Programs .....	No change.	
970.2670 .....	970.2601 (Title) .....	Implementation of Section 3021 of the Energy Policy Act of 1992.	970.2601 (Title only) is redesignated as 970.2670. The text of 970.2601 is contained in new subsections 970.2670–1 and 970.2671–1, as noted below.	
970.2670–1 .....	970.2601(a) .....	Requirements .....	Contains coverage codified at 970.2601, paragraph (a).	
970.2671 .....	N/A .....	Diversity .....	Section number and title are added for organizational purposes.	
970.2671–1 .....	970.2601(b) .....	Policy .....	Contains coverage codified at 970.2601, paragraph (b).	
970.2671–2 .....	970.2602–2(b) .....	Contract Clause .....	Contains coverage codified at 970.2602–2, paragraph (b).	
970.2672 .....	970.2602–1 .....	Implementation of Section 3161 of the National Defense Authorization Act for Fiscal Year 1993.	970.2602–1 (Title only) is redesignated as 970.2672. The text of 970.2602–1 is contained in new subsections 970.2672–1 and 970.2672–2 as noted below.	
970.2672–1 .....	970.2602–1(a) .....	Policy .....	Contains coverage codified at 970.2602–1, paragraph (a).	

## PART 970 REWRITE—Continued

New citation	Current citation	Title	Remarks	Comments
970.2672-2 .....	970.2602-1(b) .....	Requirements .....	Contains coverage codified at 970.2602-1, paragraph (b).	
970.2672-3 .....	970.2602-2(a) .....	Contract Clause .....	Contains coverage codified at 970.2602-2, paragraph (a).	
970.2673 .....	N/A .....	Regional Partnerships .....	New section number and title are added	✓
970.2673-1 .....	N/A .....	Policy .....	New subsection added to prescribe DOE policy concerning the establishment of constructive business partnerships in geographic regions in which DOE conducts business.	✓
970.2673-2 .....	N/A .....	Contract Clause .....	Prescribes the use of new contract clause 970.5226-3, Community Commitment.	✓
970.27 .....	970.27 .....	Patents, Data, and Copyrights .....	No change.	
970.2701 .....	970.2701 (Title) .....	General .....	No change (Title)	
970.2701-1 .....	970.2701 (Text) .....	Applicability .....	Contains the text of the coverage codified at 970.2701.	
970.2703 .....	970.2702 (Title) .....	Patent Rights .....	970.2702 (Title only) is redesignated as 970.2703	
970.2703-1 .....	970.2702 (Text) .....	Policy .....	Contains the text of the coverage codified at 970.2702.	
970.2703-2 .....	970.2704 .....	Contract Clauses .....	970.2704 is redesignated as 970.2703-2. Section is revised to remove existing coverage pursuant to amendments to 927.303, 952.227-11 and 952.227-13 proposed in this rule, and to add a cross-reference to 927.303.	✓
970.2704 .....	N/A .....	Rights in Data .....	Section number and title are added for organizational purposes.	
970.2704-1 .....	970.2705 .....	General .....	970.2705 is redesignated as 970.2704-1 and the title revised.	
970.2704-2 .....	970.2706 .....	Procedures .....	970.2706 is redesignated as 970.2704-2 and the title revised.	
970.2704-3 .....	970.2707 .....	Contract Clauses .....	970.2707 is redesignated as 970.2704-3 and the title revised.	
970.2770 .....	970.73 .....	Technology Transfer .....	970.73 is redesignated as 970.2770.	
970.2770-1 .....	970.7310 .....	General .....	970.7310 is redesignated as 970.2770-1.	
970.2770-2 .....	970.7320 .....	Policy .....	970.7320 is redesignated as 970.2770-2.	
970.2770-3 .....	970.2703 .....	Technology Transfer and Data Rights .....	970.2703 is redesignated as 970.2770-3 and the title revised.	
970.2770-4 .....	970.7330 .....	Contract Clause .....	970.7330 is redesignated as 970.2770-4.	
970.28 .....	970.28 .....	Bonds and Insurance .....	No change.	
970.2803 .....	N/A .....	Insurance .....	Section number and title are added for organizational purposes.	
970.2803-1 .....	970.2271 .....	Workers' Compensation Insurance .....	970.2271 is redesignated as 970.2803-1.	
970.2803-2 .....	970.2830 .....	Contract Clause .....	970.2830 is redesignated as 970.2803-2.	
970.29 .....	970.29 .....	Taxes .....	No change.	
970.2902 .....	N/A .....	Federal Excise Taxes .....	Section number and title are added for organizational purposes.	
970.2902-1 .....	970.2901 .....	Exemptions from Federal Excise Taxes .....	970.2901 is redesignated as 970.2902-1.	
970.2903 .....	N/A .....	State and Local Taxes .....	Section number and title are added for organizational purposes.	
970.2903-1 .....	970.2902 .....	Applicability of State and Local Taxes to the Government.	970.2902 is redesignated as 970.2903-1 and the title revised.	
970.2904 .....	N/A .....	Contract Clauses .....	Section number and title are added for organizational purposes.	
970.2904-1 .....	970.2903 .....	Management and Operating Contracts .....	970.2903 is redesignated as 970.2904-1 and revised to add a prescription for the modification of the clause at 48 CFR 52.229-10 for management and operating contracts.	✓
970.30 .....	970.30 .....	Cost Accounting Standards .....	No change.	
970.3002 .....	970.3001 .....	CAS Program Requirements .....	970.3001 is redesignated as 970.3002 and the title revised.	
970.3002-1 .....	970.3001-1 .....	Applicability .....	970.3001-1 is redesignated as 970.3002-1.	

## PART 970 REWRITE—Continued

New citation	Current citation	Title	Remarks	Comments
970.3002-2 .....	970.3001-2 .....	Limitations .....	970.3001-2 is redesignated as 970.3002-2.	
970.31 .....	970.31 .....	Contract Cost Principles and Procedures	No change.	
970.3100 .....	970.3100 .....	Scope of Subpart .....	The section title is revised.	
970.3100-1 .....	970.3100-1 .....	Definitions .....	No change.	
970.3100-2 .....	970.3100-2 .....	Responsibilities .....	No change.	
970.3101 .....	N/A .....	Applicability .....	Section number and title are added for organizational purposes.	
970.3101-1 .....	970.3100-3 .....	Objectives .....	970.3100-3 is redesignated as 970.3101-1 and the title revised.	
970.3101-2 .....	970.3101-6 .....	Advance Agreements .....	970.3101-6 is redesignated as 970.3101-2 and the title revised.	
970.3101-3 .....	970.3101-7 .....	Cost Certification and Penalties on Unallowable Costs.	970.3101-7 is redesignated as 970.3101-3 and the title revised.	
970.3102 .....	N/A .....	Contracts with Management and Operating Contractors.	Section number and title are added for organizational purposes.	
970.3102-1 .....	970.3101 .....	General .....	970.3101 is redesignated as 970.3102-1 and the title revised.	
970.3102-1-1 .....	970.3101-1 .....	Actual Cost Basis .....	970.3101-1 is redesignated as 970.3102-1-1.	
970.3102-1-2 .....	970.3102 .....	Application of Cost Principles .....	970.3102 is redesignated as 970.3102-1-2.	
970.3102-1-3 .....	970.3101-3 .....	General Basis for Reimbursement of Costs.	970.3101-3 is redesignated as 970.3102-1-3.	
970.3102-1-4 .....	970.3101-4 .....	Cost Determination Based on Audit .....	970.3101-4 is redesignated as 970.3102-1-4.	
970.3102-1-5 .....	970.3101-5 .....	Contractor's System of Accounting .....	970.3101-5 is redesignated as 970.3102-1-5.	
970.3102-2 .....	970.3101-2 .....	Direct and Indirect Costs .....	970.3101-2 is redesignated as 970.3102-2.	
970.3102-3 .....	N/A .....	Selected Costs .....	Section number and title are added for organizational purposes.	
970.3102-3-1 .....	970.3102-19 .....	Public Relations and Advertising .....	970.3102-19 is redesignated as 970.3102-3-1.	
970.3102-3-2 .....	970.3102-2 .....	Compensation for Personal Services .....	970.3102-2 is redesignated as 970.3102-3-2.	
970.3102-3-3 .....	970.3102-3 .....	Cost of Money .....	970.3102-3 is redesignated as 970.3102-3-3.	
970.3102-3-4 .....	970.3102-4 .....	Depreciation .....	970.3102-4 is redesignated as 970.3102-3-4.	
970.3102-3-5 .....	970.3102-5 .....	Employee Morale, Health, Welfare, Food Service, and Dormitory Costs.	970.3102-5 is redesignated as 970.3102-3-5.	
970.3102-3-6 .....	970.3102-21 .....	Fines, Penalties, and Mischarging Costs	970.3102-21 is redesignated as 970.3102-3-6.	
970.3102-3-7 .....	970.3102-7 .....	Lobbying and Political Activity Costs .....	970.3102-7 is redesignated as 970.3102-3-7 and the title revised.	
970.3102-3-8 .....	970.3102-1 .....	General and Administrative Expenses .....	970.3102-1 is redesignated as 970.3102-3-8.	
970.3102-3-9 .....	970.3102-12 .....	Plant Reconversion Costs .....	970.3102-12 is redesignated as 970.3102-3-9.	
970.3102-3-10 .....	970.3102-13 .....	Precontract Costs .....	970.3102-13 is redesignated as 970.3102-3-10.	
970.3102-3-11 .....	970.3102-9 .....	Professional and Consultant Service Costs.	970.3102-9 is redesignated as 970.3102-3-11.	
970.3102-3-12 .....	970.3102-16 .....	Relocation Costs .....	970.3102-16 is redesignated as 970.3102-3-12.	
970.3102-3-13 .....	970.3102-8 .....	Trade, Business and Professional Activity Costs.	970.3102-8 is redesignated as 970.3102-3-13 and the title revised.	
970.3102-3-14 .....	970.3102-17 .....	Travel Costs .....	970.3102-17 is redesignated as 970.3102-3-14.	
970.3102-3-15 .....	970.3102-20 .....	Cost Related to Legal and Other Proceedings.	970.3102-20 is redesignated as 970.3102-3-15 and the title revised.	
970.3102-3-16 .....	970.3102-10 .....	Overtime, Shift, and Holiday Premiums ..	970.3102-10 is redesignated as 970.3102-3-16.	
970.3102-3-17 .....	970.3102-11 .....	Page Charges in Scientific Journals .....	970.3102-11 is redesignated as 970.3102-3-17.	
970.3102-3-18 .....	970.3102-14 .....	Preparatory and Make-Ready Costs .....	970.3102-14 is redesignated as 970.3102-3-18.	
970.3102-3-19 .....	970.3102-6 .....	Facilities (Plant and Equipment) .....	970.3102-6 is redesignated as 970.3102-3-19.	
970.3102-3-20 .....	970.3102-18 .....	Special Funds in the Construction Industry.	970.3102-18 is redesignated as 970.3102-3-20.	

## PART 970 REWRITE—Continued

New citation	Current citation	Title	Remarks	Comments
970.3102–3–21 .....	970.3102–15 .....	Procurement: Subcontracts, Contractor-Affiliated Sources, and Leases.	970.3102–15 is redesignated as 970.3102–3–21.	
970.3170 .....	970.3103 .....	Contract Clauses .....	970.3103 is redesignated as 970.3170.	
970.32 .....	970.32 .....	Contract Financing .....	No change.	
970.3200 .....	970.3201 .....	Policy .....	970.3201 is redesignated as 970.3200 and the title revised.	
970.3200–1 .....	970.3272(a) and (b) .....	Reduction or Suspension of Advance, Partial, or Progress Payments.	970.3272, paragraphs (a) and (b) are redesignated as 970.3200–1.	
970.3200–1–1 .....	970.3272 (c) .....	Contract Clause .....	970.3272, paragraph (c) is redesignated as 970.3200–1–1.	
970.3204 .....	970.3202 (Title) .....	Advance Payments .....	970.3202 (Title only) is redesignated as 970.3204.	
970.3204–1 .....	970.3202 (Text) .....	Applicability .....	Contains the text of the coverage codified at 970.3204–1.	
970.3204–2 .....	970.3171 .....	Special Bank Account Agreement .....	970.3171 is redesignated as 970.3204–2.	
970.3204–3 .....	970.3170 .....	Contract Clause .....	970.3170 is redesignated as 970.3204–3 and the title revised.	
970.3270 .....	N/A .....	Standard Financial Management Clauses	Section number and title are added for organizational purposes. The section consolidates the prescriptions for certain financial management clauses contained in subpart 970.52, which are now only prescribed in the preface of each clause.	✓
970.34 .....	970.70 .....	Major System Acquisition .....	970.70 is redesignated as 970.34 and the title revised	
970.3400 .....	N/A .....	General Requirements .....	Section number and title are added for organizational purposes.	
970.3400–1 .....	970.7000 .....	Mission-oriented Solicitation .....	970.7000 is redesignated as 970.3400–1.	
970.35 .....	N/A .....	Research and Development Contracting	Subpart number and title are added to prescribe uniform policies and procedures for DOE implementation of FAR 35.017.	✓
970.3500 .....	N/A .....	Scope of Subpart .....	Section number and title are added to prescribe the scope of new Subpart 970.35.	✓
970.3501 .....	N/A .....	Federally Funded Research and Development Centers.	Section number and title are added for organizational purposes.	✓
970.3501–1 .....	N/A .....	Sponsoring Agreements .....	Subsection number and title are added to prescribe implementing requirements for FAR 35.017–1.	✓
970.3501–2 .....	N/A .....	Using an FFRDC .....	Subsection number and title are added to prescribe implementing requirements for FAR 35.017–3.	✓
970.3501–3 .....	N/A .....	Reviewing FFRDC's .....	Subsection number and title are added to prescribe implementing requirements for FAR 35.017–4.	✓
970.3501–4 .....	N/A .....	Contract Clause .....	Subsection number and title are added to prescribe a uniform clause for implementing Subpart 970.35.	✓
970.36 .....	970.36 .....	Construction and Architect-Engineer Contracts.	No change.	
970.3605 .....	N/A .....	Contract Clauses .....	Section number and title are added for organizational purposes.	
970.3605–1 .....	970.5204–43 .....	Other Contracts .....	970.5204–43 is redesignated as 970.3605–1 and the title and text revised. The DOE clause is removed and a supplement to the FAR prescription for the use of FAR clause 52.236–8 is added.	✓
970.3605–2 .....	970.3601 .....	Special Construction Clause for Operating Contracts.	970.3601 is redesignated as 970.3605–2.	
970.37 .....	N/A .....	Facilities Management Contracting .....	Subpart number and title are added for organizational purposes.	
970.3701 .....	N/A .....	General .....	Section number and title are added for organizational purposes.	
970.3701–1 .....	970.2501 .....	Severance Payments for Foreign Nationals.	970.2501 is redesignated as 970.3701–1.	
970.3701–1–1 .....	970.2501(a) .....	Waiver of Cost Allowability Provisions .....	Contains coverage codified at 970.2501, paragraph (a).	

## PART 970 REWRITE—Continued

New citation	Current citation	Title	Remarks	Comments
970.3701-1-2 .....	970.2501(b) .....	Solicitation Provision and Contract Clause.	Contains coverage codified at 970.2501, paragraph (b).	
970.3770 .....	970.72 .....	Facilities Management .....	970.72 is redesignated as 970.3770.	
970.3770-1 .....	970.7201 .....	Policy .....	970.7201 is redesignated as 970.3770-1 (except the clause prescription).	
970.3770-2 .....	970.7201 .....	Contract Clause .....	970.7201 (clause prescription) is redesignated as 970.3770-2.	
970.41 .....	970.41 .....	Acquisition of Utility Services .....	No change.	
970.4102 .....	N/A .....	Acquiring Utility Services .....	Section number and title are added for organizational purposes.	
970.4102-1 .....	970.4100 .....	Policy .....	970.4100 is redesignated as 970.4102-1 and the title revised.	
970.43 .....	N/A .....	Contract Modifications .....	Subpart number and title are added for organizational purposes.	
970.4302 .....	N/A .....	Changes .....	Section number and title are added for organizational purposes.	
970.4302-1 .....	N/A .....	Contract Clause .....	Section number and title are added for organizational purposes. Subsection prescribes the use of existing DEAR clause entitled "Changes." Currently, there is no coverage in the policy section of the regulation to prescribe the basis and use of the clause.	
970.44 .....	970.71 .....	Management and Operating Contractor Purchasing.	970.71 is redesignated as 970.44.	
970.4400 .....	N/A .....	Scope .....	Section number and title are added for organizational purposes.	
970.4401 .....	N/A .....	Responsibilities .....	Section number and title are added for organizational purposes.	
970.4401-1 .....	970.7102 .....	General .....	970.7102 is redesignated as 970.4401-1 and the title and text revised. Paragraph (b)(4) is revised to provide for two alternative methods which may be used by the contracting officer for conducting periodic appraisals of the contractor's purchasing function.	✓
970.4401-2 .....	970.7108 .....	Review and Approval .....	970.7108 is redesignated as 970.4401-2.	
970.4401-3 .....	970.7109 .....	Advance Notification .....	970.7109 is redesignated as 970.4401-3.	
970.4402 .....	N/A .....	Contractor Purchasing System .....	Section number and title are added for organizational purposes.	
970.4402-1 .....	970.7101 .....	Policy .....	970.7101 is redesignated as 970.4402-1 and the title revised.	
970.4402-2 .....	970.7103 .....	General Requirements .....	970.7103 is redesignated as 970.4402-2 and the title revised. The subsection is also revised to add new paragraph (d)(9) to emphasize the Department's policy regarding the maximization of opportunities for small, small disadvantaged, and woman-owned small business concerns in the performance of its major site and facility management contracts.	✓
970.4402-3 .....	970.7105 .....	Purchasing From Contractor-Affiliated Sources.	970.7105 is redesignated as 970.4402-3.	
970.4402-4 .....	970.7110 .....	Nuclear Material Transfers .....	970.7110 is redesignated as 970.4402-4.	
970.4403 .....	N/A .....	Contract Clause .....	Section number and title are added for organizational purposes. Subsection prescribes the use of existing DEAR clause entitled "Contractor Purchasing System." Currently, there is no coverage in the policy section of the regulation to prescribe the basis and use of the clause.	
970.45 .....	970.45 .....	Government Property .....	No change.	
970.4501 .....	N/A .....	General .....	Section number and title are added for organizational purposes.	

## PART 970 REWRITE—Continued

New citation	Current citation	Title	Remarks	Comments
970.4501-1 .....	970.4501 .....	Contract Clause	970.4501 is redesignated as 970.4501-1 and amended to authorize the contracting officer to list specific managerial personnel in paragraph (j) of the clause.	✓
970.49 .....	970.49 .....	Termination of Contracts .....	No change.	
970.4905 .....	N/A .....	Contract Termination Clause .....	Section number and title are added for organizational purposes.	
970.4905-1 .....	970.4901 and 970.4902.	Termination for Convenience and Default.	970.4901 and 970.4902 are redesignated as 970.4905-1 and the coverage revised to reflect the removal of the clause at 970.5204-45 in favor of FAR clause 52.249-6.	✓
970.50 .....	N/A .....	Extraordinary Contractual Actions .....	Subpart number and title are added for organizational purposes.	
970.5070 .....	970.2870 (Title) .....	Indemnification .....	970.2870 (Title only) is redesignated as 970.5070. The text of 970.2870 is contained in the subordinate subsections to this new section 970.5070 as noted below.	
970.5070-1 .....	970.2870(a) and (b)	Scope and Applicability .....	Contains coverage codified at 970.2870, paragraphs (a) and (b).	
970.5070-2 .....	970.2870(e) .....	General .....	Contains coverage codified at 970.2870, paragraph (e).	
970.5070-3 .....	970.2870(c) and (d)	Contract Clauses .....	Contains coverage codified at 970.2870, paragraphs (c) and (d).	
N/A .....	970.51 .....	Use of Government Sources by Contractors.	Subpart and subordinate sections are removed. Coverage to be reissued as internal DOE guidance.	✓
970.52 .....	970.52 .....	Solicitation Provisions and Contract Clauses for Management and Operating Contracts.	No change.	
970.5200 .....	970.5201 .....	Scope of Subpart .....	970.5201 is redesignated as 970.5200 and the title and text revised. The section is revised to clarify the use of the clauses prescribed in the Subpart in relation to the clauses prescribed in the FAR and in DEAR part 952.	✓
N/A .....	970.5203 .....	Modifications and Notes to Far Clauses	Section is removed as the coverage contained in the subordinate sections are unnecessarily duplicative of FAR coverage.	✓
970.5201 .....	970.5204 .....	Text of Provisions and Clauses .....	970.5204 is redesignated as 970.5201 and the title is revised.	
970.5203-1 .....	970.5204-20 .....	Management Controls .....	970.5204-20 is redesignated as 970.5203-1. The text of paragraph (a) has been divided into paragraphs (a)(1) through (a)(4). The text of current paragraph (a) is unchanged except that paragraph (a)(2) contains new coverage to contractually implement the requirement that is already prescribed at current 970.0901(b)(10) (which is redesignated as 970.0371-1 in this rule), but which was not previously set forth in the clause. Paragraph (b) of the clause is unchanged.	✓
970.5203-2 .....	N/A .....	Performance Improvement and Collaboration.	Subsection is added for proposed new clause. The new clauses implement new DOE policy to facilitate collaboration of improvements in any aspect of performance among the contractor, DOE, and other major facility contractors.	✓

## PART 970 REWRITE—Continued

New citation	Current citation	Title	Remarks	Comments
970.5203-3 .....	970.5204-12 .....	Contractor's Organization .....	970.5204-12 is redesignated as 970.5203-3. The clause is further amended to remove alternate paragraph (c) of the current clause, and to add a new paragraph (d) to the standard clause to contractually implement the requirements set forth in proposed new section 970.0371.	✓
970.5204-1 .....	970.5204-1 .....	Counterintelligence .....	970.5204-1 is redesignated as 970.5204-1 and the title and text revised. The section is revised to remove paragraph (a), which is unnecessarily duplicative of the prescription at DEAR 904.404 for the use of certain DEAR clauses. The coverage in paragraph (b) of the section is retained with technical and conforming amendments	✓
970.5204-2 .....	970.5204-78 .....	Laws, Regulations, and DOE Directives	970.5204-78 is redesignated as 970.5204-2 and amended to add a new paragraph (d) to merge the substance of the clause at 970.5204-29 (which is proposed for removal), and to redesignate current paragraph (d) as paragraph (e). The clause is also revised to clarify applicability of requirements to subcontracts.	✓
970.5204-3 .....	970.5204-79 .....	Access to and Ownership of Records .....	970.5204-79 is redesignated as 970.5204-3. The clause is further amended in paragraph (b)(1) to recognize non-employee patient medical/health related records as property of the contractor, and to update a DOE directive reference in paragraph (f).	✓
970.5208-1 .....	970.5204-19 .....	Printing .....	970.5204-19 is redesignated as 970.5208-1 and the title revised.	
970.5209-1 .....	970.5204-89 .....	Requirement for Guarantee of Performance.	970.5204-89 is redesignated as 970.5209-1.	
970.5215-1 .....	970.5204-54 .....	Total Available Fee: Base Fee Amount and Performance Fee Amount.	970.5204-54 is redesignated as 970.5215-1.	
970.5215-2 .....	970.5204-76 .....	Make-or-Buy Plan .....	970.5204-76 is redesignated as 970.5215-2.	
970.5215-3 .....	970.5204-86 .....	Conditional Payment of Fee, Profit, or Incentives.	970.5204-86 is redesignated as 970.5215-3.	
970.5215-4 .....	970.5204-87 .....	Cost Reduction .....	970.5204-87 is redesignated as 970.5215-4.	
970.5215-5 .....	970.5204-88 .....	Limitation on Fee .....	970.5204-88 is redesignated as 970.5215-5.	
970.5222-1 .....	970.5204-63 .....	Collective Bargaining Agreements—Management and Operating Contracts.	970.5204-63 is redesignated as 970.5222-1.	
970.5222-2 .....	970.5204-80 .....	Overtime Management .....	970.5204-80 is redesignated as 970.5222-2.	
970.5223-1 .....	970.5204-2 .....	Integration of Environment, Safety and Health into Work Planning and Execution.	970.5204-2 is redesignated as 970.5223-1. The clause is also revised to clarify applicability of requirements to subcontracts.	
970.5223-2 .....	970.5204-39 .....	Acquisition and Use of Environmentally Preferable Products and Services.	970.5204-39 is redesignated as 970.5223-2. The clause is amended in paragraph (a)(1) to update the reference to the applicable Executive Order.	
970.5223-3 .....	970.5204-57 .....	Agreement Regarding Workplace Substance Abuse Programs at DOE Facilities.	970.5204-57 is redesignated as 970.5223-3.	
970.5223-4 .....	970.5204-58 .....	Workplace Substance Abuse Programs at DOE Sites.	970.5204-58 is redesignated as 970.5223-4.	
970.5226-1 .....	970.5204-81 .....	Diversity Plan .....	970.5204-81 is redesignated as 970.5226-1.	
970.5226-2 .....	970.5204-77 .....	Workforce Restructuring under Section 3161 of the National Defense Authorization Act for Fiscal Year 1993.	970.5204-77 is redesignated as 970.5226-2.	

## PART 970 REWRITE—Continued

New citation	Current citation	Title	Remarks	Comments
970.5227-1 .....	970.5204-82 .....	Rights in Data—Facilities .....	970.5204-82 is redesignated as 970.5227-1.	
970.5227-2 .....	970.5204-83 .....	Rights in Data—Technology Transfer .....	970.5204-83 is redesignated as 970.5227-2.	
970.5227-3 .....	970.5204-40 .....	Technology Transfer Mission .....	970.5204-40 is redesignated as 970.5227-3.	
970.5228-1 .....	970.5204-31 .....	Insurance—Litigation and Claims .....	970.5204-31 is redesignated as 970.5228-1. The clause is also amended in paragraph (h) by removing the words “including employees” from the phrase “contractor’s liabilities to third persons” for clarification and consistency with paragraphs (a) and (e)(2) of the clause.	✓
970.5229-1 .....	970.5204-23 .....	State and Local Taxes .....	970.5204-23 is redesignated as 970.5229-1, and the title revised.	
970.5231-1 .....	970.5204-13 .....	Allowable Costs and Fee (Management and Operating Contracts).	970.5204-13 is redesignated as 970.5231-1. Amended to convert the “Notes” to “Alternates.” The title is also amended to accommodate other types of fee (see Alternate I of the clause).	
970.5231-2 .....	970.5204-17 .....	Political Activity Cost Prohibition .....	970.5204-17 is redesignated as 970.5231-2.	
970.5231-3 .....	970.5204-61 .....	Cost Prohibitions Related to Legal and Other Proceedings.	970.5204-61 is redesignated as 970.5231-3.	
970.5231-4 .....	970.5204-75 .....	Preexisting Conditions .....	970.5204-75 is redesignated as 970.5231-4.	
970.5232-1 .....	970.5204-85 .....	Reduction or Suspension of Advance, Partial, or Progress Payments upon Finding of Substantial Evidence of Fraud.	970.5204-85 is redesignated as 970.5232-1.	
970.5232-2 .....	970.5204-16 .....	Payments and Advances .....	970.5204-16 is redesignated as 970.5232-2. The clause is amended to convert the “Notes” to “Alternates.” The clause is also amended in paragraphs (b) and (e) and in paragraph (a) of Alternate II to update and conform the clause with the recently amended DOE fee policy (64 FR 12220)—e.g., update certain terms pertaining to fee, negotiated fixed amounts, and other items specifically approved by the contracting officer.	✓
970.5232-3 .....	970.5204-9 .....	Accounts, Records, and Inspection .....	970.5204-9 is redesignated as 970.5232-3. The clause is amended to convert the “Notes” to “Alternates.” The clause is also amended in paragraph (a) to address “negotiated fixed amounts”, which are authorized and frequently included in M&O contracts.	✓
970.5232-4 .....	970.5204-15 .....	Obligation of Funds .....	970.5204-15 is redesignated as 970.5232-4. Amended to convert the “Notes” to “Alternates.”	
970.5235-1 .....	N/A .....	Federally Funded Research and Development Center.	Section is added to add a uniform clause to implement the requirements prescribed at 970.35.	✓
970.5236-1 .....	970.5204-38 .....	Government Facility Subcontract Approval.	970.5204-38 is redesignated as 970.5236-1 and the title revised.	
970.5237-1 .....	970.5204-84 .....	Waiver of Limitations on Severance Payments to Foreign Nationals.	970.5204-84 is redesignated as 970.5237-1.	
970.5237-2 .....	970.5204-60 .....	Facilities Management .....	970.5204-60 is redesignated as 970.5237-2.	
970.5243-1 .....	970.5204-11 .....	Changes .....	970.5204-11 is redesignated as 970.5243-1.	

## PART 970 REWRITE—Continued

New citation	Current citation	Title	Remarks	Comments
970.5244-1 .....	970.5204-22 .....	Contractor Purchasing System .....	970.5204-22 is redesignated as 970.5244-1. Paragraph (a) is revised to provide for two alternative methods which may be used by the contracting officer for conducting periodic appraisals of the contractor's purchasing function. The clause is also amended to add paragraph (x), which incorporates certain coverage from 970.5204-44, which is proposed for removal in this rule. Amended coverage addresses subcontract flowdown requirements which are not otherwise required by the terms and conditions of the prime contract.	✓
970.5245-1 .....	970.5204-21 .....	Property .....	970.5204-21 is redesignated as 970.5245-1. Amended to convert the "Notes" to "Alternates."	
N/A .....	970.5204-3 .....	Buy American Act—Construction Materials.	Section is removed in favor of existing FAR coverage (FAR 52.225-5).	✓
N/A .....	970.5204-4 .....	New Mexico Gross Receipts and Compensating Tax.	Section is removed. The prescription for modified text of FAR clause 52.229-10 is located at new 970.2904-1(a).	✓
N/A .....	970.5204-5 .....	Disclosure of Information .....	Section is removed in favor of existing DEAR coverage (DEAR 952.204-72).	✓
N/A .....	970.5204-6 .....	Nuclear Hazards Indemnity .....	Section is removed in favor of existing DEAR coverage (DEAR 952.250-70).	✓
N/A .....	970.5204-7 .....	Protecting the Government's Interest When Subcontracting with Contractors Debarred, Suspended, or Proposed for Debarment.	Section is removed in favor of existing FAR coverage. (FAR 52.209-6).	✓
N/A .....	970.5204-8 .....	Indemnity Assurance to Architect-Engineer or Supplier Prior to Operation of a Nuclear Facility.	Section is removed in favor of existing DEAR coverage (DEAR 952.250-70).	✓
N/A .....	970.5204-10 .....	Foreign Ownership, Control, or Influence over Contractors (FOCI).	Section is removed in favor of existing DEAR coverage (DEAR 952.204-73).	✓
N/A .....	970.5204-14 .....	Allowable Costs and Fixed-fee (Support Contracts).	Section is removed as obsolete .....	✓
N/A .....	970.5204-25 .....	Workmanship and Materials .....	Section is removed in favor of existing FAR coverage (FAR 52.211-5).	✓
N/A .....	970.5204-27 .....	Consultant or Other Comparable Employment Services of Contractor Employees.	Section is removed pursuant to changes proposed to 970.2272 (redesignated as 970.0371) and 970.5204-12 (redesignated as 970.5203-3).	✓
N/A .....	970.5204-28 .....	Assignment .....	Section is removed in favor of existing FAR coverage (FAR 52.232-23 and 52.232-24).	✓
N/A .....	970.5204-29 .....	Permits or Licenses .....	Section is removed and the substance of the clause incorporated into new paragraph (d) of the clause at 970.5204-78 (redesignated as 970.5204-2).	✓
N/A .....	970.5204-30 .....	Notice of Labor Disputes .....	Section is removed in favor of existing FAR coverage (FAR 52.222-1).	✓
N/A .....	970.5204-33 .....	Priorities and Allocations .....	Section is removed in favor of existing DEAR coverage (DEAR 952.211-71).	✓
N/A .....	970.5204-35 .....	Controls in the National Interest (Unclassified Contracts with Educational Institutions).	Section is removed in favor of existing DEAR coverage (see DEAR 970.5204-78, redesignated as 970.5204-2 in this rule).	✓
N/A .....	970.5204-36 .....	Preventing Conflicts of Interest in University Research.	Section is removed as obsolete .....	✓
N/A .....	970.5204-37 .....	Statement of Work (Management and Operating Contracts).	Section is removed as obsolete .....	✓
N/A .....	970.5204-42 .....	Key Personnel .....	Section is removed pursuant to the consolidation of the clauses at 952.235-70 and 970.5204-42 into a single clause, as proposed in this rule.	✓
N/A .....	970.5204-43 .....	Other Government Contractors .....	Section is removed in favor of existing FAR coverage (FAR 52.236-8); see proposed new subsection 970.3605-1.	✓

## PART 970 REWRITE—Continued

New citation	Current citation	Title	Remarks	Comments
N/A .....	970.5204-44 .....	Flowdown of Contract Requirements to Subcontracts.	Section is removed as unnecessary. Certain portions of the coverage in this section are incorporated into 970.5204-22, redesignated as 970.5244-1 in this rule.	✓
N/A .....	970.5204-45 .....	Termination .....	Section is removed in favor of existing FAR coverage (FAR 52.249-6).	✓
N/A .....	970.5204-52 .....	Foreign Travel .....	Section is removed in favor of existing DEAR coverage (DEAR 952.247-70).	✓
N/A .....	970.5204-53 .....	Contractor Employee Travel Discounts ...	Section is removed in favor of existing DEAR coverage (DEAR 952.251-70).	✓
952.203-70 .....	970.5204-59 .....	Whistleblower Protection for Contractor Employees.	Section 970.5204-59 is redesignated as 952.203-70.	✓
N/A .....	970.5204-71 .....	Patent Rights-nonprofit Management and Operating Contractors.	Section is removed pursuant to amendments to 927.303 and 952.227-11 proposed in this rule.	✓
N/A .....	970.5204-72 .....	Patent Rights-profit-making Management and Operating Contractors.	Section is removed pursuant to amendments to 927.303 and 952.227-13 proposed in this rule.	✓
N/ .....	A970.5204-73 .....	Notice Regarding Options .....	Section is removed in favor of existing FAR coverage (FAR 52.217-9).	✓
N/A .....	970.5204-74 .....	Option to Extend the Term of the Contract.	Section is removed in favor of existing FAR coverage (FAR 52.217-9).	✓

### III. Public Comments

The amendments proposed in this rulemaking constitute primarily technical and conforming changes resulting from the reorganization of Part 970 and the elimination of coverage determined to be obsolete or unnecessarily duplicative of other governing regulations. Because these amendments involve extensive changes to the composition of the existing regulation, Part 970 is being republished, in its entirety, for the convenience of the reader. This rule also proposes to amend the text of several clauses and add material in order to ensure that uniform DOE policies and procedures are prescribed for certain issues. Interested persons are invited to submit comments regarding the proposed reorganization and numbering system for Part 970. Comments are also solicited regarding those amendments described in Section II., Section by Section Analysis, paragraphs 1. through 25., and to those amendments addressed in the table contained in paragraph 26., which are marked with a “✓”

Three copies of written comments should be submitted to the address indicated in the **ADDRESSES** section of this notice. All comments received will be available for public inspection in the DOE Reading Room, Room 1E-190, Forrestal Building, 1000 Independence Avenue, SW., Washington, D.C. 20585, between the hours of 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. All written comments received by the date indicated in the “**DATES**” section of this notice and all

other relevant information in the record will be carefully assessed and fully considered prior to publication of the final rule. Any information considered to be confidential must be so identified and submitted in writing, one copy only. DOE reserves the right to determine the confidential status of the information and to treat it according to our determination (See 10 CFR 1004.11).

The Department has concluded that this proposed rule does not involve a substantial issue of fact or law and that the proposed rule should not have substantial impact on the nation's economy or a large number of individuals or businesses. Therefore, pursuant to Public Law 95-91, the DOE Organization Act, and the Administrative Procedure Act (5 U.S.C. 553), the Department does not plan to hold a public hearing on this proposed rule.

### IV. Procedural Requirements

#### A. Review Under Executive Order 12866

Today's regulatory action has been determined not to be a “significant regulatory action” under Executive Order 12866, “Regulatory Planning and Review” (58 FR 51735, October 4, 1993). Accordingly, this action was not subject to review under that Executive Order by the Office of Information and Regulatory Affairs of the Office of Management and Budget (OMB).

#### B. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of

Executive Order 12988, “Civil Justice Reform,” 61 FR 4729 (February 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements: (1) eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. With regard to the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. The Department of Energy has completed the required review and determined that, to the extent permitted by law, the proposed regulation meets the relevant standards of Executive Order 12988.

### C. Review Under the Regulatory Flexibility Act

This proposed rule was reviewed under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, which requires preparation of a regulatory flexibility analysis for any rule which is likely to have significant economic impact on a substantial number of small entities. Today's proposed rule streamlines the Department's policies, procedures, provisions and clauses that apply to its M&O contracts. M&O contractors are not small entities. Accordingly, DOE certifies that this proposed regulation will not have a significant economic impact on a substantial number of small entities, and, therefore, no regulatory flexibility analysis has been prepared.

### D. Review Under the Paperwork Reduction Act

No new information or recordkeeping requirements are imposed by this rulemaking. Accordingly, no OMB clearance is required under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

### E. Review Under the National Environmental Policy Act

DOE has concluded that promulgation of this proposed rule falls into a class of actions which would not individually or cumulatively have significant impact on the human environment, as determined by DOE's regulations (10 CFR Part 1021, Subpart D) implementing the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*). Specifically, this rule is categorically excluded from NEPA review because the proposed amendments to the DEAR do not change the environmental effect of the rule being amended (categorical exclusion A5). Therefore, this proposed rule does not require an environmental impact statement or environmental assessment pursuant to NEPA.

### F. Review Under Executive Order 12612

Executive Order 12612 (52 FR 41685, October 30, 1987) requires that regulations, rules, legislation, and any other policy actions be reviewed for any substantial direct effects on States, on the relationship between the National Government and the States, or in the distribution of power and responsibilities among the various levels of Government. If there are sufficient substantial direct effects, then the Executive Order requires the preparation of a federalism assessment to be used in all decisions involved in promulgating and implementing a policy action. This proposed 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.

### G. Review Under the Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4) generally requires a Federal agency to perform a detailed assessment of costs and benefits of any rule imposing a Federal Mandate with costs to state, local or tribal governments, or to the private sector, of \$100 million or more. This rulemaking affects private sector entities, and the impact is less than \$100 million.

### H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. No. 105-277) requires Federal agencies to issue a Family Policymaking Assessment for any proposed rule or policy that may affect family well-being. Today's proposal would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

### List of Subjects in 48 CFR Parts 901, 902, 903, 904, 909, 911, 915, 917, 922, 923, 927, 941, 942, 947, 952 and 970.

Government procurement.

Issued in Washington, D.C. on February 15, 2000.

**Richard H. Hopf,**

*Director, Office of Procurement and Assistance Management.*

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

1. The authority citations for parts 901, 902, 903, 904, 909, 911, 915, 917, 922, 923, 941, 942, 947 and 952 continue to read as follows:

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

### PART 901—FEDERAL ACQUISITION REGULATIONS SYSTEM

#### 901.105 [Amended]

2. Section 901.105 is amended in the second sentence by revising "(see 48 CFR (DEAR) 970.5204-76)" to read "(see 48 CFR 970.5215-2)", and revising "(see 48 CFR (DEAR) 970.5204-2)" to read "(see 48 CFR 970.5223-1)."

### PART 902—DEFINITIONS OF WORDS AND TERMS

3. Section 902.200 is revised to read as follows:

#### 902.200 Definitions clause.

As prescribed by 48 CFR subpart 2.2, insert the clause at 48 CFR 52.202-1, Definitions, but modify the clause to limit the definition at paragraph (a) to encompass only the Secretary, Deputy Secretary, or Under Secretary of the Department of Energy, and the Chairman, Federal Energy Regulatory Commission. The contracting officer shall also add a paragraph at the end of the clause that defines "DOE" as meaning the United States Department of Energy and "FERC" as meaning the Federal Energy Regulatory Commission. Additional definitions may be included, provided they are consistent with the clause, the Federal Acquisition Regulation and this Department of Energy Acquisition Regulation.

### PART 903—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

4. Subpart 903.9 is added to read as follows:

#### Subpart 903.9—Whistleblower Protection for Contractor Employees

Sec.

- 903.901 Scope.
- 903.902 Definition.
- 903.903 Applicability
- 903.970 Remedies
- 903.971 Contract clause.

#### Subpart 903.9—Whistleblower Protection for Contractor Employees

##### 903.901 Scope.

This subpart implements the DOE Contractor Employee Protection Program as set forth at 10 CFR part 708. Part 708 establishes criteria and procedures for the investigation, hearing, and review of allegations from DOE contractor employees of employer reprisal resulting from employee disclosure of information to DOE, to members of Congress, or to the contractor; employee participation in proceedings before Congress or pursuant to this rule; or employee refusal to engage in illegal or dangerous activities, when such disclosure, participation, or refusal pertains to employer practices which the employee believes to be unsafe; to violate laws, rules, or regulations; or to involve fraud, mismanagement, waste, or abuse.

##### 903.902 Definition.

*Contractor*, as used in this subject, has the meaning contained in 10 CFR 708.2

**903.903 Applicability.**

10 CFR part 708 is applicable to complaints of retaliation filed by employees of contractors, and subcontractors, performing work on behalf of DOE directly related to DOE-owned or leased facilities, if the complaint stems from a disclosure, participation, or refusal described in 10 CFR 708.5.

**903.970 Remedies.**

(a) Contractors found to have retaliated against an employee in reprisal for such disclosure, participation or refusal are required to provide relief in accordance with decisions issued under 10 CFR part 708.

(b) 10 CFR part 708 provides that for the purposes of the Contract Disputes Act (41 U.S.C. 605 and 606), a final decision issued pursuant to 10 CFR part 708 shall not be considered to be a claim by the Government against a contractor or a decision by the contracting officer subject to appeal. However, a contractor's disagreement and refusal to comply with a final decision could result in a contracting officer's decision to disallow certain costs or to terminate the contract for default. In such case, the contractor could file a claim under the Disputes clause of the contract regarding the disallowance of cost or the termination of the contract.

**903.971 Contract clause.**

The contracting officer shall insert the clause at 952.203-70, Whistleblower Protection for Contractor Employees, in management and operating contracts.

**PART 904—ADMINISTRATIVE MATTERS**

5. Subpart 904.72 is added as follows:

**Subpart 904.72—Public Affairs**

Sec.

904.7200 Purpose.

904.7201 Contract clause.

**904.7200 Purpose.**

It is the policy of the Department of Energy to provide to the public and the news media, accurate and timely unclassified information on Departmental policies, programs, and activities. The Department's contractors share the responsibility for releasing unclassified information related to efforts under their contracts and must coordinate the release of unclassified information with the cognizant contracting officer and appropriate DOE Public Affairs personnel.

**904.7201 Contract clause.**

The contracting officer shall insert the clause at 952.204-75 in solicitations and

contracts that require the contractor to release unclassified information related to efforts under its contract regarding DOE policies, programs, and activities.

**PART 909—CONTRACTOR QUALIFICATIONS**

6. Subsection 909.104-1 is amended by revising "48 CFR 970.5204-57" to read "48 CFR 970.5223-3."

**PART 911—DESCRIBING AGENCY NEEDS**

7. Section 911.604 is amended by revising paragraphs (d) and (e) to read as follows:

**911.604 Solicitation provision and contract clause.**

\* \* \* \* \*

(d) The contracting officer shall insert the provision at 952.211-70, Priorities and Allocations (Domestic Energy Supplies), with its Alternate I, in solicitations that may result in the placement of rated orders for authorized energy programs, and in all management and operating contracts.

(e) The contracting officer shall insert the clause at 952.211-71, Priorities and Allocations (Domestic Energy Supplies), with its Alternate I, if it is believed the contract involves a program the purpose of which is to maximize domestic energy supplies, and in all management and operating contracts.

**PART 915—CONTRACTING BY NEGOTIATION**

8. Subsection 915.408-70 is added to read as follows:

**915.408-70 Solicitation provision and contract clause.**

The contracting officer shall insert the clause at 48 CFR 952.215-70, Key Personnel, in contracts under which performance is largely dependent on the expertise of specific key personnel.

**PART 917—SPECIAL CONTRACTING METHODS**

9. Section 917.600 is revised to read as follows:

**917.600 Scope of subpart.**

(a) This subpart implements 48 CFR subpart 17.6, Management and Operating Contracts. Departmental policies, procedures, provisions and clauses to be used in the award and administration of management and operating contracts that either implement or supplement the Federal Acquisition Regulation and parts 901 through 952 of this Chapter are contained in 48 CFR part 970.

(b) The requirements of this subpart apply to any Department of Energy management and operating contract, including performance-based management contracts as defined in 48 CFR 917.601. References in this Subpart to "management and operating contracts" include performance-based management contracts.

10. Section 917.601 is amended by revising the definition of performance-based contracting as follows:

**917.601 Definitions.**

*Performance-based contracting* has the meaning contained in 48 CFR 37.101.

\* \* \* \* \*

11. Section 917.602 is revised to read as follows:

**917.602 Policy.**

(a) The use of a management and operating contract must be authorized by the Secretary, Deputy Secretary or Under Secretary.

(b) It is the policy of the Department of Energy to provide for full and open competition in the award of management and operating contracts, including performance-based management contracts.

(c) A management and operating contract may be awarded or extended at the completion of its term without providing for full and open competition only when such award or extension is justified under one of the statutory authorities identified in 48 CFR 6.302 and only when authorized by the Head of the Agency. Documentation and processing requirements for justifications for the use of other than full and open competition shall be accomplished in accordance with internal agency procedures

**917.604 and 917.605 [Removed]**

12. Sections 917.604 and 917.605 are removed.

**PART 922—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITION****922.71 [Removed]**

13. Subpart 922.71 is removed.

**PART 923—ENVIRONMENT, CONSERVATION, OCCUPATIONAL SAFETY AND DRUG-FREE WORKPLACE****923.570-2 [Amended]**

14. Subsection 923.570-2 is amended in paragraph (a) by revising "48 CFR 970.5204-57" to read "48 CFR 970.5223-3"; and in paragraph (b) by revising "970.5204-58" to read "48 CFR 970.5223-4."

**923.570-3 [Amended]**

15. Subsection 923.570-3 is amended in paragraph (a) by revising “970.5204-58” to read “48 CFR 970.5223-4”, and in paragraph (b)(2) by revising “970.5204-57” to read “970.5223-3.”

**PART 927—PATENTS, DATA, AND COPYRIGHTS**

16. The authority citation for part 927 continues to read as follows:

**Authority:** Sec. 644 of the Department of Energy Organization Act, Pub. L. 95-91 (42 U.S.C. 7254); Sec. 148 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2168); Federal Nonnuclear Energy Research and Development Act of 1974, Sec. 9 (42 U.S.C. 5908); Atomic Energy Act of 1954, as amended, Sec. 152 (42 U.S.C. 2182); Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1987, as amended, Sec. 3131(a), (42 U.S.C. 7261a.).

17. Section 927.303 is amended by revising paragraph (a) to read as follows:

**927.30 Contract clauses.**

(a) In solicitations and contracts for experimental, research, developmental, or demonstration work (but see 48 CFR 27.304-3 regarding contracts for construction work or architect-engineer services), and all management and operating contracts, the contracting officer shall include the following clauses:

(1) Insert the clause at 48 CFR 952.227-11, Patent Rights by the Contractor (Short Form), in contracts in which the contractor is a domestic small business or nonprofit organization as defined at 48 CFR 27.301, except where the work of the contract is subject to an Exceptional Circumstances Determination by DOE. In contracts with nonprofit entities for the management and operation of DOE laboratories and production facilities, the contracting officer shall insert the clause with its Alternate I.

(2) Insert the clause at 48 CFR 952.227-13, Patent Rights Acquisition by the Government, in all contracts other than those described in paragraph (a)(1) of this section. In contracts with profit-making entities for the management and operation of DOE laboratories and production facilities, the contracting officer shall insert the clause with its Alternate I.

\* \* \* \* \*

**927.402-1 [Amended]**

18. Subsection 927.402-1 is amended in paragraph (b) by revising “(see 970.2705)” to read “(see 48 CFR 970.2704)”, and by revising “970.5204-82” to read “48 CFR 970.5227-1.”

**927.404 [Amended]**

19. Section 927.404 is amended in paragraph (g)(4) by revising “970.5204-82” to read “48 CFR 970.5227-2.”

20. Section 927.409 is amended in paragraph (a)(2)(vi) by revising “(See 970.2705)” to read “(see 48 CFR 970.2704).”

**PART 935—RESEARCH AND DEVELOPMENT CONTRACTING****935.070 [Removed]**

21. Section 935.070 is removed.

**PART 941—ACQUISITION OF UTILITY SERVICES**

22. Subsection 941.201-71 is amended by revising “48 CFR 970.0803” to read “48 CFR 970.4102-1.”

**PART 942—CONTRACT ADMINISTRATION**

23. Subpart 942.2 is added as follows:

**Subpart 942.2—Contract Administration Services****942.2-1 Contract Administration Services.****942.270-1 Contracting officer's representatives.**

In accordance with internal agency procedures, a contracting officer may designate other qualified personnel to be the Contracting Officer's Representative (COR) for the purpose of performing certain technical functions in administering a contract. These functions include, but are not limited to, technical monitoring, inspection, approval of shop drawings, testing, and approval of samples. The COR acts solely as a technical representative of the contracting officer and is not authorized to perform any function that results in a change in the scope, price, terms or conditions of the contract. COR designations must be made in writing by the contracting officer, and shall identify the responsibilities and limitations of the designation. A copy of the COR designation must be furnished to the contractor and the contract administration office.

**942.270-2 Contract clause.**

The clause at 952.242-70 may be inserted in solicitations and contracts when a designated Contracting Officer's Representative will issue technical direction to the contractor under the contract.

**PART 947—TRANSPORTATION**

24. Subpart 947.70 is added to read as follows:

**Subpart 947.70—Foreign Travel**

Sec.

947.7000 Definition.

947.7001 Policy.

947.7002 Contract clause.

**947.70—Foreign Travel****947.7000 Definition.**

*Foreign travel*, for purposes of this subpart, means any travel outside of Canada, Mexico and the United States and its territories and possessions.

**947.7001 Policy.**

Prior approval of the contracting officer is required by the contractor when foreign travel by contractor personnel will be charged directly to a DOE contract. Such approval shall be required for each separate trip regardless of whether funds for such travel are contained in an approved budget.

**947.7002 Contract clause.**

When foreign travel may be required under the contract, the contracting officer shall insert the clause at 48 CFR 952.247-70, Foreign Travel.

**PART 952—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

25. Section 952.203-70 is added to read as follows:

**952.203-70 Whistleblower protection for contractor employees.**

As prescribed in 48 CFR 903.971, insert the following clause:

Whistleblower Protection for Contractor Employees (Month and Year TBE)

(a) The contractor shall comply with the requirements of “DOE Contractor Employee Protection Program” at 10 CFR part 708 for work performed on behalf of DOE directly related to activities at DOE-owned or -leased sites.

(b) The contractor shall insert or have inserted the substance of this clause, including this paragraph (b), in subcontracts at all tiers, for subcontracts involving work performed on behalf of DOE directly related to activities at DOE-owned or -leased sites. (End of Clause)

26. Section 952.204-75 is added as follows:

**952.204-75 Public affairs.**

As prescribed in 48 CFR 904.7201, insert the following clause.

Public Affairs (Month and Year TBE)

(a) The Contractor must cooperate with the Department in releasing unclassified information to the public and news media regarding DOE policies, programs, and activities relating its effort under the contract. The responsibilities under this clause must be accomplished through

coordination with the Contracting Officer and appropriate DOE public affairs personnel.

(b) The Contractor is responsible for the development, planning, and coordination of proactive approaches for the timely dissemination of unclassified information regarding DOE activities onsite and offsite, including, but not limited to, operations and programs. Proactive public affairs programs may utilize a variety of communication media, including public workshops, meetings or hearings, open houses, newsletters, press releases, conferences, audio/visual presentations, speeches, forums, tours, and other appropriate stakeholder interactions.

(c) The Contractor's internal procedures must ensure that all releases of information to the public and news media are coordinated through, and approved by, a management official at an appropriate level within the Contractor's organization.

(d) The Contractor must comply with established DOE procedures for obtaining advance clearances on all oral, written, and audio/visual informational material prepared for public dissemination or use.

(e) Unless prohibited by law, the Contractor must notify the Contracting Officer and appropriate DOE public affairs personnel of any communications or contacts with Members of Congress relating to the effort performed under the contract.

(f) The Contractor must notify the Contracting Officer and appropriate DOE public affairs personnel of any activities or situations that may attract regional or national news media attention and of non-routine inquiries from national news media relating to the effort performed under the contract.

(g) In releases of information to the public and news media, the Contractor must fully and accurately identify the Contractor's relationship to the Department and fully and accurately credit the Department for its role in funding programs and projects resulting in scientific, technical, and other achievements.

27. Section 952.215-70 is added as follows:

**952.215-70 Key Personnel.**

As prescribed in 48 CFR 915.408-70(a), the contracting officer shall insert the following clause:

Key Personnel (Month and Year TBE)

(a) The personnel listed below or elsewhere in this contract [Insert cross-reference, if applicable] are considered essential to the work being performed under this contract. Before removing, replacing, or diverting any of the listed or specified personnel, the Contractor must: (1) Notify the Contracting Officer reasonably in advance; (2) submit justification (including proposed substitutions) in sufficient detail to permit evaluation of the impact on this contract; and (3) obtain the Contracting Officer's written approval.

(b) The list of personnel may, with the consent of the contracting parties, be amended from time to time during the course of the contract to add or delete personnel.

[Insert List of Key Personnel unless listed elsewhere in the contract]

(End of clause)

**952.222-70 [Removed]**

28. Section 952.222-70 is removed.

**952.223-71 [Removed]**

29. Section 952.223-71 is amended by revising "970.5204-2" to read "48 CFR 970.5223-1."

30. Section 952.227-11 is amended by revising the prescription and clause date, and adding Alternate I as follows:

**952.227-11 Patent rights—retention by the contractor (short form).**

As prescribed in 48 CFR 927.303(a)(1), the contracting officer shall insert the following clause:

Patent Rights—Retention by the Contractor (Short Form) (Month and Year TBE)

\* \* \* \* \*

Alternate I (Month and Year TBE). As prescribed in 48 CFR 927.303(a)(1), replace paragraph (e)(1) with the following paragraph (e)(1), and add the following paragraphs (m) and (n):

(e)(1) The contractor may request the right to reserve a revocable, nonexclusive, royalty-free license throughout the world in each subject invention to which the Government obtains title, except if the contractor fails to disclose the invention within the times specified in paragraph (c) of this clause. When DOE approves such reservation, the contractor's license will extend to its domestic subsidiaries and affiliates, if any, within the corporate structure of which the contractor is a party and includes the right to grant sublicenses of the same scope to the extent the contractor was legally obligated to do so at the time the contract was awarded. The license is transferable only with the approval of DOE, except when transferred to the successor of that part of the contractor's business to which the invention pertains.

(m) Transfer to successor contractor. (1) In the event of termination or expiration of this contract, the contractor shall transfer any unexpended balance of income received relating to intellectual property, in accordance with instructions from the contracting officer, to a successor contractor, or in the absence of a successor contractor, to such other entity as designated by the contracting officer. The contractor shall also transfer title, as one package, in all patents and patent applications, license agreements, accounts containing royalty revenues from such license agreements, including equity positions in third-party entities, and other intellectual property that arose under the performance of this contract, to the successor contractor or to the Government, as directed by the contracting officer. (2) The Government agrees that the recipient of such title shall assume any remaining obligations and liabilities in connection with the patents and patent applications.

(n) Facilities license. In addition to the rights of the parties with respect to inventions or discoveries conceived or first actually reduced to practice in the course of or under this contract, the contractor agrees to and does hereby grant to the Government

an irrevocable, nonexclusive, paid-up license in and to any inventions or discoveries regardless of when conceived or actually reduced to practice or acquired by the contractor at any time through completion of this contract and which are incorporated or embodied in the construction of the facility or which are utilized in the operation of the facility or which cover articles, materials, or products manufactured at the facility (1) to practice or have practiced by or for the Government at the facility, and (2) to transfer such license with the transfer of that facility. The acceptance or exercise by the Government of these rights shall not prevent the Government at any time from contesting the enforceability, validity or scope of, or title to, any rights or patents herein licensed.

31. Section 952.227-13 is amended by revising the prescription and clause date, and adding Alternate I as follows:

**952.227-13 Patent rights—acquisition by the Government.**

As prescribed in 48 CFR 927.303(a)(2), the contracting officer shall insert the following clause:

Patent Rights—Acquisition by the Government (Month and Year TBE)

\* \* \* \* \*

Alternate I (Month and Year TBE). As prescribed in 48 CFR 927.303(a)(2), add the following paragraphs (j) and (k):

(j) Transfer to successor contractor. (1) In the event of termination or expiration of this contract, the contractor shall transfer any unexpended balance of income received relating to intellectual property, in accordance with instructions from the contracting officer, to a successor contractor, or in the absence of a successor contractor, to such other entity as designated by the contracting officer. The contractor shall also transfer title, as one package, in all patents and patent applications, license agreements, accounts containing royalty revenues from such license agreements, including equity positions in third-party entities, and other intellectual property that arose under the performance of this contract, to the successor contractor or to the Government, as directed by the contracting officer.

(2) The Government agrees that the recipient of such title shall assume any remaining obligations and liabilities in connection with the patents and patent applications.

(k) Facilities License. In addition to the rights of the parties with respect to inventions or discoveries conceived or first actually reduced to practice in the course of or under this contract, the contractor agrees to and does hereby grant to the Government an irrevocable, nonexclusive, paid-up license in and to any inventions or discoveries regardless of when conceived or actually reduced to practice or acquired by the contractor at any time through completion of this contract and which are incorporated or embodied in the construction of the facility or which are utilized in the operation of the facility or which cover articles, materials, or products manufactured at the facility (1) to practice or have practiced by or for the

Government at the facility, and (2) to transfer such license with the transfer of that facility. The acceptance or exercise by the Government of these rights shall not prevent the Government at any time from contesting the enforceability, validity or scope of, or title to, any rights or patents herein licensed.

32. Section 952.242–70 is added as follows:

**952.242–70 Technical Direction**

As prescribed in 48 CFR 942.270–2, insert the following clause.

Technical Direction (Month and Year TBE)

(a) Performance of the work under this contract shall be subject to the technical direction of the DOE Contracting Officer's Representative (COR). The term "technical direction" is defined to include, without limitation:

(1) Providing direction to the contractor that redirects contract effort, shift work emphasis between work areas or tasks, require pursuit of certain lines of inquiry, fill in details, or otherwise serve to accomplish the contractual Statement of Work.

(2) Providing written information to the contractor that assists in interpreting drawings, specifications, or technical portions of the work description.

(3) Reviewing and, where required by the contract, approving, technical reports, drawings, specifications, and technical information to be delivered by the contractor to the Government.

(b) The contractor will receive a copy of the written COR designation from the contracting officer. It will specify the extent of the COR's authority to act on behalf of the contracting officer.

(c) Technical direction must be within the scope of work stated in the contract. The COR does not have the authority to, and may not, issue any technical direction that:

(1) Constitutes an assignment of additional work outside the Statement of Work;

(2) Constitutes a change as defined in the contract clause entitled "Changes;"

(3) In any manner causes an increase or decrease in the total estimated contract cost, the fee (if any), or the time required for contract performance;

(4) Changes any of the expressed terms, conditions or specifications of the contract; or

(5) Interferes with the contractor's right to perform the terms and conditions of the contract.

(d) All technical direction shall be issued in writing by the COR.

(e) The contractor must proceed promptly with the performance of technical direction duly issued by the COR in the manner prescribed by this clause and within its authority under the provisions of this clause. If, in the opinion of the contractor, any instruction or direction by the COR falls within one of the categories defined in (c)(1) through (c)(5) of this clause, the contractor must not proceed and must notify the Contracting Officer in writing within five (5) working days after receipt of any such instruction or direction and must request the Contracting Officer to modify the contract accordingly. Upon receiving the notification

from the contractor, the Contracting Officer must:

(1) Advise the contractor in writing within thirty (30) days after receipt of the contractor's letter that the technical direction is within the scope of the contract effort and does not constitute a change under the Changes clause of the contract; or

(2) Advise the contractor in writing within a reasonable time that the Government will issue a written change order.

(f) A failure of the contractor and Contracting Officer either to agree that the technical direction is within the scope of the contract or to agree upon the contract action to be taken with respect to the technical direction will be subject to the provisions of the clause entitled "Disputes."

(End of Clause)

33. Section 952.247–70 is amended by revising the prescription to read as follows:

**952.247–70 Foreign travel.**

As prescribed in 48 CFR 947.7002, insert the following clause:

\* \* \* \* \*

**952.250–70 [Amended]**

34. Section 952.250–70 is amended in paragraph (h) by revising "Audit and records—Negotiation", to read "Accounts, records, and inspection."

35. The authority citation for Part 970 continues 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).

36. Part 970 is revised to read as follows:

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

Sec.

**Subpart 970.01—Management and Operating Contract Regulatory System**

970.0100 Scope of part.

970.0103 Publication and codification.

**Subpart 970.03—Improper Business Practices and Personal Conflicts of Interest**

970.0309 Whistleblower protection of contractor employees.

970.0309–1 Applicability.

970.0370 Management controls and improvements.

970.0370–1 Policy.

970.0370–2 Contract clause.

970.0371 Conduct of employees of DOE management and operating contractors.

970.0371–1 Scope of section.

970.0371–2 Applicability.

970.0371–3 Definition.

970.0371–4 Gratuities.

970.0371–5 Use of privileged information.

970.0371–6 Incompatibility between regular duties and private interests.

970.0371–7 Outside employment of contractor employees.

970.0371–8 Employee disclosure concerning other employment services.

970.0371–9 Contract clause.

**Subpart 970.04—Administrative Matters**

970.0404 Safeguarding classified information.

970.0404–1 Definitions.

970.0404–2 General.

970.0404–3 Responsibilities of contracting officers.

970.0404–4 Solicitation provision and contract clauses.

970.0407 Contractor records retention.

970.0407–1 Applicability.

970.0407–1–1 Alternate retention schedules.

970.0407–1–2 Access to and ownership of records.

970.0407–1–3 Contract clause.

970.0470 Department of Energy directives.

970.0470–1 General.

970.0470–2 Contract clause.

**Subpart 970.08—Required Sources of Supplies and Services**

970.0801 Excess personal property.

970.0801–1 Policy.

970.0808 Acquisition of printing.

970.0808–1 Scope of section.

970.0808–2 Policy.

970.0808–3 Contract clause.

**Subpart 970.09—Contractor Qualifications**

970.0905 Organizational conflicts of interest.

970.0970 Performance guarantees.

970.0970–1 Determination of responsibility.

970.0970–2 Solicitation provision.

**Subpart 970.11—Describing Agency Needs**

970.1100 Policy.

970.1100–1 Performance-based contracting.

970.1100–2 Additional considerations.

**Subpart 970.15—Contracting by Negotiation**

970.1504 Contract pricing.

970.1504–1 Price analysis.

970.1504–1–1 Fees for management and operating contracts.

970.1504–1–2 Fee policy.

970.1504–1–3 Special considerations: Laboratory management and operation.

970.1504–1–4 Types of contracts and fee arrangements.

970.1504–1–5 General considerations and techniques for determining fixed fees.

970.1504–1–6 Calculating fixed fee.

970.1504–1–7 Fee base.

970.1504–1–8 Special equipment purchases.

970.1504–1–9 Special considerations: Cost-plus-award-fee.

970.1504–1–10 Special considerations: Fee limitations.

970.1504–1–11 Documentation.

970.1504–2 Price negotiation.

970.1504–3 Documentation.

970.1504–3–1 Cost or pricing data.

970.1504–4 Special cost or pricing areas.

970.1504–4–1 Make-or-Buy Plans.

970.1504–4–2 Policy.

970.1504–4–3 Requirements.

970.1504–5 Solicitation provision contract clauses.

**Subpart 970.17—Special Contracting Methods**

970.1706 Management and operating contracts.

- 970.1706-1 Award, renewal, and extension.  
970.1706-2 Contract clause.

**Subpart 970.19—Small, Small Disadvantaged and Women-Owned Small Business Concerns**

- 970.1907 Subcontracting with Small Business, Small Disadvantaged Business and Woman-owned Small Business Concerns.  
970.1907-1 Subcontracting plan requirements.

**Subpart 970.22—Application of Labor Policies**

- 970.2200 Scope of subpart.  
970.2201 Basic labor policies.  
970.2201-1 Labor relations.  
970.2201-1-1 General.  
970.2201-1-2 Policies.  
970.2201-1-3 Contract clause.  
970.2201-2 Overtime management.  
970.2201-2-1 Policy.  
970.2201-2-2 Contract clause.  
970.2204 Labor standards for contracts involving construction.  
970.2204-1 Statutory and regulatory requirements.  
970.2204-1-1 Administrative controls and criteria for application of the Davis-Bacon Act in operational or maintenance activities.  
970.2208 Equal employment opportunity.  
970.2210 Service Contract Act.  
970.2270 Unemployment compensation.

**Subpart 970.23—Environmental, Conservation, and Occupational Safety Programs**

- 970.2303 Hazardous materials identification and material safety.  
970.2303-1 General.  
970.2303-2 Contract clauses.  
970.2304 Use of recovered/recycled materials.  
970.2304-1 General.  
970.2304-2 Contract clause.  
970.2305 Workplace substance abuse programs—management and operating contracts.  
970.2305-1 General.  
970.2305-2 Applicability.  
970.2305-3 Definitions.  
970.2305-4 Solicitation provision and contract clause.  
970.2306 Suspension of payments, termination of contract, and debarment and suspension actions.

**Subpart 970.26—Other Socioeconomic Programs**

- 970.2670 Implementation of section 3021 of the Energy Policy Act of 1992.  
970.2670-1 Requirements.  
970.2671 Diversity.  
970.2671-1 Policy.  
970.2671-2 Contract clause.  
970.2672 Implementation of section 3161 of the National Defense Authorization Act for Fiscal Year 1993.  
970.2672-1 Policy.  
970.2672-2 Requirements.  
970.2672-3 Contract clause.  
970.2673 Regional partnerships.  
970.2673-1 Policy.  
970.2673-2 Contract clause.

**Subpart 970.27—Patents, Data, and Copyrights**

- 970.2701 General.  
970.2701-1 Applicability.  
970.2703 Patent rights.  
970.2703-1 Policy.  
970.2703-2 Contract clauses.  
970.2704 Rights in data.  
970.2704-1 General.  
970.2704-2 Procedures.  
970.2704-3 Contract clauses.  
970.2770 Technology transfer.  
970.2770-1 General.  
970.2770-2 Policy.  
970.2770-3 Technology transfer and patent rights.  
970.2770-4 Contract clause.

**Subpart 970.28—Bonds and Insurance**

- 970.2803 Insurance.  
970.2803-1 Workers' compensation insurance.  
970.2803-2 Contract clause.

**Subpart 970.29—Taxes**

- 970.2902 Federal Excise Taxes.  
970.2902-1 Exemptions from Federal Excise Taxes.  
970.2903 State and Local Taxes.  
970.2903-1 Applicability of State and Local Taxes to the Government.  
970.2904 Contract clauses.  
970.2904-1 Management and operating contracts.

**Subpart 970.30—Cost Accounting Standards**

- 970.3002 CAS Program Requirements.  
970.3002-1 Applicability.  
970.3002-2 Limitations.

**Subpart 970.31—Contract Cost Principles and Procedures**

- 970.3100 Scope of Subpart.  
970.3100-1 Definitions.  
970.3100-2 Responsibilities.  
970.3101 Applicability.  
970.3101-1 Objectives.  
970.3101-2 Advance agreements.  
970.3101-3 Cost certification and penalties on unallowable costs.  
970.3102 Contracts with Management and Operating Contractors.  
970.3102-1 General.  
970.3102-1-1 Actual Cost Basis.  
970.3102-1-2 Application of Cost Principles.  
970.3102-1-3 General Basis for Reimbursement of Costs.  
970.3102-1-4 Cost Determination Based on Audit.  
970.3102-1-5 Contractor's System of Accounting.  
970.3102-2 Direct and Indirect Costs.  
970.3102-3 Selected Costs.  
970.3102-3-1 Public Relations and Advertising.  
970.3102-3-2 Compensation for Personal Services.  
970.3102-3-3 Cost of Money.  
970.3102-3-4 Depreciation.  
970.3102-3-5 Employee Morale, Health, Welfare, Food Service, and Dormitory Costs.  
970.3102-3-6 Fines, Penalties, and Mischarging Costs.

- 970.3102-3-7 Lobbying and Political Activity Costs.  
970.3102-3-8 General and Administrative Expenses.  
970.3102-3-9 Plant Reconversion Costs.  
970.3102-3-10 Precontract Costs.  
970.3102-3-11 Professional and Consultant Service Costs.  
970.3102-3-12 Relocation Costs.  
970.3102-3-13 Trade, Business, Technical and Professional Activity Costs.  
970.3102-3-14 Travel Costs.  
970.3102-3-15 Cost Related to Legal and Other Proceedings.  
970.3102-3-16 Overtime, Shift and Holiday Premiums.  
970.3102-3-17 Page Charges in Scientific Journals.  
970.3102-3-18 Preparatory and Make-Ready Costs.  
970.3102-3-19 Facilities (Plant and Equipment).  
970.3102-3-20 Special Funds in the Construction Industry.  
970.3102-3-21 Procurement: Subcontracts, Contractor-Affiliated Sources, and Leases.  
970.3170 Contract Clauses.

**Subpart 970.32—Contract Financing**

- 970.3200 Policy.  
970.3200-1 Reduction or Suspension of Advance, Partial, or Progress Payments.  
970.3200-1-1 Contract Clause.  
970.3204 Advance Payments.  
970.3204-1 Applicability.  
970.3204-2 Special Bank Account Agreement.  
970.3204-3 Contract clause.  
970.3270 Standard Financial Management Clauses.

**Subpart 970.34—Major System Acquisition**

- 970.3400 General Requirements.  
970.3400-1 Mission-oriented Solicitation.

**Subpart 970.35—Research and Development Contracting**

- 970.3500 Scope of Subpart  
970.3501 Federally Funded Research and Development Centers.  
970.3501-1 Sponsoring Agreements.  
970.3501-2 Using an FFRDC.  
970.3501-3 Reviewing FFRDC's.  
970.3501-4 Contract Clause.

**Subpart 970.36—Construction and Architect-Engineer Contracts.**

- 970.3605 Contract Clauses.  
970.3605-1 Other Contracts.  
970.3605-2 Special Construction Clause for Operating Contracts.

**Subpart 970.37—Facilities Management Contracting**

- 970.3701 General.  
970.3701-1 Severance Payments to Foreign Nationals.  
970.3701-1-1 Waiver of Cost Allowability Provisions.  
970.3701-1-2 Solicitation Provision and Contract Clause.  
970.3770 Facilities Management.  
970.3770-1 Policy.  
970.3770-2 Contract clause.

**Subpart 970.41—Acquisition of Utility Services**

- 970.4102 Acquiring Utility Services.
- 970.4102-1 Policy.

**Subpart 970.43—Contract Modifications**

- 970.4302 Changes.
- 970.4302-1 Contract Clause.

**Subpart 970.44—Management and Operating Contractor Purchasing**

- 970.4400 Scope.
- 970.4401 Responsibilities.
- 970.4401-1 General.
- 970.4401-2 Review and Approval.
- 970.4401-3 Advance Notification.
- 970.4402 Contractor Purchasing System.
- 970.4402-1 Policy.
- 970.4402-2 General Requirements.
- 970.4402-3 Purchasing from Contractor-Affiliated Sources.
- 970.4402-4 Nuclear Material Transfers.
- 970.4403 Contract Clause.

**Subpart 970.45—Government Property**

- 970.4501 General.
- 970.4501-1 Contract Clause.

**Subpart 970.49—Termination of Contracts**

- 970.4905 Contract Termination Clause.
- 970.4905-1 Termination for Convenience of the Government and Default.

**Subpart 970.50—Extraordinary Contractual Actions**

- 970.5070 Indemnification.
- 970.5070-1 Scope and Applicability.
- 970.5070-2 General.
- 970.5070-3 Contract Clauses.

**Subpart 970.52—Solicitation Provisions and Contract Clauses for Management and Operating Contracts**

- 970.5200 Scope of Subpart.
- 970.5201 Text of Provisions and Clauses.
- 970.5203-1 Management Controls.
- 970.5203-2 Performance Improvement and Collaboration.
- 970.5203-3 Contractor's Organization.
- 970.5204-1 Counterintelligence.
- 970.5204-2 Laws, Regulations, and DOE Directives.
- 970.5204-3 Access to and Ownership of Records.
- 970.5208-1 Printing.
- 970.5209-1 Requirement for Guarantee of Performance.
- 970.5215-1 Total Available Fee: Base Fee Amount and Performance Fee Amount.
- 970.5215-2 Make-or-Buy Plan.
- 970.5215-3 Conditional Payment of Fee, Profit, or Incentives.
- 970.5215-4 Cost Reduction.
- 970.5215-5 Limitation on Fee.
- 970.5222-1 Collective Bargaining Agreements—Management and Operating Contracts.
- 970.5222-2 Overtime Management.
- 970.5223-1 Integration of Environment, Safety, and Health into Work Planning and Execution.
- 970.5223-2 Acquisition and Use of Environmentally Preferable Products and Services.
- 970.5223-3 Agreement Regarding Workplace Substance Abuse Programs at DOE Facilities.

- 970.5223-4 Workplace Substance Abuse Programs at DOE Sites.
- 970.5226-1 Diversity Plan.
- 970.5226-2 Workforce Restructuring under Section 3161 of the National Defense Authorization Act for Fiscal Year 1993.
- 970.5227-1 Community Commitment.
- 970.5227-1 Rights in Data—Facilities.
- 970.5227-2 Rights in Data—Technology Transfer.
- 970.5227-3 Technology Transfer Mission.
- 970.5228-1 Insurance—Litigation and Claims.
- 970.5229-1 State and Local Taxes.
- 970.5231-1 Allowable Costs and Fee (Management and Operating Contracts).
- 970.5231-2 Political Activity Cost Prohibition.
- 970.5231-3 Cost Prohibitions Related to Legal and Other Proceedings.
- 970.5231-4 Preexisting Conditions.
- 970.5232-1 Reduction or Suspension of Advance, Partial, or Progress Payments Upon Finding of Substantial Evidence of Fraud.
- 970.5232-2 Payments and Advances.
- 970.5232-3 Accounts, Records, and Inspection.
- 970.5232-4 Obligation of Funds.
- 970.5235-1 Federally Funded Research and Development Center Sponsoring Agreement.
- 970.5236-1 Government Facility Subcontract Approval.
- 970.5237-1 Waiver of Limitations on Severance Payments to Foreign Nationals.
- 970.5237-2 Facilities Management.
- 970.5243-1 Changes.
- 970.5244-1 Contractor Purchasing System.
- 970.5245-1 Property.

**Subpart 970.01—Management and Operating Contract Regulatory System****970.0100 Scope of Part.**

This part provides Departmental policies, procedures, provisions, and clauses that implement and supplement the Federal Acquisition Regulation (FAR) and other parts of the Department of Energy Acquisition Regulation (DEAR) for the award and administration of the Department's management and operating contracts, as defined at 48 CFR subpart 17.6.

**970.0103 Publication and codification.**

(a) Organization of Part 970. (1) To the extent possible, the titles and text of the subparts, sections, and subsections of this part are numbered to correspond with related material that is contained in the FAR.

(2) The number to the left of the decimal point represents the DEAR Part number (i.e., 970). The numbers to the right of the decimal point and to the left of the dash represent, in order, the DEAR subpart (first two digits), and the DEAR section number (second two digits). The numbers to the right of the dash represent the DEAR subsection. A

second dash may follow the DEAR subsection number. As applicable, numbers to the right of the second dash represent subordinate subsections.

(3) To the extent practicable, the subpart number corresponds with the FAR part which contains related coverage, and the section number corresponds with the FAR subpart which contains related coverage (e.g., the coverage contained in DEAR 970.0309 corresponds with material contained in FAR 3.9).

(4) Where the FAR does not contain related coverage on a particular subject, the DEAR section number will be numbered using numbers of 70 and up (e.g., 970.0370).

(b) Special note regarding clause numbering. The section number for clauses prescribed in part 970 are numbered to correspond with the subpart in which the clause is prescribed (e.g., 970.5203-1 is prescribed for use at subpart 970.03).

**Subpart 970.03—Improper Business Practices and Personal Conflicts of Interest****970.0309 Whistleblower Protection for Contractor Employees.****970.0309-1 Applicability.**

The contracting officer shall refer to 48 CFR subpart 903.9 regarding the applicability of the DOE Employee Protection Program to management and operating contracts.

**970.0370 Management Controls and Improvements.****970.0370-1 Policy.**

(a) Management and operating contractors shall develop and maintain systems of management and quality control to discourage waste, fraud and abuse; and to ensure that components, products, and services that are provided to DOE satisfy the contractor's obligations under the contract.

(b) As a part of the required overall management structure, the contractor must maintain management control systems which, in compliance with the requirements of the clause at 48 CFR 970.5203-1:

(1) Are documented and satisfactory to DOE;

(2) Ensure that all levels of management are accountable for effective management systems and internal controls within their areas of assigned responsibility;

(3) Cover both programmatic and administrative functions;

(4) Provide reasonable assurance that Government resources are safeguarded against theft, fraud, waste, and unauthorized use;

(5) Promote efficient and effective operations;

(6) Ensure that all obligations and costs incurred are in compliance with the intended purposes and the terms and conditions of the contract;

(7) Properly record, manage, and report all revenues, expenditures, transactions and assets;

(8) Maintain financial, statistical and other reports necessary to maintain accurate, reliable, and timely accountability and management controls;

(9) Are periodically reviewed to ensure that the systems provide reasonable assurance that the objectives of the system are being accomplished and that these controls are working effectively;

(10) Are in accordance with the Comptroller General's standards for internal controls, as set forth in the General Accounting Office Policy and Procedures Manual For Guidance To Federal Agencies, (Oct 1984), as amended.

(c) Management and operating contractors shall also develop and maintain a baseline program of quality assurance that will implement documented performance and quality standards, and management controls and assessment techniques to ensure components, services, and products meet DOE's, design criteria and other governing and applicable specifications.

(d) DOE expects all its contractors to seek to identify improvements in any aspect of performance. Management and operating contracts are very large and complex; therefore, the opportunities to identify changes in performance that will increase the effectiveness or efficiency of contract performance are more prevalent than under other contracts. The clause at 48 CFR 970.5203-2 requires DOE management and operating contractors to affirmatively seek to identify, evaluate, and institute, where appropriate, processes that will improve the effectiveness or efficiency of any aspect of contract performance. It further requires the contractor to communicate any such improvements to DOE, other management and operating contractors, and DOE major facilities contractors. The contractor is required to participate in efforts by those contractors to address common problems or the institution of improvements. It allows the contractor to enlist the aid of the DOE contracting officer where necessary to institute or communicate the improvements. The obligations under the clause in no way affect the contractor's obligations under other provisions of the contract to notify

or acquire the approval of the contracting officer.

#### **970.0370-2 Contract clause.**

(a) The contracting officer shall insert the clause at 970.5203-1, Management Controls, in all management and operating contracts.

(b) The contracting officer shall insert the clause at 970.5203-2, Performance Improvement and Collaboration, in all management and operating contracts.

#### **970.0371 Conduct of employees of DOE management and operating contractors.**

##### **970.0371-1 Scope of section.**

This section establishes the policies for maintaining satisfactory standards of conduct on the part of individuals employed by DOE management and operating contractors.

##### **970.0371-2 Applicability.**

The policies in this section are applicable to all DOE management and operating contractors.

##### **970.0371-3 Definition.**

*Employees*, as used in this section, are defined to mean individuals employed by the contractor, both full and part-time, who are assigned to work under a DOE management and operating contract.

##### **970.0371-4 Gratuities.**

Employees of a management and operating contractor shall not, under circumstances which might reasonably be interpreted as an attempt to influence the recipients in the conduct of their duties, accept any gratuity or special favor from individuals or organizations with whom the contractor is doing business, or proposing to do business, in accomplishing the work under the contract. Reference is made to the requirements prescribed in 48 CFR 3.502.

##### **970.0371-5 Use of privileged information.**

Management and operating contractor employees shall not use privileged information for personal gain, or make other improper use of privileged information which is acquired in connection with their employment on contract work. For the purposes of this subsection, the term "privileged information" includes but is not limited to, unpublished information relating to technological and scientific developments; medical, personnel, or security records of individuals; anticipated materials' requirements or pricing action; possible new sites for DOE program operations; and knowledge of selections of contractors or subcontractors in advance of official announcement.

#### **970.0371-6 Incompatibility between regular duties and private interests.**

Employees of a management and operating contractor shall not be permitted to make or influence any decisions on behalf of the contractor which directly or indirectly affect the interest of the Government, if the employee's personal concern in the matter may be incompatible with the interest of the Government. For example: An employee of a contractor will not negotiate, or influence the award of, a subcontract with a company in which the individual has an employment relationship or significant financial interest; and an employee of a contractor will not be assigned the preparation of an evaluation for DOE or for any DOE contractor of some technical aspect of the work of another organization with which the individual has an employment relationship, or significant financial interest, or which is a competitor of an organization (other than the contractor who is the individual's regular employer) in which the individual has an employment relationship or significant financial interest. The contractor shall be responsible for informing employees that they are expected to disclose any incompatibilities between duties performed for the contractor and their private interests and to refer undecided questions to the contractor.

#### **970.0371-7 Outside employment of contractor employees.**

Employees of a management and operating contractor are entitled to the same rights and privileges with respect to outside employment as other citizens. Therefore, there is no general prohibition against contractor employees having outside employment. However, no employee of a contractor performing work on a full or part-time basis under a DOE management and operating contract may engage in employment outside official hours of duty or while on leave if such employment will:

(a) In any manner interfere with the proper and effective performance of the duties of the position;

(b) Appear to create a conflict-of-interest situation, or

(c) Appear to subject DOE or the contractor to public criticism or embarrassment.

#### **970.0371-8 Employee disclosure concerning other employment services.**

(a) Management and operating contractors are responsible for requiring its employees to file with the contractor, a written disclosure statement concerning outside employment

services which involve the use of information in the area of the employee's employment with the contractor. The disclosure shall contain such information concerning the outside employment as the contractor may prescribe. At a minimum, the employee's disclosure shall:

(1) Acknowledge that the employee has read and is familiar with:

(i) The requirements and restrictions prescribed in this section,

(ii) DOE publication entitled, "Reporting Results of Scientific and Technical Work Funded by DOE", and

(iii) The requirements of the contractor's contract with DOE relating to patents.

(2) Include information concerning any rate of remuneration significantly in excess of the employee's regular rate of remuneration;

(3) Identify any actual or potential conflicts with DOE's policies regarding conduct of employees of DOE's contractors set forth in this section;

(4) Address any potential impacts that such employment may have on the contractor's responsibility to report fully and promptly to DOE all significant research and development information; and

(5) Identify any potential conflicts such employment may have with the patent provisions of the contractor's contract with DOE.

(b) The contractor shall provide a copy of all disclosures to the contracting officer.

#### **970.0371-9 Contract clause.**

The contracting officer shall insert the clause at 970.5203-3, Contractor's Organization, in all management and operating contracts.

### **Subpart 970.04—Administrative Matters**

#### **970.0404 Safeguarding classified information.**

##### **970.0404-1 Definitions.**

*Classified information* means any information or material that is owned by or produced for, or is under the control of the United States Government, and determined pursuant to provisions of Executive Order 12356, April 2, 1982 (47 FR 14874, April 6, 1982), or prior orders, or as authorized under the Atomic Energy Act of 1954, as amended, to require protection against unauthorized disclosure, and is so designated.

*Counterintelligence* means information gathered and activities conducted to protect against espionage, other intelligence activities, sabotage, or assassinations conducted for or on

behalf of foreign powers, organizations or persons, or international terrorist activities, but not including personnel, physical, document or communication security programs.

*Restricted data* means data which is defined, in section 11, of the Atomic Energy Act of 1954, as amended, as "all data concerning:

(1) Design, manufacture, or utilization of atomic weapons;

(2) The production of special nuclear material; or

(3) The use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to section 142."

##### **970.0404-2 General.**

(a) The basis of DOE's security requirements is the Atomic Energy Act of 1954, as amended.

(b) DOE regulations concerning national security information are codified at 10 CFR parts 1045 and 710. Supplemental security material is found in the DOE Directives system. Foreign ownership, control, or influence over contractors as it relates to security is discussed at 48 CFR 904.70 also applies to management and operating contracts. Regulations pertaining to the protection of restricted data are found under 10 CFR part 1016.

(c) Statutory requirements to be observed in connection with the release of Restricted Data to foreign governments are contained in the Atomic Energy Act of 1954, Sections 141 and 144 (42 U.S.C. 2161 and 2164).

(d) Section 148 of the Atomic Energy Act (42 U.S.C. 2168) prohibits the unauthorized dissemination of unclassified nuclear information with respect to the atomic energy defense programs pertaining to:

(1) The design of production facilities or utilization facilities;

(2) Security measures (including security plans, procedures, and equipment) for the physical protection of:

(i) Production or utilization facilities,

(ii) Nuclear material contained in such facilities, or

(iii) Nuclear materials in transit; or

(3) The design, manufacture, or utilization of any atomic weapon or component if the design, manufacture, or utilization of such weapon or component was contained in any information declassified or removed from the Restricted Data category pursuant to section 142 of the Atomic Energy Act (42 U.S.C. 2162).

(e) Executive Order 12333, United States Intelligence Activities, provides for the organization and control of

United States foreign intelligence and counterintelligence activities. In accordance with this Executive Order, DOE has established a counterintelligence program which is described in DOE Order 5670.3 (as amended). All DOE elements, including management and operating contractors and other contractors managing DOE-owned facilities which require access authorizations, should undertake the necessary precautions to ensure that DOE and covered contractor personnel, programs and resources are properly protected from foreign intelligence threats and activities.

#### **970.0404-3 Responsibilities of contracting officers.**

(a) If access to Restricted Data may be required during the solicitation process for a management and operating contract, security clearances shall be obtained in accordance with applicable DOE Directives in the safeguards and security series.

(b) Management and operating contracts which may require the processing or storage of Restricted Data or Special Nuclear Material require application of the applicable DOE Directives in the safeguards and security series.

(c) The contracting officer shall refer to 48 CFR 904.71 for guidance concerning the prohibition on award of a DOE contract under a national security program to a company owned by an entity controlled by a foreign government when access to proscribed information is required to perform the contract.

#### **970.0404-4 Solicitation provision and contract clauses.**

(a) The contracting officer shall insert the clause at 970.5204-1, Counterintelligence, into all management and operating contracts and other contracts for the management of DOE-owned facilities which include the security and classification/declassification clauses.

(b) The contracting officer shall refer to 48 CFR 904.404 and 48 CFR 904.7103 for the prescription of solicitation provisions and contract clauses relating to safeguarding classified information and foreign ownership, control, or influence over contractors.

#### **970.0407 Contractor records retention.**

##### **970.0407-1 Applicability.**

##### **970.0407-1-1 Alternate retention schedules.**

Records produced under the Department's contracts involving management and operation

responsibilities relative to DOE-owned or—leased facilities are to be retained and disposed of in accordance with the guidance contained in DOE G 1324.5B, Records Management Program and DOE Records Schedules (see current version), rather than those set forth at 48 CFR subpart 4.7, Contractor Records Retention.

**970.0407–1–2 Access to and ownership of records.**

Contracting officers may agree to contractor ownership of certain categories of records designated in the instruction contained in paragraph (b) of the clause at 48 CFR 970.5204–3, Access to and Ownership of Records, provided the Government's rights to inspect, copy, and audit these records are not limited. These rights must be retained by the Government in order to carry out the Department's statutory responsibilities required by the Atomic Energy Act and other statutes for oversight of its contractors, including compliance with the Department's health, safety and reporting requirements, and protection of the public interest.

**970.0407–1–3 Contract clause.**

The contracting officer shall insert the clause at 48 CFR 970.5204–3, Access to and Ownership of Records, in management and operating contracts.

**970.0470 Department of Energy Directives.**

**970.0470–1 General.**

(a) The contractor is required to comply with the requirements of applicable Federal, State and local laws and regulations, unless relief has been granted by the appropriate authority. For informational purposes, the contracting officer may append the contract with a list of applicable laws or regulations (see 970.5204–2, Laws, Regulations, and DOE Directives, paragraph (a)).

(b) The Department of Energy Directives System is a system of instructions, including orders, notices, manuals, guides, and standards, for Departmental elements. In certain circumstances, requirements contained in these directives may apply to a contractor through operation of a contract clause. Program and requirements personnel are responsible for identifying requirements in the Directives System which are applicable to a contract, and for developing a list of applicable requirements and providing it to the contracting officer for inclusion in the contract.

(c) Where directives requirements are established using either the Standards/ Requirements Identification Process or

the Work Smart Standards Process, the applicable process should also be used to establish the environment, safety, and health portion of the list identified in paragraph (b) of this section.

(d) Environmental, safety, and health (ES&H) requirements appropriate for work conducted under a management and operating contract may be determined by a DOE approved process to evaluate the work and the associated hazards, and identify an appropriately tailored set of standards, practices, and controls, such as a tailoring process included in a DOE approved Safety Management System implemented under 48 CFR 970.5223–1, Integration of Environment, Safety, and Health into Work Planning and Execution. When such a process is used, the contracting officer shall ensure that the set of tailored requirements, as approved by DOE pursuant to the process, is incorporated into the list identified in paragraph (b) of this section. These requirements shall supersede, in whole or in part, the contractual environmental, safety, and health requirements previously made applicable to the contract by List B. If the tailored set of requirements identifies an alternative requirement which varies from an ES&H requirement of an otherwise applicable law or regulation, the contractor must request an exemption or other appropriate regulatory relief that may be specified in the governing regulation.

**970.0470–2 Contract clause.**

The contracting officer shall insert the clause at DEAR 970.5204–2, Laws, Regulations, and DOE Directives, in management and operating contracts.

**Subpart 970.08—Required Sources of Supplies and Services**

**970.0801 Excess personal property.**

**970.0801–1 Policy.**

The provisions of 48 CFR subpart 8.1 (Federal Acquisition Regulation), 41 CFR 101–43 (Federal Property Management Regulation), and 41 CFR 109–43 (DOE Property Management Regulation) apply to DOE's management and operating contracts.

**970.0808 Acquisition of printing.**

**970.0808–1 Scope of section.**

This section prescribes the Department's policy concerning duplicating or printing services which may be required in the performance of management and operating contracts.

**970.0808–2 Policy.**

Management and operating contractors shall provide or secure

duplication and printing services in accordance with the Government Printing and Binding Regulations, Title 44 of the U.S. Code, and applicable DOE Directives.

**970.0808–3 Contract clause.**

The contracting officer shall insert the clause at 970.5208–1, Printing, in all management and operating contracts.

**Subpart 970.09—Contractor Qualifications**

**970.0905 Organizational conflicts of interest.**

Management and operating contracts shall contain an organizational conflict of interest clause substantially similar to the clause at 48 CFR 952.209–72, Organizational Conflicts of Interest, and which is appropriate to the statement of work of the individual contract. In addition, the contracting officer shall assure that the clause contains appropriate restraints on intra-corporate relations between the contractor's organization and personnel operating the Department's facility and its parent corporate body and affiliates. Such restraints shall include personnel access to the facility, technical transfer of information from the facility, and the availability from the facility of other advantages flowing from performance of the contract. The contracting officer is responsible for ensuring that M&O contractors adopt policies and procedures in the award of subcontracts that will meet the Department's need to safeguard against a biased work product and an unfair competitive advantage. To this end, the organizational conflicts of interest clause in management and operating contracts shall include Alternate I.

**970.0970 Performance Guarantees.**

**970.0970–1 Determination of Responsibility.**

(a) In the award of a management and operating contract, the contracting officer shall determine that the prospective contractor is a responsible contractor and is capable of providing all necessary financial, personnel, and other resources in performance of the contract.

(b) DOE contracts with entities that have been created solely for the purpose of performing a specific management and operating contract. Generally, such newly created entities will have very limited financial and other resources. In such instances, when making the determination of responsibility required under this section, the contracting officer may evaluate the financial resources of other entities only to the

extent that those entities are legally bound, jointly and severally if more than one, by means of a performance guarantee or other equivalent enforceable commitment to supply the necessary resources to the prospective contractor and to assume all contractual obligations of the prospective contractor. A performance guarantee should be the means used unless an equivalent degree of commitment can be obtained by an alternative means.

(c) The guaranteeing corporate entity(ies) must be found to have sufficient resources in order to satisfy its guarantee.

#### **970.0970-2 Solicitation provision.**

The contracting officer shall insert the provision at 48 CFR 970.5209-1, Requirement for Guarantee of Performance, in solicitations when the awardee will be required to be organized solely for performance of the requirement.

### **Subpart 970.11—Describing Agency Needs**

#### **970.1100 Policy.**

##### **970.1100-1 Performance-based contracting.**

(a) It is the policy of the Department of Energy to use, to the maximum extent practicable, performance-based contracting methods in its management and operating contracts. Office of Federal Procurement Policy Letter 91-2 provides guidance concerning the development and use of performance-based contracting concepts and methodologies that may be generally applied to management and operating contracts. Performance-based contracts: describe performance requirements in terms of results rather than methods of accomplishing the work; use measurable (i.e., terms of quality, timeliness, quantity) performance standards and objectives and quality assurance surveillance plans; provide performance incentives (positive or negative) where appropriate; and specify procedures for award or incentive fee reduction when work activities are not performed or do not meet contract requirements.

(b) The use of performance-based statements of work, where feasible, is the preferred method for establishing work requirements. Such statements of work and other documents used to establish work requirements (such as work authorization directives) should describe performance requirements and expectations in terms of outcome, results, or final work products, as opposed to methods, processes, or design.

(c) Contract performance requirements and expectations should be consistent with the Department's strategic planning goals and objectives, as made applicable to the site or facility through Departmental programmatic and financial planning processes. Measurable performance criteria, objective measures, and where appropriate, performance incentives, shall be structured to correspond to the performance requirements established in the statement of work and other documents used to establish work requirements.

(d) Quality assurance surveillance plans shall be developed to facilitate the assessment of contractor performance and ensure the appropriateness of any award or incentive fee payment. Such plans shall be tailored to the contract performance objectives, criteria, and measures, and shall, to the maximum extent practicable, focus on the level of performance required by the performance objectives rather than the methodology used by the contractor to achieve that level of performance.

##### **970.1100-2 Additional considerations.**

(a) While it is not feasible to set forth standard language which would apply to every contract situation, language must be designed for inclusion in a management and operating contract to describe clearly the work being undertaken; the controls, as appropriate, to be exercised by DOE over the performance of that work; and the relationship contemplated between the parties.

(b) The language shall also include the following with respect to subcontracting performance of the work described pursuant to paragraph (a) of this section: "The contractor shall, when directed by DOE and may, but only when authorized by DOE, enter into subcontracts for the performance of any part of the work under this clause."

(c) The provisions required in paragraphs (a) and (b) of this section shall be set forth in the statement of work of the contract.

### **Subpart 970.15—Contracting by Negotiation**

#### **970.1504 Contract pricing.**

##### **970.1504-1 Price analysis.**

##### **970.1504-1-1 Fees for management and operating contracts.**

This subsection sets forth the Department's policies on fees for management and operating contracts and may be applied to other contracts as determined by the Procurement Executive, or designee.

#### **970.1504-1-2 Fee policy.**

(a) DOE management and operating contractors may be paid a fee in accordance with the requirements of this subsection.

(b) There are three basic principles underlying the Department's fee policy:

(1) The amount of available fee should reflect the financial risk assumed by the contractor.

(2) It is the policy of the Department, when work elements cannot be fixed price, incentive fees (including award fees) tied to objective measures should be used to the maximum extent appropriate.

(3) When work elements cannot be fixed price and award fees are employed, they should be tied to either objective or subjective measures. Each measure should, to the maximum extent appropriate, be directly tied to a specific portion of the fee pool.

(c) Fee objectives and amounts are to be determined for each contract. Standard fees or across-the-board fee agreements will not be used or made. Due to the nature of funding management and operating contracts, it is anticipated that fee shall be established in accordance with the annual funding cycle; however, with the prior approval of the Procurement Executive, or designee, a longer period may be used where necessary to incentivize performance objectives that span funding cycles or to optimize cost reduction efforts.

(d) Annual fee amounts shall be established in accordance with this subsection. Annual amounts shall not exceed maximum amounts derived from the appropriate fee schedule (and Classification Factor, if applicable) unless approved in advance by the Procurement Executive, or designee. In no event shall any fee exceed statutory limits imposed by 41 U.S.C. 254(b).

(e)(1) Contracting Officers shall include negative fee incentives in contracts when appropriate. A negative fee incentive is one in which the contractor will not be paid the full target fee amount when the actual performance level falls below the target level established in the contract.

(2) Negative fee incentives may only be used when:

(i) A target level of performance can be established, which the contractor can reasonably be expected to reach;

(ii) The value of the negative incentive is commensurate with the lower level of performance and any additional administrative costs;

(iii) Factors likely to prevent attainment of the target level of performance are clearly within the control of the contractor; and

(iv) The contract indicates clearly a level below which performance is not acceptable.

(f) Prior to the issuance of a competitive solicitation or the initiation of negotiations for an extension of an existing contract, the HCA shall coordinate the maximum available fee, as allowed by 48 CFR 970.1504-1-1, and the fee amount targeted for negotiation, if less, with the Procurement Executive, or designee. Solicitations shall identify maximum available fee under the contract and may invite offerors to propose fee less than the maximum available.

(g) When a contract subject to this subsection requires a contractor to use its own facilities or equipment, or other resources to make its own cost investment for contract performance (e.g., when there is no letter-of-credit financing), consideration may be given, subject to approval by the Procurement Executive, or designee, to increasing the total available fee amount above that otherwise provided by this subsection.

(h) Multiple fee arrangements should be used in accordance with 48 CFR 970.1504-1-4.

**970.1504-1-3 Special considerations: Laboratory management and operation.**

(a) For the management and operation of a laboratory, the contracting officer shall consider whether any fee is appropriate. Considerations should include:

(1) The nature and extent of financial or other liability or risk assumed or to be assumed under the contract;

(2) The proportion of retained earnings (as established under generally accepted accounting methods) that are utilized to fund the performance of work related to the DOE contracted effort;

(3) Facilities capital or capital equipment acquisition plans;

(4) Other funding needs, to include contingency funding, working capital funding, and provision for funding unreimbursed costs deemed ordinary and necessary;

(5) The utility of fee as a performance incentive; and

(6) The need for fee to attract qualified contractors, organizations, and institutions.

(b) In the event fee is considered appropriate, the contracting officer shall determine the amount of fee in accordance with this subsection.

(1) Costs incurred in the operation of a laboratory that are allowable and allocable under the cost principles (i.e., commercial using 48 CFR 31.2, nonprofit using OMB Circular A-122, or university-affiliated using OMB Circular

A-21), regulations, or statutes applicable to the operating contractor should be classified as direct or indirect (overhead or G&A) charges to the contract and not included as proposed fee. Exceptions must be approved by the Procurement Executive, or designee.

(2) Except as specified in 48 CFR 970.1504-1-3(c)(3), the maximum total amount of fee shall be calculated in accordance with 48 CFR 970.1504-1-5 or 48 CFR 970.1504-1-9, as appropriate. The total amount of fee under any laboratory management and operating contract or other designated contract shall not exceed, and may be significantly less than, the result of that calculation. In determining the total amount of fee, the contracting officer shall consider the evaluation of the factors in paragraph (a) of this subsection as well as any benefits the laboratory operator will receive due to its tax status.

(c) In the event fee is considered appropriate, the contracting officer shall establish the type of fee arrangement in accordance with this subsection.

(1) The amount of fee may be established as total available fee with a base fee portion and a performance fee portion. Base fee, if any, shall be an amount in recognition of the risk of financial liability assumed by the contractor and shall not exceed the cost risk associated with those liabilities or the amount calculated in accordance with 48 CFR 970.1504-1-5, whichever is less. The total available fee, excepting any base fee, shall normally be associated with performance at or above the target level of performance as defined by the contract. If performance in either of the two general work categories appropriate for laboratories (science/technology and support) is rated at less than the target level of performance, the total amount of the available fee shall be subject to downward adjustment. Such downward adjustment shall be subject to the terms of the clause at 48 CFR 970.5215-3, Conditional Payment of Fee, Profit, or Incentives, if contained in the contract.

(2) The amount of fee may be established as a fixed fee in recognition of the risk of financial liability to be assumed by the contractor, with such fixed fee amount not exceeding the cost risk associated with the liabilities assumed or the amount of fee calculated in accordance with 48 CFR 970.1504-1-5, whichever is less.

(3) If the fixed fee or total available fee exceeds 75% of the fee that would be calculated per 48 CFR 970.1504-1-5 or 48 CFR 970.1504-1-9; or if a fee arrangement other than one of those set forth in paragraphs (c) (1) or (2) of this

subsection is considered appropriate, the approval of the Procurement Executive, or designee, shall be obtained prior to its use.

(4) Fee, if any, as well as the type of fee arrangement, will normally be established for the life of the contract. It will be established at time of award, as part of the extend/compete decision, at the time of option exercise, or at such other time as the parties can mutually reach agreement, e.g., negotiations. Such agreement shall require the approval of the Procurement Executive, or designee.

(5) Fee established for longer than one year shall be subject to adjustment in the event of a significant change (greater than +/- 10% or a lesser amount if appropriate) to the budget or work scope.

(6) Retained earnings (reserves) shall be identified and a plan for their use and disposition developed.

(7) The use of retained earnings as a result of performance of laboratory management and operation may be restricted if the operator is an educational institution.

**970.1504-1-4 Types of contracts and fee arrangements.**

(a) Contract types and fee arrangements suitable for management and operating contracts may include cost, cost-plus-fixed-fee, cost-plus-award-fee, cost-plus-incentive-fee, fixed-price incentive, firm-fixed-price or any combination thereof (see 48 CFR 16.1). In accordance with 48 CFR 970.1504-1-2(b)(1), the fee arrangement chosen for each work element should reflect the financial risk for project failure that contractors are willing to accept. Contracting officials shall structure each contract and the elements of the work in such a manner that the risk is manageable and, therefore, assumable by the contractor.

(b) Consistent with the concept of a performance-based management contract, those contract types which incentivize performance and cost control are preferred over a cost-plus-fixed-fee arrangement. Accordingly, a cost-plus-fixed-fee contract in instances other than those set forth in 48 CFR 970.1504-1-3(c)(2) may only be used when approved in advance by the Procurement Executive, or designee.

(c) A cost-plus-award-fee contract is generally the appropriate contract type for a management and operating contract.

(1) Where work cannot be adequately defined to the point that a fixed price contract is acceptable, the attainment of acquisition objectives generally will be enhanced by using a cost-plus-award-fee contract or other incentive fee

arrangement to effectively motivate the contractor to superior performance and to provide the Department with flexibility to evaluate actual performance and the conditions under which it was achieved.

(2) The construct of fee for a cost-plus-award-fee management and operating contract is that total available fee will equal a base fee amount and a performance fee amount. The total available fee amount including the performance fee amount the contractor may earn, in whole or in part during performance, shall be established annually (or as otherwise agreed to by the parties and approved by the Procurement Executive, or designee), in an amount sufficient to motivate performance excellence.

(3) However, consistent with concepts of performance-based contracting, it is Departmental policy to place fee at risk based on performance. Accordingly, a base fee amount will be available only when approved in advance by the Procurement Executive, or designee, except as permitted in 48 CFR 970.1504-1-3(c)(1). Any base fee amount shall be fixed, expressed as a percent of the total available fee at inception of the contract, and shall not exceed that percent during the life of the contract.

(4) The performance fee amount may consist of an objective fee component and a subjective fee component. Objective performance measures, when appropriately applied, provide greater incentives for superior performance than do subjective performance measures and should be used to the maximum extent appropriate. Subjective measures should be used when it is not feasible to devise effective predetermined objective measures applicable to cost, technical performance, or schedule for particular work elements.

(d) Consistent with performance-based contracting concepts, performance objectives and measures related to performance fee should be as clearly defined as possible and, where feasible, expressed in terms of desired performance results or outcomes. Specific measures for determining performance achievement should be used. The contract should identify the amount and allocation of fee to each performance result or outcome.

(e) Because the nature and complexity of the work performed under a management and operating contract may be varied, opportunities may exist to utilize multiple contract types and fee arrangements. Consistent with paragraph (a) of this subsection and 48 CFR 16.1, the contracting officer should

apply that contract type or fee arrangement most appropriate to the work component. However, multiple contract types or fee arrangements:

(1) Must conform to the requirements of 48 CFR part 915 and 48 CFR parts 15 and 16, and

(2) Where appropriate to the type, must be supported by:

(i) Negotiated costs subject to the requirements of the Truth in Negotiations Act,

(ii) A pre-negotiation memorandum, and

(iii) A plan describing how each contract type or fee arrangement will be administered.

(f) Cost reduction incentives are addressed in the clause at 48 CFR 970.5215-4, Cost Reduction. This clause provides for incentives for quantifiable cost reductions associated with contractor proposed changes to a design, process, or method that has an established cost, technical, and schedule baseline, is defined, and is subject to a formal control procedure. The clause is to be included in management and operating contracts as appropriate. Proposed changes must be: initiated by the contractor, innovative, applied to a specific project or program, and not otherwise included in an incentive under the contract. Such cost reduction incentives do not constitute fee and are not subject to statutory or regulatory fee limitations; however, they are subject to all appropriate requirements set forth in this subpart.

(g) Operations and field offices shall take the lead in developing and implementing the most appropriate pricing arrangement or cost reduction incentive for the requirements. Pricing arrangements which provide incentives for performance and cost control are preferred over those that do not. The operations and field offices are to ensure that the necessary resources and infrastructure exist within both the contractor's and government's organizations to prepare, evaluate, and administer the pricing arrangement or cost reduction incentive prior to its implementation.

#### **970.1504-1-5 General considerations and techniques for determining fixed fees.**

(a) The Department's fee policy recognizes that fee is remuneration to contractors for the entrepreneurial function of organizing and managing resources, the use of their resources (including capital resources), and, as appropriate, their assumption of the risk that some incurred costs (operating and capital) may not be reimbursed.

(b) Use of a purely cost-based structured approach for determining fee

objectives and amounts for DOE management and operating contracts is inappropriate considering the limited level of contractor cost, capital goods, and operating capital outlays for performance of such contracts. Instead of being solely cost-based, the desirable approach calls for a structure that allows evaluation of the following eight significant factors, as outlined in order of importance, and the assignment of appropriate fee values (subject to the limitations on fixed fee in 48 CFR 970.1504-1-6):

(1) The presence or absence of financial risk, including the type and terms of the contract;

(2) The relative difficulty of work, including specific performance objectives, environment, safety and health concerns, and the technical and administrative knowledge, and skill necessary for work accomplishment and experience;

(3) Management risk relating to performance, including:

(i) Composite risk and complexity of principal work tasks required to do the job;

(ii) Labor intensity of the job;

(iii) Special control problems; and

(iv) Advance planning, forecasting and other such requirements;

(4) Degree and amount of contract work required to be performed by and with the contractor's own resources, as compared to the nature and degree of subcontracting and the relative complexity of subcontracted efforts, subcontractor management and integration;

(5) Size and operation (number of locations, plants, differing operations, etc.);

(6) Influence of alternative investment opportunities available to the contractor (i.e., the extent to which undertaking a task for the Government displaces a contractor's opportunity to make a profit with the same staff and equipment in some other field of activity);

(7) Benefits which may accrue to the contractor from gaining experience and knowledge of how to do something, from establishing or enhancing a reputation, or from having the opportunity to hold or expand a staff whose loyalties are primarily to the contractor; and

(8) Other special considerations, including support of Government programs such as those relating to small and minority business subcontracting, energy conservation, etc.

(c) The total fee objective for a particular annual fixed fee negotiation is established by evaluating the factors in this subsection, assigning fee values to them, and totaling the resulting amounts

(subject to limitations on total fixed fee in 48 CFR 970.1504-1-6).

**970.1504-1-6 Calculating fixed fee.**

(a) In recognition of the complexities of the fee determination process, and to assist in promoting a reasonable degree of consistency and uniformity in its application, the following fee schedules

set forth the maximum amounts of fee that contracting activities are allowed to award for a particular fixed fee transaction calculated annually.

(b) Fee schedules representing the maximum allowable annual fixed fee available under management and operating contracts have been

established for the following management and operating contract efforts:

- (1) Production;
- (2) Research and Development; and
- (3) Environmental Management.

(c) The schedules are:

**PRODUCTION EFFORTS**

Fee base (dollars)	Fee (dollars)	Fee (percent)	Incr. (percent)
Up to \$1 Million .....			7.66
1,000,000 .....	\$76,580	7.66	6.78
3,000,000 .....	212,236	7.07	6.07
5,000,000 .....	333,670	6.67	4.90
10,000,000 .....	578,726	5.79	4.24
15,000,000 .....	790,962	5.27	3.71
25,000,000 .....	1,161,828	4.65	3.35
40,000,000 .....	1,663,974	4.16	2.92
60,000,000 .....	2,247,076	3.75	2.57
80,000,000 .....	2,761,256	3.45	2.34
100,000,000 .....	3,229,488	3.23	1.45
150,000,000 .....	3,952,622	2.64	1.12
200,000,000 .....	4,510,562	2.26	0.61
300,000,000 .....	5,117,732	1.71	0.53
400,000,000 .....	5,647,228	1.41	0.45
500,000,000 .....	6,097,956	1.22	.....
Over \$500 Million .....	6,097,956	.....	0.45

**RESEARCH AND DEVELOPMENT EFFORTS**

Fee base (dollars)	Fee (dollars)	Fee (percent)	Incr. (percent)
Up to \$1 Million .....			8.42
1,000,000 .....	\$84,238	8.42	7.00
3,000,000 .....	224,270	7.48	6.84
5,000,000 .....	361,020	7.22	6.21
10,000,000 .....	671,716	6.72	5.71
15,000,000 .....	957,250	6.38	4.85
25,000,000 .....	1,441,892	5.77	4.22
40,000,000 .....	2,075,318	5.19	3.69
60,000,000 .....	2,813,768	4.69	3.27
80,000,000 .....	3,467,980	4.33	2.69
100,000,000 .....	4,006,228	4.01	1.69
150,000,000 .....	4,850,796	3.23	1.14
200,000,000 .....	5,420,770	2.71	0.66
300,000,000 .....	6,083,734	2.03	0.53
400,000,000 .....	6,667,930	1.67	0.50
500,000,000 .....	7,172,264	1.43	.....
Over \$500 Million .....	7,172,264	.....	0.50

**ENVIRONMENTAL MANAGEMENT EFFORTS**

Fee base (dollars)	Fee (dollars)	Fee (percent)	Incr. (percent)
Up to \$1 Million .....			7.33
1,000,000 .....	\$73,298	7.33	6.49
3,000,000 .....	203,120	6.77	5.95
5,000,000 .....	322,118	6.44	5.40
10,000,000 .....	592,348	5.92	4.83
15,000,000 .....	833,654	5.56	4.03
25,000,000 .....	1,236,340	4.95	3.44
40,000,000 .....	1,752,960	4.38	3.29
60,000,000 .....	2,411,890	4.02	3.10
80,000,000 .....	3,032,844	3.79	2.49
100,000,000 .....	3,530,679	3.53	1.90
150,000,000 .....	4,479,366	2.99	1.48
200,000,000 .....	5,219,924	2.61	1.12

## ENVIRONMENTAL MANAGEMENT EFFORTS—Continued

Fee base (dollars)	Fee (dollars)	Fee (percent)	Incr. (percent)
300,000,000 .....	6,337,250	2.11	0.88
400,000,000 .....	7,219,046	1.80	0.75
500,000,000 .....	7,972,396	1.59	0.58
750,000,000 .....	9,423,463	1.26	0.55
1,000,000,000 .....	10,786,788	1.08	.....
Over \$1.0 Billion .....	10,786,788	.....	0.55

**970.1504-1-7 Fee Base.**

(a) The fee base is an estimate of necessary allowable costs, with some exclusions. It is used in the fee schedules to determine the maximum annual fee for a fixed fee contract. That portion of the fee base that represents the cost of the Production, Research and Development, or Environmental Management work to be performed, shall be exclusive of the cost of source and special nuclear materials; estimated costs of land, buildings and facilities whether to be leased, purchased or constructed; depreciation of Government facilities; and any estimate of effort for which a separate fee is to be negotiated.

(b) Such portion of the fee base, in addition to the adjustments in paragraph (a) of this subsection, shall exclude:

(1) Any part of the estimated cost of capital equipment (other than special equipment) which the contractor procures by subcontract or other similar costs which is of such magnitude or nature as to distort the technical and management effort actually required of the contractor;

(2) At least 20% of the estimated cost or price of subcontracts and other major contractor procurements;

(3) Up to 100% of the estimated cost or price of subcontracts and other major contractor procurements if they are of a magnitude or nature as to distort the technical and management effort actually required of the contractor;

(4) Special equipment as defined in 48 CFR 970.1504-1-8;

(5) Estimated cost of Government-furnished property, services and equipment;

(6) All estimates of costs not directly incurred by or reimbursed to the operating contractor;

(7) Estimates of home office or corporate general and administrative expenses that shall be reimbursed through the contract;

(8) Estimates of any independent research and development cost or bid and proposal expenses that may be approved under the contract;

(9) Any cost of work funded with uncosted balances previously included

in a fee base of this or any other contract performed by the contractor;

(10) Cost of rework attributable to the contractor; and

(11) State taxes.

(c) In calculating the annual fee amounts associated with the Production, Research and Development, or Environmental Management work to be performed, the fee base is to be allocated to the category reflecting the work to be performed and the appropriate fee schedule utilized.

(d) The portion of the fee base associated with the Production, Research and Development, or Environmental Management work to be performed and the associated schedules in this part are not intended to reflect the portion of the fee base or related compensation for unusual architect-engineer, construction services, or special equipment provided by the management and operating contractor. Architect-engineer and construction services are normally covered by special agreements based on the policies applying to architect-engineer or construction contracts. Fees paid for such services shall be calculated using the provisions of 48 CFR 91504-1-5 relating to architect-engineer or construction fees and shall be in addition to the operating fees calculated for the Production, Research and Development, or Environmental Management work to be performed. Special equipment purchases shall be addressed in accordance with the provisions of 48 CFR 970.1504-1-8 relating to special equipment.

(e) No schedule set forth in 48 CFR 915.404-4-71-5 or 48 CFR 970.1504-1-6 shall be used more than once in the determination of the fee amount for an annual period, unless prior approval of the Procurement Executive, or designee, is obtained.

**970.1504-1-8 Special equipment purchases.**

(a) Special equipment is sometimes procured in conjunction with management and operating contracts. When a contractor procures special equipment, the DOE negotiating official shall determine separate fees for the

equipment which shall not exceed the maximum fee allowable as established using the schedule in 48 CFR 915.404-4-71-5(h).

(b) In determining appropriate fees, factors such as complexity of equipment, ratio of procurement transactions to volume of equipment to be purchased and completeness of services should be considered. Where possible, the reasonableness of the fees should be checked by their relationship to actual costs of comparable procurement services.

(c) For purposes of this subsection, special equipment is equipment for which the purchase price is of such a magnitude compared to the cost of installation as to distort the amount of technical direction and management effort required of the contractor. Special equipment is of a nature that requires less management attention. When a contractor procures special equipment, the DOE negotiating official shall determine separate fees for the equipment using the schedule in 48 CFR 915.404-4-71-5(h). The determination of specific items of equipment in this category requires application of judgment and careful study of the circumstances involved in each project. This category of equipment would generally include:

(1) Major items of prefabricated process or research equipment; and

(2) Major items of preassembled equipment such as packaged boilers, generators, machine tools, and large electrical equipment. In some cases, it would also include special apparatus or devices such as reactor vessels and reactor charging machines.

**970.1504-1-9 Special Considerations: Cost-plus-award-fee.**

(a) When a management and operating contract is to be awarded on a cost-plus-award-fee basis, several special considerations are appropriate.

(b) All annual performance incentives identified under these contracts are funded from the annual total available fee, which consists of a base fee amount (which may be zero) and a performance fee amount (which typically will consist of an incentive fee component for

objective performance requirements, an award fee component for subjective performance requirements, or both).

(c) The annual total available fee for the contract shall equal the product of the fee(s) that would have been calculated for an annual fixed fee contract and the classification factor(s) most appropriate for the facility/task. If more than one fee schedule is applicable to the contract, the annual total available fee shall be the sum of the available fees derived proportionately from each fee schedule; consideration of significant factors applicable to each fee schedule; and application of a Classification Factor(s) most appropriate for the work.

(d) Classification Factors applied to each Facility/Task Category are:

Facility/task category	Classification factor
A .....	3.0
B .....	2.5
C .....	2.0
D .....	1.25

(e) The contracting officer shall select the Facility/Task Category after considering the following:

(1) Facility/Task Category A. The main focus of effort performed is related to:

(i) The manufacture, assembly, retrieval, disassembly, or disposal of nuclear weapons with explosive potential;

(ii) The physical cleanup, processing, handling, or storage of nuclear radioactive or toxic chemicals with consideration given to the degree the nature of the work advances state of the art technologies in cleanup, processing or storage operations and/or the inherent difficulty or risk of the work is significantly demanding when compared to similar industrial/DOE settings (i.e., nuclear energy processing, industrial environmental cleanup);

(iii) Construction of facilities such as nuclear reactors, atomic particle accelerators, or complex laboratories or industrial units especially designed for handling radioactive materials;

(iv) Research and development directly supporting paragraphs (e)(1)(i), (ii), or (iii) of this subsection and not conducted in a laboratory, or

(v) As designated by the Procurement Executive, or designee. (Classification factor 3.0)

(2) Facility/Task Category B. The main focus of effort performed is related to:

(i) The safeguarding and maintenance of nuclear weapons or nuclear material;

(ii) The manufacture or assembly of nuclear components;

(iii) The physical cleanup, processing, handling, or storage of nuclear radioactive or toxic chemicals, or other substances which pose a significant threat to the environment or the health and safety of workers or the public, if the nature of the work uses state of the art technologies or applications in such operations and/or the inherent difficulty or risk of the work is more demanding than that found in similar industrial/DOE settings (i.e., nuclear energy, chemical or petroleum processing, industrial environmental cleanup);

(iv) The detailed planning necessary for the assembly/disassembly of nuclear weapons/components;

(v) Construction of facilities involving operations requiring a high degree of design layout or process control;

(vi) Research and development directly supporting paragraphs (e)(2)(i), (ii), (iii), (iv) or (v) of this subsection and not conducted in a laboratory; or

(vii) As designated by the Procurement Executive, or designee. (Classification factor 2.5)

(3) Facility/Task Category C. The main focus of effort performed is related to:

(i) The physical cleanup, processing, or storage of nuclear radioactive or toxic chemicals if the nature of the work uses routine technologies in cleanup, processing or storage operations and/or the inherent difficulty or risk of the work is similar to that found in similar industrial/DOE settings (i.e., nuclear energy, chemical processing, industrial environmental cleanup);

(ii) Plant and facility maintenance;

(iii) Plant and facility security (other than the safeguarding of nuclear weapons and material);

(iv) Construction of facilities involving operations requiring normal processes and operations; general or administrative service buildings; or routine infrastructure requirements;

(v) Research and development directly supporting paragraphs (e)(3)(i), (ii), (iii) or (iv) of this subsection and not conducted in a laboratory; or

(vi) As designated by the Procurement Executive, or designee. (Classification factor 2.0)

(4) Facility/Task Category D. The main focus of the effort performed is research and development conducted at a laboratory. (Classification factor 1.25)

(f) Where the Procurement Executive, or designee, has approved a base fee, the Classification Factors shall be reduced, as approved by the Procurement Executive, or designee.

(g) Any risks which are indemnified by the Government (for example, by the Price-Anderson Act) will not be considered as risk to the contractor.

(h) All management and operating contracts awarded on a cost-plus-award-fee basis shall set forth in the contract, or the Performance Evaluation and Measurement Plan(s) required by the contract clause at 48 CFR 970.5215-1, Total Available Fee: Base Fee Amount and Performance Fee Amount, a site specific method of rating the contractor's performance of the contract requirements and a method of fee determination tied to the method of rating.

(i) Prior approval of the Procurement Executive, or designee, is required for an annual total available fee amount exceeding the guidelines in paragraph (c) of this subsection.

(j) DOE Operations/Field Office Managers must ensure that all important areas of contract performance are specified in the contract or Performance Evaluation and Measurement Plan(s), even if such areas are not assigned specific weights or percentages of available fee.

#### **970.1504-1-10 Special considerations: Fee limitations.**

In situations where the objective performance incentives are of unusual difficulty or where the successful completion of the performance incentives would provide extraordinary value to the Government, fees in excess of those allowed under 48 CFR 970.1504-1-5 and 48 CFR 970.1504-1-9 may be allowed with the approval of the Procurement Executive, or designee. Requests to allow fees in excess of those provided under other provisions of this fee policy must be accompanied by a written justification with detailed supporting rationale as to how the specific circumstances satisfy the two criteria listed in this subsection.

#### **970.1504-1-11 Documentation.**

The contracting officer shall tailor the documentation of the determination of fee prenegotiation objective based on 48 CFR 15.406-1, Prenegotiation objectives, and the determination of the negotiated fee in accordance with 48 CFR 15.406-3, Documenting the negotiation. The contracting officer shall include as part of the documentation: the rationale for the allocation of cost and the assignment of Facility/Task Categories; a discussion of the calculations described in 48 CFR 970.1504-1-5; and discussion of any other relevant provision of this subsection.

#### **970.1504-2 Price negotiation.**

(a) Management and operating contract prices (fee) and DOE

obligations to support contract performance shall be governed by:

(1) The level of activity authorized and the amount of funds appropriated for DOE approved programs by specific program legislation;

(2) Congressional budget and reporting limitations;

(3) The amount of funds apportioned to DOE;

(4) The amount of obligational authority allotted to program officials and Approved Funding Program limitations; and

(5) The amount of funds actually available to the DOE operating activity as determined in accordance with applicable financial regulations and directives.

(b) Funds shall be obligated and made available by contract provision or modification after the funds become available for obligation for payment to support performance of DOE approved projects, tasks, work authorizations, or services.

(c) Contractor expenditures shall be limited to the overall amount of funds available and obligated on the contract. As prescribed at 48 CFR 970.3270(b), the clause at 48 CFR 970.5232-4, Obligation of Funds, is used for this purpose.

#### **970.1504-3 Documentation.**

##### **970.1504-3-1 Cost or pricing data.**

(a) The certification requirements of 48 CFR 15.406-2 are not applied to DOE cost-reimbursement management and operating contracts.

(b) The contracting officer shall ensure that management and operating contractors and their subcontractors obtain cost or pricing data prior to the award of a negotiated subcontract or modification of a subcontract in accordance with 48 CFR 15.406-2, and incorporate appropriate contract provisions similar to those set forth at 48 CFR 52.215-10 and 48 CFR 52.215-11 that provide for the reduction of a negotiated subcontract price by any significant amount that the subcontract price was increased because of the submission of defective cost or pricing data by a subcontractor at any tier.

(c) The clauses at 48 CFR 52.215-12 and 48 CFR 52.215-13 shall be included in management and operating contracts.

##### **970.1504-4 Special cost or pricing areas.**

##### **970.1504-4-1 Make-or-buy plans.**

##### **970.1504-4-2 Policy.**

(a) Contracting officers shall require management and operating contractors to develop and implement make-or-buy plans that establish a preference for

providing supplies or services (including construction and construction management) on a least-cost basis, subject to program specific make-or-buy criteria. The emphasis of this make-or-buy structure is to eliminate bias for in-house performance where an activity may be performed at less cost or otherwise more efficiently through subcontracting.

(b) A work activity, supply or service is provided at "least cost" when, after consideration of a variety of appropriate programmatic, business, and financial factors, it is concluded that performance by either "in-house" resources or by contracting out is likely to provide the property or service at the lowest overall cost. Programmatic factors include, but are not limited to, program specific make-or-buy criteria established by the Department of Energy, the impact of a "make" or a "buy" decision on mission accomplishment, and anticipated changes to the mission of the facility or site. Business factors pertain to such elements as market conditions, past experience in obtaining similar supplies or services, and overall operational efficiencies that might be available through either in-house performance or contracting out. Among the financial factors that may be considered to determine a least-cost alternative in a make-or-buy analysis are both recurring and one-time costs attributable to either retaining or contracting out a particular item, financial risk, and the anticipated contract price.

(c) In developing and implementing its make-or-buy plan, a contractor shall be required to assess subcontracting opportunities and implement subcontracting decisions in accordance with the following:

(1) The contractor shall conduct internal productivity improvement and cost-reduction programs so that in-house performance options can be made more efficient and cost-effective.

(2) The contractor shall consider subcontracting opportunities with the maximum practicable regard for open communications with potentially affected employees and their representatives. Similarly, a contractor will communicate its plans, activities, cost-benefit analyses, and decisions with those stakeholders likely to be affected by such decisions, including representatives of the community and local businesses.

##### **970.1504-4-3 Requirements.**

(a) Development of program-specific make-or-buy criteria.

(1) Program specific make-or-buy criteria are those factors that reflect specific mission or program objectives

(including operational efficiency, contractor diversity, environment, safety and health, work force displacement and restructuring, and collective bargaining agreements) and that, upon their application to a specific work effort, would override a decision based on a purely economic rationale. These criteria are to be used to assess each work effort identified in a facility's or site's make-or-buy plan to determine the appropriateness of a contractor's make-or-buy decisions.

(2) Heads of Contracting Activities shall ensure that program specific make-or-buy criteria are developed and provided to the contractor for use in its make-or-buy plan administration activities for the facility, site, or specific program, as appropriate. Although the Head of the Contracting Activity has the responsibility for ensuring that the program-specific make-or-buy criteria are developed and provided to the contractor, the actual development of the program specific make or buy criteria should be accomplished by the appropriate collaboration of headquarters and field office program, technical, and business specialists. Accordingly, these organizations and individuals should be relied on for the development of the program specific make or buy criteria so that they appropriately reflect program considerations applicable to the contractor's make-or-buy decisions.

(b) Make-or-buy plan property and services. Supplies or services estimated to cost less than one (1) percent of the estimated total operating cost for a year or \$1 million for the same year, whichever is less, need not be included in the contractor's make-or-buy plan. However, adjustments may be made to these thresholds where programmatic or cost considerations would indicate that a particular supply or service should be included in the make-or-buy plan.

(c) Competitive solicitation requirements. (1) To the extent practicable, a competitive solicitation for the management and operation of a Department of Energy facility or site should:

(i) Identify those programs, projects, work areas, functions or services that the Department intends for the successful offeror to include in any make-or-buy plan; and

(ii) Require the submission of a preliminary make-or-buy plan for the period of performance of the contract from each offeror as part of its proposal submitted in response to the competitive solicitation.

(2) If the requirement for each offeror to submit a preliminary make-or-buy plan as part of its proposal is

impractical or otherwise incompatible with the acquisition strategy, consideration should be given to structuring the evaluation criteria for the competitive solicitation in such a manner as to permit the evaluation of an offeror's approach to conducting its make-or-buy program within the context of the contractual requirements.

(3) The successful offeror's preliminary make-or-buy plan shall be submitted for final approval within 180 days after contract award, consistent with the requirements of 48 CFR 970.5215-2(c), Make-or-Buy Plan.

(d) Evaluation of the contractor's make-or-buy plan. In evaluating the contractor's make-or-buy plan, the contracting officer shall consider the following factors:

(1) The program specific make-or-buy criteria (such as operational efficiency, contractor diversity, environment, safety and health, work force displacement and restructuring, and collective bargaining agreements) with particular attention to the effect of a "buy" decision on the contractor's ability to maintain core competencies needed to accomplish mission-related programs and projects;

(2) The impact of a "make" or "buy" decision on contract cost, schedule, and performance and financial risk;

(3) The potential impact of a "make" or "buy" decision on known future mission or program activities at the facility or site;

(4) Past experience at the facility or site regarding "make-or-buy" decisions for the same, or similar, supplies or services;

(5) Consistency with the contractor's approved subcontracting plan, as required by the clause entitled "Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan" (48 CFR 52.219-9), and implementation of Section 3021 of the Energy Policy Act of 1992.

(6) Local market conditions, including contractor work force displacement and the availability of firms that can meet the work requirements with regard to quality, quantity, cost, and timeliness;

(7) Where the construction of new or additional facilities is required, that the cost of such facilities is in the Government's best interest when compared to subcontracting or privatization alternatives; and

(8) Whether all relevant requirements and costs of performing the work by the contractor and through subcontracting are considered and any different requirements for the same work are reconciled.

(e) Approval. The contracting officer shall approve all plans and revisions

thereto. Once approved, a make-or-buy plan shall remain effective for the term of the contract (up to a period of five years), unless circumstances warrant a change.

(f) Administration. The contractor's performance against the approved make-or-buy plan shall be monitored to ensure that:

(1) The contractor is complying with the plan;

(2) Items identified for deferral decisions are addressed in a timely manner; and

(3) The contractor periodically updates the make-or-buy plan based on changed circumstances or significant new work.

#### **970.1504-5 Solicitation provision contract clauses.**

(a) The contracting officer shall insert the clause at 48 CFR 970.5215-1, Total Available Fee: Base Fee Amount and Performance Fee Amount, in management and operating contracts, and other contracts determined by the Procurement Executive, or designee, that include cost-plus-award-fee arrangements.

(1) The contracting officer shall include the clause with its Alternate I when the award fee cycle consists of two or more evaluation periods.

(2) The contracting officer shall include the clause with its Alternate II when the award fee cycle consists of one evaluation period.

(3) The contracting officer shall include the clause with its Alternate III when the DOE Operations/Field Office Manager, or designee, requires the contractor to submit a self-assessment.

(4) The contracting officer shall include the clause with its Alternate IV when the DOE Operations/Field Office Manager, or designee, permits the contractor to submit a self-assessment at the contractor's option.

(b) The contracting officer shall insert the clause at 48 CFR 970.5215-2, Make-or-Buy Plan, in management and operating contracts. The contracting officer may add a sentence at the end of paragraph (d) of the clause to identify where in the contract the make-or-buy plan is located.

(c) The contracting officer shall insert the clause at 48 CFR 970.5215-3, Conditional Payment of Fee, Profit, or Incentives, in management and operating contracts, and other contracts determined by the Procurement Executive, or designee. The contracting officer shall include the clause with its Alternate I in contracts awarded on cost-plus-award-fee, multiple fee, or incentive fee basis which may include

various types of fee and incentive arrangements.

(d) The contracting officer shall insert the clause at 48 CFR 970.5215-4, Cost Reduction, in management and operating contracts, and other contracts determined by the Procurement Executive, or designee, if cost savings programs are contemplated.

(e) The Contracting officer shall insert the provision at 48 CFR 970.5215-5, Limitation on Fee, in solicitations for management and operating contracts, and other contracts determined by the Procurement Executive, or designee.

#### **Subpart 970.17—Special Contracting Methods**

##### **970.1706 Management and operating contracts.**

##### **970.1706-1 Award, renewal, and extension.**

(a) Contract term. Effective work performance under a management and operating contract is facilitated by the use of a relatively long contract term of up to ten (10) years. Accordingly, management and operating contracts shall provide for a basic contract term not to exceed five (5) years and may include an option(s) to extend the term for additional periods; provided, that no one option period exceeds five (5) years in duration and the total term of the contract, including any options exercised, does not exceed ten (10) years. The specific term of the base period and of any options periods shall be determined at the time of the authorization to compete or extend the contract. The term "option" as used herein means a unilateral right in the contract by which the Government can extend the term of the contract.

Accordingly, except as may be provided for through the inclusion of an option(s) in the contract to extend the term, any extension to continue the contract with the incumbent contractor beyond its term shall only occur when such extension can be justified under one of the statutory authorities identified in 48 CFR 6.302 and when authorized by the Head of the Agency.

(b) Exercise of option. As part of the review required by 48 CFR 17.605(b), the contracting officer shall assess whether competing the contract will produce a more advantageous offer than exercising the option. The incumbent contractor's past performance under the contract, the extent to which performance-based management contract provisions are present, or can be negotiated into, the contract, and the impact of a change in a contractor on the Department's discharge of its programs are considerations that shall

be addressed in the contracting officer's decision that the exercise of the option is in the Government's best interest. The contracting officer's decision shall be approved by the Procurement Executive and the cognizant Assistant Secretary(s).

(c) Conditional authorization of non-competitive extension made pursuant to authority under CICA. Authorization to extend a management and operating contract by the Head of the Agency shall be considered conditional upon the successful negotiation of the contract to be extended in accordance with the Department's negotiation objectives. The Head of the Contracting Activity shall advise the Procurement Executive no later than 6 months after receipt of the conditional authorization as to whether the Department's objectives will be met and, if not, the contracting activity's plans for competing the requirement.

#### **970.1706-2 Contract clause.**

The contracting officer shall insert the clause at 48 CFR 52.217-9, Option to Extend the Term of the Contract, in all management and operating contracts when the inclusion of an option is appropriate.

### **Subpart 970.19—Small, Small Disadvantaged and Women-Owned Small Business Concerns**

#### **970.1907 Subcontracting with Small Business, Small Disadvantaged Business and Woman-Owned Small Business Concerns.**

##### **970.1907-1 Subcontracting plan requirements.**

Pursuant to the clause at 48 CFR 52.219-9, Small, Small Disadvantaged and Woman-Owned Small Business Subcontracting Plan, which is required for all management and operating contracts, each management and operating contract shall include a subcontracting plan which is effective for the term of the contract. Goals for the contract shall be negotiated annually when revised funding levels are determined. The plan should include provisions for revising the goals or any other sections of the plan. Such revisions shall be in writing, approved by the contracting officer, and shall be specifically made a material part of the contract.

### **Subpart 970.22—Application of Labor Policies**

#### **970.2200 Scope of Subpart.**

This Subpart prescribes Department of Energy labor policies pertaining to the award and administration of management and operating contracts.

#### **970.2201 Basic labor policies.**

##### **970.2201-1 Labor relations.**

##### **970.2201-1-1 General.**

Contracting officers shall, in appropriate circumstances, follow the guidance in 48 CFR subpart 22.1, as supplemented in this section, in the award and administration of management and operating contracts.

##### **970.2201-1-2 Policies.**

(a) The extent of Government ownership of the nation's energy plant and materials, and the overriding concerns of national defense and security, impose special conditions on personnel and labor relations in the energy program. Such special conditions include the need for continuity of vital operations at DOE installations; retention by DOE of absolute authority on all questions of security; and DOE review of labor expenses under management and operating contracts as a part of its responsibility for assuring judicious expenditure of public funds. It is the intent of DOE that personnel and labor policies throughout the energy program reflect the best experience of American industry in aiming to achieve the type of stable labor-management relations that are essential to the proper development of the energy program. The following enunciates the principles upon which the DOE policy is based:

(1) Employment standards. (i) Management and operating contractors are expected to bring experienced, proven personnel from their private operations to staff key positions on the contract work and to recruit other well-qualified personnel as needed. Such personnel should be employed and treated during employment without discrimination by reason of race, color, religion, sex, or national origin. Contractors shall be required to take affirmative action to achieve these objectives.

(ii) The job qualifications and suitability of prospective employees should be established by the contractor prior to employment by careful personnel investigations. Such personnel investigations should include, as appropriate: a credit check; verification of high school degree/diploma or degree/diploma granted by an institution of higher learning within the last 5 years; contacts with listed personal references; contacts with listed employers for the past 3 years (excluding employment of less than 60 days duration, part-time employments, and craft/union employments); and local law enforcement checks when such checks are not prohibited by State

or local law or regulation, and when the individual resides in the jurisdiction where the contractor is located. When a DOE access authorization (security clearance) will be required, the aforementioned preemployment checks must be conducted and the applicant's job qualifications and suitability must be established before a request is made to the DOE to process the applicant for access authorization. Evidence must be furnished to the DOE with the applicant's security forms that specify: the date each check was conducted, the entity contacted that provided information concerning the applicant, a synopsis of the information provided as a result of each contact, and a statement that all information available has been reviewed and favorably adjudicated in accordance with the contractor's personnel policies. When an applicant is being hired specifically for a position which requires a DOE access authorization, the applicant shall not be placed in that position prior to the access authorization being granted by the DOE unless an exception has been obtained from the Head of the Contracting Activity, or designee. If an applicant is placed in that position prior to access authorization being granted by the DOE, the applicant may not be afforded access to classified matter or special nuclear materials (in categories requiring access authorization) until the DOE notifies the employer that access authorization has been granted. Management and operating contractors and other contractors operating DOE facilities may include the requirements set forth in this subsection in subcontracts (appropriately modified to identify the parties) wherein subcontract employees will be required to hold DOE access authorization in order to perform on-site duties, such as protective force operations.

(iii) Consistent with the policies set forth in this subpart, the contractor is responsible for maintaining satisfactory standards for employee qualifications, performance, conduct, and business ethics under its own personnel policies.

(2) Security. On all matters of security at its facilities, DOE retains absolute authority and neither the regulations and policies pertaining to security, nor their administration, are matters for collective bargaining between the contractor's management and labor. Insofar as DOE security regulations affect the collective bargaining process, the security policies and regulations will be made known to both parties. To the fullest extent feasible, DOE will consult with representatives of the contractor's management and labor when formulating security regulations

and policies that may affect the collective bargaining process.

(3) Wages, salaries, and employee benefits. (i) Wages, salaries, and employee benefits shall be administered in a manner designated to adapt the normal practices and conditions of industry or institutions of higher education to the contract work, and to provide for appropriate review by DOE. Area practices, valid patterns, and well-established commercial or academic practices of the contractors, as appropriate, form the criteria for the establishment and adjustment of compensation schedules.

(ii) The aspects of wages, hours, and working conditions which are the substance of collective bargaining in normal organized industries will be left to the orderly processes of negotiation and agreement between DOE contractor management and employee representatives with maximum possible freedom from Government interference.

(4) Employee relations. The handling of employee relations on contract work, including such matters as the conduct and discipline of the work force and the handling of employee grievances, is part of the normal management responsibility of the contractor.

(5) Collective bargaining. (i) DOE review of collective bargaining practices will be premised on the view that management's trusteeship for the operation of the Government facilities includes the duty to adopt practices which are fundamental to the friendly adjustment of disputes, and which experience has shown, promote orderly collective bargaining relationships. Practices inconsistent with this view may be objected to if not found to be otherwise clearly warranted.

(ii) Consistent with the policy of assuring continuity of operation of vital facilities, all collective bargaining agreements at DOE-owned facilities should provide that grievances and disputes involving the interpretation or application of the agreement will be settled without resorting to strike, lockout, or other interruption of normal operations. For this purpose, each collective bargaining agreement entered into during the period of performance of this contract should provide an effective grievance procedure with arbitration as its final step, unless the parties mutually agree upon some other method of assuring continuity of operation for the term of the collective bargaining agreement.

(iii) DOE expects its management and operating contractors and the unions representing the contractor's employees to cooperate fully with the Federal Mediation and Conciliation Service.

(6) Personnel training. DOE encourages and supports personnel training programs aimed at improving work efficiency or developing needed skills which are not otherwise obtainable.

(7) Working conditions. Accident, fire, health, and occupational hazards associated with DOE activities will be held to a practical minimum level and controlled in the interest of maintenance of health and prevention of accidents. Subject to DOE control, contractors shall be required to maintain comprehensive continuous preventive and protective programs appropriate to the particular activities throughout all operations. Appropriate financial protection in case of occupational disability must be provided to employees on DOE projects.

(c) Title to payroll and associated records under certain contracts for the management and operation of DOE facilities, and for necessary miscellaneous construction incidental to the function of these facilities, shall vest in the Government. Such records are to be disposed of in accordance with DOE directions. For such contracts, the Solicitor of Labor has granted a tolerance from the Department of Labor Regulations to omit from the prescribed labor clauses the requirement for the retention of payrolls and associated records for a period of three years after completion of the contract. Under this tolerance, the records retention requirements for all labor clauses in the contract and the Fair Labor Standards Act are satisfied by disposal of such records in accordance with applicable DOE directives.

#### **970.2201-1-3 Contract clause.**

In addition to the clause at 48 CFR 52.222-1, Notice to the Government of Labor Disputes, the contracting officer shall insert the clause at 970.5222-1, Collective Bargaining Agreements' Management and Operating Contracts, in all management and operating contracts.

#### **970.2201-2 Overtime management.**

##### **970.2201-2-1 Policy.**

Contracting officers shall ensure that management and operating contractors manage overtime cost effectively and use overtime only when necessary to ensure performance of work under the contract.

##### **970.2201-2-2 Contract clause.**

The contracting officer shall insert the clause at 48 CFR 970.5222-2, Overtime Management, in management and operating contracts.

#### **970.2204 Labor standards for contracts involving construction.**

##### **970.2204-1 Statutory and regulatory requirements.**

##### **970.2204-1-1 Administrative controls and criteria for application of the Davis-Bacon Act in operational or maintenance activities.**

(a) Particular work items falling within one or more of the following criteria normally will be classified as noncovered by the Davis-Bacon Act, hereinafter referred to in this section as the "Act."

(1) Individual work items estimated to cost \$2,000 or less. The total dollar amount of the management and operating contract is not a factor to be considered and bears no relation to individual work items classified as construction, alteration and/or repair, including painting and decorating. However, no item of work, the cost of which is estimated to be in excess of \$2,000, shall be artificially divided into portions less than \$2,000 for the purpose of avoiding the application of the Act.

(2) Work and services that are a part of operational and maintenance activities or which, being very closely and directly involved therewith, are more in the nature of operational activities than construction, alteration, and/or repair work. This includes work and services which would involve a material risk to continuity of operations, to life or property, or to DOE operating requirements, if performed by persons other than the contractor's regular production and maintenance forces. However, any decision that contracts or work items are noncovered for these reasons must be made by the Head of the Contracting Activity without power of delegation.

(3) Assembly, modification, setup, installation, replacement, removal, rearrangement, connection, testing, adjustment, and calibration of machinery and equipment. However, it is noted that these activities are covered if they are part of, or would be a logical part of, the construction of a facility, or if construction-type work which is not "incidental" to the overall effort is involved.

(4) Experimental development of equipment, processes, or devices, including assembly, fitting, installation, testing, reworking, and disassembly. This refers to equipment, processes, and devices which are assembled for the purpose of conducting a test or experiment. The design may be only conceptual in character, and professional personnel who are responsible for the experiment participate in the assembly. Specifically

excluded from the category of experimental development are buildings and building utility services, as distinguished from temporary connections thereto. Also specifically excluded from this category is equipment to be used for continuous testing (*e.g.*, a machine to be continuously used for testing the tensile strength of structural members).

(5) Experimental work in connection with peaceful uses of nuclear energy. This refers to equipment, processes and devices which are assembled and/or set in place and interconnected for the purpose of conducting a test or experiment. The nature of the test or experiment is such that professional personnel who are responsible for the test or experiment and/or data to be derived therefrom must, by necessity, participate in the assembly and interconnections. Specifically excluded from experimental work are buildings, building utility services, structural changes, drilling, tunneling, excavation, and back-filling work which can be performed according to customary drawings and specifications, and utility services of modifications to utility services, as distinguished from temporary connections thereto. Work in this category may be performed in mines or in other locations specifically constructed for tests or experiments.

(6) Emergency work to combat the effects of fire, flood, earthquake, equipment failure, accident, or other casualties, and to restart the operational activity following the casualty. Work which is not directly related to restarting the activity or which involves rebuilding or replacement of a structure, structural components, or equipment is excluded from this category.

(7) Decontamination, including washing, scrubbing, and scraping to remove contamination; removal of contaminated soil or other material; and painting or other resurfacing, provided that such painting or resurfacing is an integral part of the decontamination activity and performed by the employees of the contractors performing the decontamination.

(8) Burial of contaminated soil waste or contained liquid; however, initial preparatory work readying the burial ground for use (*e.g.*, any grading or excavating that is a part of initial site preparation, fencing, drilling wells for continued monitoring of contamination, construction of guard or other office space) is covered. Work performed subsequent to burial which involves the placement of concrete or other like activity is also covered.

(b) The classification of a contract as a contract for operational or

maintenance activities does not necessarily mean that all work and activities at the contract location are classifiable as outside coverage of the Act since it may be necessary to separate work which should be classified as covered. Therefore, the Heads of Contracting Activities shall establish and maintain controls for the careful scrutiny of proposed work assignments under such contracts to assure that:

(1) Contractors whose contracts do not contemplate the performance of work covered by the Act with the contractor's own forces are neither asked nor authorized to perform work within the scope of the Act. If the actual work assignments do involve covered work, the contract should be modified to include applicable provisions of the Act.

(2) Where covered work is performed by a contractor whose contract contains provisions required by the Act, such work is performed as required by law and the contract. After the contractor has been informed, as provided in paragraph (b)(3) of this subsection, that certain work is covered, the responsibilities of the Head of the Contracting Activity to assure compliance is the same as it would be if the work were being performed under a separate construction contract.

(3) Controls provided for above include consideration by the Head of the Contracting Activity and the contractor, before work is begun or contracted out, of the relation of the Act to (i) the annual programming of work; (ii) the contractor's work orders; and (iii) work contracted out in excess of \$2,000. The Head of the Contracting Activity may, if consistent with DOE's responsibilities as described in this subsection, prescribe from time to time classes of work as to which applicability or nonapplicability of the Act is clear, for which the Head of the Contracting Activity will require no further DOE determination on coverage in advance of the work. For all work, controls to be established by the Head of the Contracting Activity should provide for notification to the contractor before work is begun as to whether such work is covered. The Head of the Contracting Activity is responsible for submitting to the Wage and Hours Division, Employment Standards Administration, Department of Labor, Washington, D.C. 20210, all DOE requests for project area or installation wage determinations, or individual determinations, or extensions or modification thereto. Requests for such determinations shall be made on Standard Form 308, at least 30 calendar days before they are

required for use in advertising for bids or requests for proposals.

(c) Experimental installations. Within DOE programs, a variety of experiments are conducted involving materials, fuels, coolants, and processing equipment. Certain types of situations where tests and experiments have presented coverage questions are described as follows:

(1) Set-ups of device and/or processes. The proving out of investigative findings and theories of a scientific and technical nature may require the set-up of various devices and/or processes at an early, pre-prototype stage of development. These may range from laboratory bench size to much larger set-ups. As a rule, these set-ups are made within established facilities (normally laboratories), required utility connections are made to services provided as a part of the basic facilities, and the activity as a whole falls within the functional purpose of the facility. Such set-ups are generally not covered. However, the erection of structures which are public works is covered if construction type work, other than incidental work, is involved. Preparatory work for the set-up requiring structural changes or modifications of basic utility services, as distinguished from connections thereto, is covered. The following are illustrations of noncovered set-ups of devices and/or processes:

(i) Assembly of piping and equipment within existing "hot cell" facilities for proving out a conceptual design of a chemical processing unit;

(ii) Assembly of equipment, including adaptation and modification thereof, in existing "hot cell" facilities to prove out a conceptual design for remotely controlled machining equipment;

(iii) Assembly of the first graphite pile in a stadium at Stagg Field in Chicago;

(iv) Assembly of materials and equipment for particular aspects of the direct current thermonuclear experiments to explore feasibility and to study other ramifications of the concept of high energy injection and to collect data thereon.

(2) Loops. Many experiments are carried on in equipment assemblies, called loops, in which liquids or gases are circulated under monitored and controlled conditions. For purposes of determining coverage under the Act, loops may be classed as loop facilities or as loop set-ups. Both of these classes of loops can include in-reactor loops and out-of-reactor loops. In differentiating between clearly identified loop set-ups and loop facilities, an area exists in which there have been some questions of coverage,

such as certain loops at the Material Test Reactor and at Engineering Test Reactor and the Idaho National Engineering and Environmental Laboratory site. Upon clarification of this area, further illustrations will be added. In the meantime, the differentiation between loop set-ups and loop facilities must be made on a case-by-case basis, taking into account the total criteria set forth in this subpart.

(i) Loop set-ups. The assembly, erection, modification, and disassembly of a loop set-up is noncovered. A noncontroversial example of a loop set-up is one which is assembled in a laboratory, *e.g.*, Oak Ridge National Laboratory, Argonne National Laboratory, or Lawrence Livermore National Laboratory, for a particular test and thereafter disassembled. However, preparatory work for a loop set-up requiring structural changes or modifications of basic utility services as distinguished from connections thereto is covered, as are material and equipment that are installed for a loop set-up which is a permanent part of the facility or which is use for a succession of experimental programs.

(ii) Loop facilities. A loop facility differs from a loop set-up in that it is of a more permanent character. It is usually, but not always, of greater size. It normally involves the building or modification of a structure. Sometimes it is installed as a part of construction of the facility. It may be designed for use in a succession of experimental programs over a longer period of time. Examples of loop facilities are the in-reactor "K" loops at Hanford and the large Aircraft Nuclear Propulsion loop at the Idaho National Engineering and Environmental Laboratory site. The on-site assembly and erection of such loop facilities are covered. However, once a loop facility is completed and becomes operational, the criteria set forth above for operational and maintenance activities apply.

(3) Reactor component experiments. Other experiments are carried on by insertion of experimental components within reactor systems without the use of a loop assembly. An example of reactor facilities erected for such experimental purposes are the special power excursion test reactors (SPETRs) at the National Reactor Test Site which are designed for studying reactor behavior and performance characteristics of certain reactor components. Such a facility may consist of a reactor vessel, pressurizing tank, coolant loops, pumps, heat exchangers, and other auxiliary equipment as needed. The facility also may include sufficient shielding to permit work on

the reactor to proceed following a short period of power interruption, and buildings as needed to house the reactor and its auxiliary equipment. The erection and on-site assembly of such a reactor facility is covered, but the components whose characteristics are under study are excluded from coverage. To illustrate, one of the SPETRs planned for studies of nuclear reactor safety is designed to accommodate various internal fuel and control assemblies. The internal structure of the pressure vessel is designed so that cores of different shapes and sizes may be placed in the vessel for investigation, or the entire internal structure may be easily removed and replaced by a structure which will accept a different core design. Similarly, the control rod assembly is arranged to provide for flexibility in the removal of instrument leads and experimental assemblies from within the core.

(4) Tests or experiments in peaceful uses of nuclear energy. These tests or experiments are varied in nature and some are only in a planning stage. They consist of one or more nuclear or nonnuclear detonations for the purposes of acquiring data. The data can include seismic effects, radiation effects, amount of heat generated, amount of material moved and so forth. Some of these tests are conducted in existing mines, while others are conducted in facilities specifically constructed for the tests or experiments. In general, all work which can be performed in accordance with customary drawings and specifications, as well as other work in connection with preparation of facilities is treated as covered work. Such work includes tunneling, drilling, excavation and backfilling, erection of buildings or other structures, and installation of utilities. The installation of the nonnuclear material or nuclear device to be detonated, and the instrumentation and connection between such material or device and the instrumentation are treated as noncovered work.

(5) Tests or experiments in military uses of nuclear energy. As in 970.2204-1-1(c)(4), these tests or experiments can be varied in nature. However, under this category it is intended to include only detonation of nonnuclear material or nuclear devices. The material or devices can be detonated either underground, at ground level, or above the ground. These tests or experiments have been conducted in, on, or in connection with facilities specifically constructed for such tests or experiments. As in tests or experiments in peaceful uses of nuclear energy, all work which can be performed in accord with customary

drawings and specifications, as well as other work in connection with preparation of facilities are treated as covered work. Such work includes building towers or similar structures, tunneling, drilling, excavation and backfilling, erection of buildings or other structures, and installation of utilities. The installation of the nonnuclear material or nuclear devices and instrumentation are treated as noncovered work.

(d) Construction site contiguous to an established manufacturing facility. As DOE-owned property sometimes encompasses several thousand acres of real estate, a number of separate facilities may be located in areas contiguous to each other on the same property. These facilities may be built over a period of years, and established manufacturing activities may be regularly carried on at one site at the same time that construction of another facility is underway at another site. On occasion, the regular manufacturing activities of the operating contractor at the first site may include the manufacture, assembly, and reconditioning of components and equipment which in other industries would normally be done in established commercial plants. While the manufacture of components and equipment in the manufacturing plant is noncovered, the installation of any such manufactured items on a construction job is covered.

#### **970.2208 Equal employment opportunity.**

The equal employment opportunity provisions of 48 CFR subpart 22.8 and subpart 922.8 of this chapter, including Executive Order 11246 and 41 CFR part 60, are applicable to DOE management and operating contracts.

#### **970.2210 Service Contract Act.**

The Service Contract Act of 1965 is not applicable to contracts for the management and operation of DOE facilities.

#### **970.2270 Unemployment compensation.**

(a) Each state has its own unemployment compensation system to provide payments to workers who become unemployed involuntarily and through no fault of their own. Funds are provided for unemployment compensation benefits through a payroll tax on employers. Most DOE contractors are subject to the unemployment compensation tax laws of the states in which they are located. It is the policy to assure, both in the negotiation and administration of cost-reimbursement type contracts, that economical and practical arrangements are made and

practiced with respect to unemployment compensation.

(b) Contract exempt from state laws.

(1) Some contractors are exempt from state unemployment compensation laws, usually on grounds that they are nonprofit organizations or subdivisions of State governments. Most states, however, permit such employers to elect unemployment compensation coverage on a voluntary basis. Under such circumstances, all existing or prospective cost-reimbursement contractors shall be encouraged to provide unemployment compensation coverage or equivalent substitutes.

(2) It is also DOE policy that, prior to the award or extension of a management and operating contract, exempt contractors or prospective contractors shall be required to submit to the contracting officer a statement that they will either elect coverage or provide equivalent substitutes for unemployment compensation, or in the alternative, submit evidence that it is impractical to do so. If any exempt contractor or prospective contractor submits that it is impractical to elect coverage or to provide an equivalent substitute, appropriate Office of Contract and Resource Management, within the Headquarters procurement organization, staff shall review that position prior to recommending an award or extension of the contract. If there are substantial reasons for not electing coverage or for not providing equivalent substitutes, a contract may be awarded or extended. Headquarters' staff review and recommendation shall be based on such factors as:

(i) The specific provisions of the unemployment compensation law of the State;

(ii) The extent to which the establishment of special conditions on DOE work may have an adverse effect on the contractor's general policies and operating costs in its private operations;

(iii) The numerical relationship between the contractor's private work force and its employees performing only work for DOE;

(iv) The contractor's record with respect to work force stability and the general outlook with respect to future work force stability;

(v) In a replacement contractor situation, whether or not the prior contractor had coverage or suitable substitutes; and

(vi) The particular labor relations implications involved.

## **Subpart 970.23—Environmental, Conservation, and Occupational Safety Programs**

### **970.2303 Hazardous materials identification and material safety.**

#### **970.2303-1 General.**

(a) The Department of Energy regulates the nuclear safety of its major facilities under its own statutory authority derived from the Atomic Energy Act and other legislation. The Department also regulates, under certain specific conditions, the use by its contractors of radioactive materials and ionizing radiation producing machines.

(b) The inclusion of environmental, safety and health clauses in DOE contracts shall be made by the contracting officer in accordance with this subpart and in consultation with appropriate environmental, safety and health program management personnel.

#### **970.2303-2 Contract clauses.**

(a) When work under management and operating contracts and subcontracts thereunder is to be performed at a facility where DOE will exercise its statutory authority to enforce occupational safety and health standards applicable to the working conditions of the contractor and subcontractor employees at such facility, the clause at 48 CFR 970.5223-1, Integration of Environment, Safety and Health into Work Planning and Execution, shall be used in such contract or subcontract and made applicable to the work if conditions in paragraphs (a)(1) through (3) of this section, are satisfied:

(1) DOE work is segregated from the contractor's or subcontractor's other work;

(2) The operation is of sufficient size to support its own safety and health services; and

(3) The facility is government-owned, or leased by or for the account of the government.

(b) The clause set forth in 952.223-72, Radiation Protection and Nuclear Criticality, shall be included in those contracts or subcontracts for, and be made applicable to, work to be performed at a facility where DOE does not elect to assert its statutory authority to enforce occupational safety and health standards applicable to the working conditions of contractor and subcontractor employees, but does need to enforce radiological safety and health standards pursuant to provisions of the contract or subcontract rather than by reliance upon Nuclear Regulatory Commission licensing requirements (including agreements with States under section 274 of the Atomic Energy Act).

### **970.2304 Use of recovered/recycled materials.**

#### **970.2304-1 General.**

The policy for the acquisition and use of environmentally preferable products and services is described at 48 CFR subpart 923.4.

#### **970.2304-2 Contract clause.**

The contracting officer shall insert the clause at 48 CFR 970.5223-2, Acquisition and Use of Environmentally Preferable Products and Services, in management and operating contracts.

### **970.2305 Workplace substance abuse programs—management and operating contracts.**

#### **970.2305-1 General.**

(a) The Department of Energy (DOE), as part of its overall responsibilities to protect the environment, maintain public health and safety, and safeguard the national security, has established policies, criteria, and procedures for management and operating contractors to develop and implement programs that help maintain a workplace free from the use of illegal drugs.

(b) Regulations concerning DOE's management and operating contractor workplace substance abuse programs are promulgated at 10 CFR part 707, Workplace Substance Abuse Programs at DOE Sites.

#### **970.2305-2 Applicability.**

(a) All management and operating contracts awarded under the authority of the Atomic Energy Act of 1954, as amended, are required to implement the policies, criteria, and procedures of 10 CFR part 707, Workplace Substance Abuse Programs at DOE Sites.

(b) Except as otherwise provided for in this subpart, management and operating contracts subject to the requirements of 10 CFR part 707 and this subpart shall not be subject to 48 CFR 23.5, Drug Free Workplace.

#### **970.2305-3 Definitions.**

Terms and words relating to DOE's Workplace Substance Abuse Programs, as used in this section, have the same meanings assigned to such terms and words in 10 CFR part 707.

### **970.2305-4 Solicitation provision and contract clause.**

(a) The contracting officer shall insert the provision at 48 CFR 970.5223-3, Agreement Regarding Workplace Substance Abuse Programs at DOE Sites, in solicitations for the management and operation of DOE-owned or -controlled sites operated under the authority of the Atomic Energy Act of 1954, as amended.

(b) The contracting officer shall insert the clause at 970.5223-4, Workplace Substance Abuse Programs at DOE Sites, in contracts for the management and operation of DOE-owned or -controlled sites operated under the authority of the Atomic Energy Act of 1954, as amended.

**970.2306 Suspension of payments, termination of contract, and debarment and suspension actions.**

(a) The contracting officer shall comply with the procedures of 48 CFR 23.506 regarding the suspension of contract payments, the termination of the contract for default, and the debarment and suspension of a contractor relative to failure to comply with the clause at 48 CFR 970.5223-4, Workplace Substance Abuse Programs at DOE Sites.

(b) For purposes of 10 CFR part 707, the specific causes for suspension of contract payments, termination of the contract for default, and debarment and suspension of the contractor are:

(1) The contractor fails to either comply with the requirements of 10 CFR part 707 or perform in a manner consistent with its approved program;

(2) The contractor has failed to comply with the terms of the provision at 48 CFR 970.5223-3, Agreement Regarding Workplace Substance Abuse Programs at DOE Sites;

(3) Such a number of contractor employees having been convicted of violations of criminal drug statutes for violations occurring on the DOE-owned or -controlled site, as to indicate that the contractor has failed to make a good faith effort to provide a drug free workplace; or,

(4) The offeror has submitted a false certification in response to the provision at 48 CFR 970.5223-3, Agreement Regarding Workplace Substance Abuse Programs at DOE Sites.

**Subpart 970.26—Other Socioeconomic Programs**

**970.2670 Implementation of Section 3021 of the Energy Policy Act of 1992.**

**970.2670-1 Requirements.**

The goal requirements of Section 3021 of the Energy Policy Act of 1992, and the attendant reporting requirements shall be included in the subcontracting plan for the management and operating contract and shall apply to the annual dollar obligations specifically provided to the contractor for competitively awarded subcontracts that fulfill Energy Policy Act requirements.

**970.2671 Diversity.**

**970.2671-1 Policy.**

Department of Energy policy recognizes that full utilization of the talents and capabilities of a diverse work force is critical to the achievement of its mission. The principal goals of this policy are to foster and enhance partnerships with small, small disadvantaged, women-owned small businesses, and educational institutions; to match capabilities with existing opportunities; to track small, small disadvantaged, women-owned small business, and educational activity; and to develop innovative strategies to increase opportunities.

**970.2671-2 Contract clause.**

The contracting officer shall insert the clause at 48 CFR 970.5226-1, Diversity Plan, in all management and operating contracts.

**970.2672 Implementation of Section 3161 of the National Defense Authorization Act for Fiscal Year 1993.**

**970.2672-1 Policy.**

Consistent with the objectives of Section 3161 of the National Defense Authorization Act for Fiscal Year 1993, 42 U.S.C. 7274h, in instances where the Department of Energy has determined that a change in work force at a DOE Defense Nuclear Facility is necessary, DOE contractors and subcontractors at DOE Defense Nuclear Facilities shall accomplish work force restructuring or displacement so as to mitigate social and economic impacts and in a manner consistent with any DOE work force restructuring plan in effect for the facility or site. In all cases, mitigation shall include the requirement for hiring preferences for employees whose positions have been terminated (except for termination for cause) as a result of changes to the work force at the facility due to restructuring accomplished under the requirements of Section 3161. Where applicable, contractors may take additional actions to mitigate consistent with the Department's Workforce Restructuring Plan for the facility or site.

**970.2672-2 Requirements.**

The requirements set forth in 48 CFR 926.71, Implementation of Section 3161 of the National Defense Authorization Act for Fiscal Year 1993, for contractors and subcontractors to provide a hiring preference for employees under Department of Energy contracts whose employment in positions at a Department of Energy Defense Nuclear Facility is terminated (except for a

termination for cause) applies to management and operating contracts.

**970.2672-3 Contract clause.**

The contracting officer shall insert the clause at 48 CFR 970.5226-2, Workforce Restructuring Under Section 3161 of the National Defense Authorization Act for Fiscal Year 1993, in contracts for the management and operation of Department of Energy Defense Nuclear Facilities and, as appropriate, in other contracts that include site management responsibilities at a Department of Energy Defense Nuclear Facility.

**970.2673 Regional partnerships.**

**970.2673-1 Policy.**

It is the policy of the DOE to be a constructive partner in the geographic region in which DOE conducts its business. The basic elements of this policy include:

(1) Recognizing the diverse interests of the region and its stakeholders,

(2) Engaging regional stakeholders in issues and concerns of mutual interest, and

(3) Recognizing that giving back to the community is a worthwhile business practice.

**970.2673-2 Contract clause.**

The contracting officer shall insert the clause at 48 CFR 970.5226-3, Community Commitment, in all management and operating contracts.

**Subpart 970.27—Patents, Data, and Copyrights**

**970.2701 General.**

**970.2701-1 Applicability.**

This Subpart applies to negotiation of patent rights and rights in technical data provisions for the Department of Energy contracts for the management and operation of its research and development and production facilities.

**970.2703 Patent rights.**

**970.2703-1 Policy.**

(a) Whenever a contract has as a purpose, the design, construction, or operation of a Government-owned research, development, demonstration or production facility, it is necessary that the Government be accorded certain rights with respect to further use of the facility by or on behalf of the Government upon termination of the contract, including the right to make, use, transfer, or otherwise dispose of all articles, materials, products, or processes embodying inventions or discoveries used or embodied in the facility regardless of whether or not conceived or first actually reduced to

practice under or in the course of such a contract. Thus, both versions of the Department's clauses which address patent rights for management and operating contracts (952.227-11, Alternate I, and 952.227-13, Alternate I) contain a facilities license.

(b) In the case of contractors operating and managing DOE research and development or production facilities that are not the beneficiaries of the Bayh-Dole Act (35 U.S.C. 200, *et seq.*, as amended), the Department is statutorily obligated to take title to inventions conceived or first actually reduced to practice in the performance of the contracts. Here, as in all other circumstances in which the Department takes title to inventions by statute, the contractors may request a waiver at the time of contracting for a class of inventions or during contract performance for identified inventions. DOE includes the considerations at 42 U.S.C. 5908 in its determination as to whether to approve the request.

(c) While no contractor that manages and operates a DOE research and development or production facility is a small business, several have historically been nonprofit organizations. As such, they are the beneficiaries of the Bayh-Dole Act (35 U.S.C. 200 *et seq.*, as amended) and, therefore, receive the right to retain title to inventions conceived or first actually reduced to practice in the performance of their contracts with the Department, except in areas of technology covered by Exceptional Circumstances Determinations made by DOE or of nuclear weapons and naval nuclear propulsion. In these latter two areas, the contractor may request that the Department waive its title and, therefore, subject to the exceptions identified in the subsection below, may be granted title to inventions conceived or first actually reduced to practice in the performance of its contract with the Department.

(d) DOE has exercised the statutory authority granted under 35 U.S.C. 202(a)(ii) and 202(a)(iv). In accordance with 35 U.S.C. 202(a)(ii), DOE has issued several Exceptional Circumstances Determinations pursuant to which DOE nonprofit management and operating contractors have no right to elect title to inventions conceived or first actually reduced to practice in the course of or under their contracts within covered areas of technology. However, those contractors may be given some lesser property right in an invention within limits set by DOE in a particular Exceptional Circumstances Determination so that the contractor can effectively assist with a mission of DOE,

such as technology transfer. As new technologies evolve, DOE may issue additional Exceptional Circumstances Determinations, as appropriate.

(e) In accordance with 35 U.S.C. 202(a)(iv), DOE has exempted its weapons-related and naval nuclear propulsion programs from the broad Bayh-Dole right of its nonprofit management and operating contractors to elect title to inventions conceived or first actually reduced to practice in the course of or under their contracts. The effect of this exemption is that, if the contractors want to acquire title, they must request title to covered inventions. DOE may then grant the request subject to a case-by-case determination that the contractor has met all procedural requirements unilaterally set by DOE to insure that all national security concerns of DOE relating to the contractor's use of an invention in either of these two areas for commercialization have been met.

#### **970.2703-2 Contract clauses.**

The contracting officer shall refer to 48 CFR 927.303 for guidance concerning the use of clauses in management and operating contracts addressing patent rights.

#### **970.2704 Rights in data.**

##### **970.2704-1 General.**

(a) Rights in data relating to the performance of the contract and to all facilities are significant in assuring continuity of the management and operation of DOE facilities. It is crucial in assuring DOE's continuing ability to perform its statutory missions that DOE obtain rights to all data produced or specifically used by its management and operating contractors and appropriate subcontractors. In order to obtain the necessary rights in technical data, DOE contracting officers shall assure that management and operating contracts contain either the Rights in Data clause at 48 CFR 970.5227-1, Rights in Data-Facilities, or the clause at 48 CFR 970.5227-2, Rights in Data-Technology Transfer. Selection of the appropriate clause is dependent upon whether technology transfer is a mission of the management and operating contract pursuant to the National Competitiveness Technology Transfer Act of 1989, Public Law 101-189, (15 U.S.C. 3711 *et seq.*, as amended). If technology transfer is not a mission of the management and operating contract, the clause at 48 CFR 970.5227-1, Rights in Data-Facilities, shall be used. In those instances in which technology transfer is a mission of the contract, the clause

at 48 CFR 970.5227-2, Rights in Data-Technology Transfer, shall be used.

(b) Employees of the management and operating contractor may not be used to assist in the preparation of a proposal or bid for services which are similar or related to those being performed under the contract, which are to be performed by the contractor or its parent or affiliate organization for commercial customers unless the employee has been separated from work under the DOE contract for such period as the Head of the Contracting Activity or designee shall have directed.

#### **970.2704-2 Procedures.**

(a) The clauses at 48 CFR 970.5227-1, Rights in Data-Facilities, and 48 CFR 970.5227-2, Rights in Data-Technology Transfer, both provide generally for Government ownership and for unlimited rights in the Government for all data first produced in the performance of the contract and unlimited rights in data specifically used in the performance of the contract. Both clauses provide that, subject to patent, security, and other provisions of the contract, the contractor may use contract data for its private purposes. The contractor, under either clause, must treat any data furnished by DOE or acquired from other Government agencies or private entities in the performance of their contracts in accordance with any restrictive legends contained therein.

(b) Since both clauses secure access to and, if requested, delivery of technical data used in the performance of the contract, there is generally no need to use the Additional Technical Data Requirements clause at 48 CFR 52.227-16 in the management and operating contract.

(c)(1) Paragraph (d) of the clause at 48 CFR 970.5227-1, Rights in Data-Facilities, and paragraph (f) of the clause at 48 CFR 970.5227-2, Rights in Data-Technology Transfer, provide for the inclusion in subcontracts of the Rights in Technical Data-General clause at 48 CFR 52.227-14, with Alternate V, and modified in accordance with DEAR 927.409. Those clauses also provide for the inclusion in appropriate subcontracts Alternates II, III, and IV to the clause at 48 CFR 52.227-14 with DOE's prior approval and the inclusion of the Additional Technical Data Requirements clause at 48 CFR 52.227-16 in all subcontracts for research, development, or demonstration and all other subcontracts having special requirements for the production or delivery of data. In subcontracts, including subcontracts for related support services, involving the design or

operation of any plants or facilities or specially designed equipment for such plants or facilities that are managed or operated by the contractor under its contract with DOE, the management and operating contractor shall use the Rights in Data-Facilities clause at 48 CFR 970.5227-1.

(2) Where, however, a subcontract is to be awarded by the management and operating contractor in connection with a program, as discussed at 927.404-70, which provides statutory authority to protect from public disclosure, data first produced under contracts awarded pursuant to the program, contracting officers shall ensure that the management and operating contractor includes in that subcontract the rights in data clause provided by DOE Patent Counsel, consistent with any accompanying guidance.

(3) Management and operating contractors and higher-tier subcontractors shall not use their power to award subcontracts as economic leverage to acquire rights in a subcontractor's limited rights data or restricted computer software for their private use, nor may they acquire rights in a subcontractor's limited rights data or restricted computer software except through the use of Alternate II or III to the clause at 48 CFR 52.227-14, respectively, without the prior approval of DOE Patent Counsel.

(d)(1) Paragraphs (e) and (f) of the clause at 48 CFR 970.5227-1, Rights in Data-Facilities, and paragraphs (g) and (h) of the clause at 48 CFR 970.5227-2, Rights in Data-Technology Transfer, provide for the contractor's granting a nonexclusive license in any limited rights data and restricted computer software specifically used in performance of the contract.

(2) In certain instances the objectives of DOE would be frustrated if the Government did not obtain, at the time of contracting, limited license rights on behalf of responsible third parties and the Government, and to limited rights data or restricted computer software or both necessary for the practice of subject inventions or data first produced or delivered in the performance of the contract. This situation may arise in the performance of management and operating contracts and contracts for the management or operation of a DOE facility or site. Contracting officers should consult with program officials and Patent Counsel. No such rights should be obtained from a small business or non-profit organization, unless similar rights in background inventions of the small business or non-profit organization have been authorized in accordance with 35 U.S.C. 202(f).

Where such a background license is in DOE's interest, a provision that provides substantially as Alternate VI at 48 CFR 952.227-14 should be added to the appropriate clause, 48 CFR 970.5227-1, Rights in Data-Facilities, or 48 CFR 970.5227-2, Rights in Data-Technology Transfer.

(e) The Rights in Data-Technology Transfer clause at 48 CFR 970.5227-2 differs from the clause at 48 CFR 970.5227-1, Rights in Data-Facilities, in the context of its more detailed treatment of copyright. In management and operating contracts that have technology transfer as a mission, the right to assert copyright in data first produced under the contract will be a valuable right, and commercialization of such data, including computer software, will assist the management and operating contractor in advancing the technology transfer mission of the contract. The clause at 48 CFR 970.5227-2, Rights in Data-Technology Transfer, provides for DOE approval of DOE's taking a limited copyright license for a period of five years, and, in certain rare cases, specified longer periods in order to contribute to commercialization of the data.

(f) Contracting officers should consult with Patent Counsel to assure that requirements regarding royalties and conflicts of interest associated with asserting copyright in data first produced under the contract are appropriately addressed in the Technology Transfer Mission clause (48 CFR 970.5227-3) of the management and operating contract. Where it is not otherwise clear which DOE program funded the development of a computer software package, such as where the development was funded out of a contractor's overhead account, the DOE program which was the primary source of funding for the entire contract is deemed to have administrative responsibility. This issue may arise, among others, in the decision whether to grant the contractor permission to assert copyright. See paragraph (e) of the Rights in Data-Technology Transfer clause at 970.5227-2.

(g) In management and operating contracts involving access to DOE-owned Category C-24 restricted data, as set forth in 10 CFR part 725, DOE has reserved the right to receive reasonable compensation for the use of its inventions and discoveries, including its related restricted data and technology. Alternate I to each clause shall be used where access to Category C-24 restricted data is contemplated in the performance of a contract.

#### **970.2704-3 Contract clauses.**

(a) The contracting officer shall insert the clause at 48 CFR 970.5227-1, Rights in Data-Facilities, in management and operating contracts which do not contain the clause at 48 CFR 970.5227-2, Rights in Data-Technology Transfer Mission. The contracting officer shall include the clause with its Alternate I in contracts where access to Category C-24 restricted data, as set forth in 10 CFR part 725, is to be provided to contractors.

(b) The contracting officer shall insert the clause at 970.5227-2, Rights in Data-Technology Transfer, in management and operating contracts which contain the clause at 970.5227-3, Technology Transfer Mission. The contracting officer shall include the clause with its Alternate I in contracts where access to Category C-24 restricted data, as set forth in 10 CFR part 725, is to be provided to contractors.

#### **970.2770 Technology transfer.**

##### **970.2770-1 General.**

This subpart prescribes policies and procedures for implementing the National Competitiveness Technology Transfer Act of 1989, Public Law 101-189, (15 U.S.C. 3711 *et seq.*, as amended). The Act requires that technology transfer be established as a mission of each Government-owned laboratory operated under contract by a non-Federal entity. The National Defense Authorization Act for Fiscal Year 1994 expanded the definition of "laboratory" to include weapon production facilities that are operated for national security purposes and are engaged in the production, maintenance, testing, or dismantlement of a nuclear weapon or its components.

##### **970.2770-2 Policy.**

All new awards for or extensions of existing DOE laboratory or weapon production facility management and operating contracts shall have technology transfer, including authorization to award Cooperative Research and Development Agreements (CRADAs), as a laboratory or facility mission under Section 11(a)(1) of the Stevenson-Wydler Technology Innovation Act of 1980, Public Law 96-480 (15 U.S.C. 3701 *et seq.*, as amended). A management and operating contractor for a facility not deemed to be a laboratory or weapon production facility may be authorized on a case-by-case basis to support the DOE technology transfer mission including, but not limited to, participating in CRADAs awarded by DOE laboratories and weapon production facilities.

**970.2770-3 Technology transfer and patent rights.**

The National Competitiveness Technology Transfer Act of 1989 (NCTTA) established technology transfer as a mission for Government-owned, contractor-operated laboratories, including weapons production facilities, and authorizes those laboratories to negotiate and award cooperative research and development agreements with public and private entities for purposes of conducting research and development and transferring technology to the private sector. In implementing the NCTTA, DOE has negotiated technology transfer clauses with the contractors managing and operating its laboratories. Those technology transfer clauses must be read in concert with the patent rights clause required by this subpart. Thus, each management and operating contractor holds title to subject inventions for the benefit of the laboratory or facility being managed and operated by that contractor.

**970.2770-4 Contract clause.**

(a) The contracting officer shall insert the clause at 970.5227-3, Technology Transfer Mission, in each solicitation for a new or an extension of an existing laboratory or weapon production facility management and operating contract.

(b) If the contractor is a nonprofit organization or small business eligible under 35 U.S.C. 200 *et seq.*, to receive title to any inventions under the contract and proposes to fund at private expense the maintaining, licensing, and marketing of the inventions, the contracting officer shall use the basic clause with its Alternate I.

(c) If the facility is operated for national security purposes and engaged in the production, maintenance, testing, or dismantlement of a nuclear weapon or its components, the contracting officer shall use the basic clause with its Alternate II.

**Subpart 970.28—Bonds and Insurance****970.2803 Insurance.****970.2803-1 Workers' compensation insurance.**

(a) Policies and requirements. (1) Workers' compensation insurance protects employers against liability imposed by workers' compensation laws for injury or death to employees arising out of, or in the course of, their employment. This type of insurance is required by state laws unless employers have acceptable programs of self-insurance.

(2) Special requirements. Certain workers' compensation laws contain

provisions which result in limiting the protection afforded persons subject to such laws. The policy with respect to these limitations as they affect persons employed by management and operating contractors is set forth as follows:

(i) Elective provisions. Some worker's compensation laws permit an employer to elect not to be subject to its provisions. It is DOE policy to require these contractors to be subject to workers' compensation laws in jurisdictions permitting election.

(ii) Statutory immunity. Under the provisions of some workers' compensation laws, certain types of employers; *e.g.*, nonprofit educational institutions, are relieved from liability. If a contractor has a statutory option to accept liability, it is DOE policy to require the contractor to do so.

(iii) Limited medical benefits. Some workers' compensation laws limit the liability of the employer for medical care to a maximum dollar amount or to a specified period of time. In such cases, a contractor's workers' compensation insurance policy should contain a standard extrastatutory medical coverage endorsement.

(iv) Limits on occupational disease coverage and employers' liability. Some workers' compensation laws do not provide coverage for all occupational diseases. In such situations, a contractor's workers' compensation insurance policy should contain voluntary coverage for all occupational diseases.

(3) Contractor "employees' benefit plan"—self-insurers. The policies and requirements set forth in paragraph (a)(2) of this section apply where management and operating contractors purchase workers' compensation insurance. With respect to self-insured contractors, the objectives specified in paragraph (a)(2) also shall be met through primary or excess workers' compensation and employers' liability insurance policy(ies) or an approved combination thereof. "Employees' benefit plans" which were established in prior years may be continued to contrast termination at existing benefit levels.

(b) Assignment of responsibilities. (1) Office of Contract and Resource Management, within the Headquarters procurement organization, other officials, and the Heads of Contracting Activities, consistent with their delegations of responsibility, shall assure management and operating contracts are consistent with the policies and requirements of paragraph (a) of this section.

(2) In discharging assigned responsibility, the Heads of Contracting Activities shall:

(i) Periodically review workers' compensation insurance programs of management and operating contractors in the light of applicable workers' compensation statutes to assure conformance with the requirements of paragraph (a) of this section.

(ii) Evaluate the adequacy of coverage of "self-insured" workers' compensation programs;

(iii) Provide arrangements for the administration of any existing "employees' benefit plans until such plans" are terminated; and

(iv) Submit to the Office of Contract and Resource Management, within the Headquarters procurement organization, all proposals for the modification of existing "employees' benefit plans."

(3) The Office of Contract and Resource Management, within the Headquarters procurement organization, is responsible for approving management and operating contractor "employees' benefit plans."

**970.2803-2 Contract clause.**

The contracting officer shall insert the clause at 48 CFR 970.5228-1, Insurance—Litigation and Claims, in all management and operating contracts. Paragraphs (h)(3) and (j)(2) apply to a nonprofit contractor only to the extent specifically provided in the individual contract.

**Subpart 970.29—Taxes****970.2902 Federal excise taxes.****970.2902-1 Exemptions from Federal Excise Taxes.**

(a) The exemption respecting taxes on communication services or facilities has been held to extend to such services when furnished to DOE management and operating contractors who pay for such services or facilities from advances made to them by DOE under their contracts.

(b) Where it is considered that a request for an additional exemption in the performance of a management and operating contract would be justified, a recommendation that such a request be made should be forwarded to the Chief Financial Officer, Headquarters.

(c) Where tax exemption certificates are required in connection with the foregoing taxes, the Head of the Contracting Activity will supply standard Government forms (SF 1094, U.S. Tax Exemption Certificate) on request.

**970.2903 State and local taxes.****970.2903-1 Applicability of state and local taxes to the Government.**

It is DOE policy to secure those immunities or exemptions from state and local taxes to which it is entitled under the Federal Constitution or state laws. In carrying out this policy, the Heads of Contracting Activities shall:

(a) Take all necessary steps to preclude payment of any taxes for which any of the foregoing immunities or exemptions are available. Advice of Counsel should be sought as to the availability of such immunities or exemptions;

(b) Acquire directly and furnish to contractors as Government furnished property, equipment, material, or services when, in the opinion of the Head of the Contracting Activity:

(1) Such direct acquisition will result in substantial savings to the Government, taking into consideration any additional administrative costs;

(2) Such direct acquisition will not have a substantial adverse effect on the relationship between DOE and its contractor; and

(3) Such direct acquisition will not have a substantial adverse effect on the DOE program or schedules.

**970.2904 Contract clauses.****970.2904-1 Management and operating contracts.**

(a) Pursuant to 48 CFR 29.401-6(b), the clause at 48 CFR 52.229-10, State of New Mexico Gross Receipts And Compensating Tax, is applicable to all management and operating contracts. For all DOE management and operating contracts, the contracting officer shall modify paragraph (b) of the clause to replace the phrase "Allowable Cost and Payment clause" with the phrase "Allowable Costs and Fixed Fee Clause."

(b) Contracting officers shall include the clause at 48 CFR 970.5229-1, State and Local Taxes, in management and operating contracts.

**Subpart 970.30—Cost Accounting Standards****970.3002 CAS program requirements.****970.3002-1 Applicability.**

The provisions of 48 CFR part 30 and 48 CFR 9904.414 shall be followed for management and operating contracts.

**970.3002-2 Limitations.**

Cost of money as an element of the cost of facilities capital (CAS 414) and as an element of the cost of capital assets under construction (CAS 417) is not recognized as an allowable cost

under management and operating contracts (see 970.3102-3-3).

**Subpart 970.31—Contract Cost Principles and Procedures****970.3100 Scope of subpart.**

The cost principles, procedures and general policy for the determination of reimbursable costs that are applicable to the administration of management and operating contracts are set forth in this subpart. The terms "reimbursement" and "reimbursable" are used interchangeably as they pertain to "allowable costs" as a matter of editorial convenience. No "reimbursement" is actually involved in those situations where the cost-type contractor makes payments for "allowable cost" from Government funds advanced to the contractor by DOE.

**970.3100-1 Definitions.**

Off-site work is contract required work (under a contract covered by 48 CFR subpart 17.6) performed in contractor-owned facilities, such as a central or branch office.

On-site work (under a contract covered by 48 CFR subpart 17.6) is work performed at the Government site.

Direct costs of a management and operating contract are defined as follows:

(a) With respect to on-site work, "direct costs" technically include all performance costs; i.e., such costs are identified specifically for, or account of, the contract. However, in some circumstances it may be desirable or necessary because of the requirements of the contract to distinguish between direct and indirect types of costs. "Direct costs," when the foregoing circumstances apply, are those which are identified as having been incurred specifically for, or on account of a designated cost objective, such as a particular product (or groups of similar products), work order, job, project, program or contract. Materials, labors or expenses which relate specifically and solely to the manufacture of a particular product or to the performance of a distinct job or work are broad examples of direct costs. Direct costs are not limited to items incorporated in an end product.

(b) With respect to "off-site" work, "direct costs" are as defined in 48 CFR 31.202 and discussed in other sections of this subpart. "Indirect costs" of a management and operating contract are defined as follows:

(1) With respect to "on-site" work, when it is desirable or necessary to distinguish them from direct costs, "indirect costs" are those items of

material, labor, and expenses not directly identified with a single final cost accumulation point, but identified with applicability to two or more objectives or with at least one intermediate cost objective.

(2) With respect to "off-site" work, "indirect cost" are as defined in 48 CFR 31.203 and discussed in other sections of this subpart.

**970.3100-2 Responsibilities.**

(a) The Senior Procurement Executive is responsible for developing and revising the policy and procedures for the determination of allowable costs reimbursable under a management and operating contract, and for seeing that they are properly coordinated with other Headquarters' offices having joint interests.

(b) The Head of the Contracting Activity is responsible for following the policy, principles and standards set forth herein in establishing the compensation provisions of contracts and subcontracts and for submission of deviations for Headquarters consideration.

**970.3101 Applicability.****970.3101-1 Objectives.**

Deviations from the policies and principles set forth in this subpart shall not be made unless authorized by the Senior Procurement Executive on the basis of a written justification stating clearly the special circumstances involved. As appropriate, approved deviations shall be reflected in the compensation provisions of the contract.

**970.3101-2 Advance agreements.**

(a) In order to avoid the potential for subsequent disallowance or dispute of certain costs, it is important that agreement between DOE and its management and operating contractors be reached in advance of the incurrence of costs in categories where reasonableness as to amounts, or allocability of costs to the management and operating contract are difficult to determine. Any such agreement should be incorporated in the contract. However, the absence of such agreement on any element of cost will not, in itself, serve to make the element either allowable or unallowable. Examples of costs on which advance agreements may be particularly important are:

- (1) Deferred maintenance costs;
- (2) Precontract costs;
- (3) Professional or technical consulting services;
- (4) Reconversion costs;
- (5) Research and development costs;
- (6) Royalties;

(7) Selling and distribution costs;  
 (8) Unemployment insurance experience ratings;

(9) Employee compensation, including amounts of money or percentage of payment authorized to be expended annually for groups of employees for all types of wage and salary increases, travel, relocation expenses and other personnel costs.

(10) Lobbying costs;

(11) Public relations and advertising; and

(12) Travel and relocation costs as related to special or mass personnel movements and as related to travel via contractor-owned leased, or chartered aircraft.

(b) Generally, DOE utilizes the following two basic methods of achieving and recording understandings with contractors regarding the allowability of employee compensation, travel, relocation, and other personnel costs: Negotiation of a personnel appendix to the contract, which sets forth the policies, programs, and schedules which are accepted as the basis for determining the allowability of costs; or reviewing and reaching agreements on established policies, programs, and schedules (and any changes thereto during the contract term) that are applicable to the contractor's private operations which are acceptable for contract work and which will be consistently followed throughout the contractor's organization. A personnel appendix to the contract setting forth advance understandings covering compensation for personal services shall be utilized in management and operating contracts when one or more of the following circumstances exist: when policies, programs, and schedules are established specifically for contract work; when the contractor's work is predominantly or exclusively made up of negotiated Government contract work; when contract work is so different from the organization's private work that existing established policies, programs, and schedules cannot reasonably be extended to and consistently applied on contract work; or, when established policies, programs, and schedules proposed for contract work are not sufficiently definitive to permit a clear advance mutual understanding of allowable costs and to provide a basis for audit. The Head of the Contracting Activity is authorized to select the alternative method of achieving and recording advance understandings that they find most appropriate pursuant to the facts of the particular contract situation.

(c) With regard to the costs described in paragraph (a)(9) of this subsection:

(1) Compensation for personal services includes wages and salaries, bonuses and incentives, premium payments, pay for time not worked, and supplementary compensation and benefits, such as pension and retirement, group insurance, severance pay plans, and other forms of compensation covered by 970.3102-3-2.

(2) Employee travel costs include transportation expenses incurred while on official business, within the U.S. or outside the U.S. as necessary. Travel of executive officers is covered in 970.3102-3-14. Contractor travel policies must be acceptable to the Department, and result in reasonable cost necessary for contract performance. To avoid disputes and to clearly state the treatment that applies to travel cost, advance understandings should be reached with the management and operating contractor. They should be sufficiently definitive to evidence the contractor's responsibility to minimize costs consistent with contract performance. The allowability to certain travel costs, such as air travel, are specifically limited by Department policy. For example, the added cost of first class air travel is prohibited as a reimbursable cost, except under stringent conditions, which must be justified in writing. Contractually enforceable understandings concerning the allowability and reimbursement of other potentially significant travel costs (such as the use of Government-furnished automobiles or Government-contract provided rental automobiles) should be reached with the contractor. A reasonable basis for such understandings is the Federal travel policy applicable to Government and directly paid contractor employees.

(3) Other personnel costs include:

(i) Morale, health, welfare, food service and dormitory costs covered in 970.3102-3-5;

(ii) Training and education costs covered in 970.5231-1;

(iii) Relocation costs for relocating employees as discussed in 970.3102-3-12; and special or mass personnel movement covered in 970.3102-3-2(i).

**970.3101-3 Cost certification and penalties on unallowable costs.**

(a) The contracting officer shall require that management and operating contractors provide a submission for settlement of costs incurred during the period stipulated on the submission and a certification that the costs included in the submission are allowable. The contracting officer shall assess a penalty if unallowable costs are included in the

submission. Unallowable costs are either expressly unallowable or determined unallowable.

(1) An expressly unallowable cost is a particular item or type of cost which, under the express provisions of an applicable law, regulation, or this contract, is specifically named and stated to be unallowable.

(2) A cost determined unallowable is one which, for that contractor:

(i) Was subject to a contracting officer's final decision and not appealed;

(ii) The Department's Board of Contract Appeals or a court has previously ruled as unallowable; or

(iii) Was mutually agreed to be unallowable.

(b) If, during the review of the submission, the contracting officer determines that the submission contains an expressly unallowable cost or a cost determined to be unallowable prior to the submission, the contracting officer shall assess a penalty.

(c) If the contracting officer determines that a cost submitted by the contractor in its submission for settlement is:

(1) Expressly unallowable, then the contracting officer shall assess a penalty in an amount equal to the disallowed cost allocated to this contract plus interest on the paid portion of the disallowed cost. Interest shall be computed from the date of overpayment to the date of repayment using the interest rate specified by the Secretary of the Treasury pursuant to 26 U.S.C. 6621(a)(2).

(2) Determined unallowable, then the contracting officer shall assess a penalty in an amount equal to two times the amount of the disallowed cost allocated to this contract.

(d) The contracting officer may waive the penalty provisions when:

(1) The contractor withdraws the submission before the formal initiation of an audit of the submission and submits a revised submission;

(2) The amount of the unallowable costs allocated to covered contracts is \$10,000 or less; or

(3) The contractor demonstrates to the contracting officer's satisfaction that:

(i) It has established appropriate policies, personnel training, and an internal control and review system that provides assurances that unallowable costs subject to penalties are precluded from the contractor's submission for settlement of costs; and

(ii) The unallowable costs subject to the penalty were inadvertently incorporated into the submission.

(e) The Head of the Contracting Activity may waive the certification when:

(1) It is determined that it would be in the best interest to waive such certification; and

(2) The Head of the contracting Activity states in writing the reasons for that determination and makes such determination available to the public.

**970.3102 Contracts with management and operating contractors.**

**970.3102-1 General.**

The cost policies of the DOE regarding management and operating contracting are as discussed in this subsection.

**970.3102-1-1 Actual cost basis.**

(a) DOE shall reimburse its contractors for costs incurred in the performance of a management and operating contract in accordance with its terms and the provisions of this subpart. Such costs are those allowable costs provided for in the contract to the extent that they are necessary or incident, and either directly attributable or equitably allocable to the work under the contract. This broad expression of the DOE's cost-reimbursement policy is further developed and elaborated upon throughout this subpart.

(b) DOE uses retrospective or after-the-fact determination, usually called the actual cost basis, to establish the amount reimbursable. This general policy precludes the use of predetermined fixed percentage rates except for provisional payments.

(c) When a fixed compensation for any otherwise allowable cost is separately negotiated, the items of such costs covered by the fixed amount shall be identified with maximum clarity and set forth in an appropriate appendix to the contract as an amount otherwise exclusive of other reimbursable costs (this is done in order to distinguish between those allowable costs subject to reimbursement and those costs which are covered by the negotiated fixed amount).

**970.3102-1-2 Application of cost principles.**

(a) The incurred costs of performing management and operating contracts shall be reimbursed to the extent they are reasonable, allocable, and determined to be allowable under the provisions of this Subpart and the terms of the contract.

(b) This subsection does not cover every element of cost. Failure to include any item of cost does not imply that it is either allowable or unallowable. The determination of allowability shall be based on the principles and standards in this subpart and the treatment of similar or related items. When more than one paragraph in this subsection is relevant

to a contractor cost, the cost shall be apportioned among the applicable subsections, and the determination of allowability of each portion shall be based on the guidance contained in the applicable subsection. As an example, the cost of meals while in a travel status would normally be allowable if reasonable. However, the cost of alcoholic beverages associated with a meal would be unallowable. In no case shall costs made specifically unallowable under one cost principle be made allowable under another cost principle.

**970.3102-1-3 General basis for reimbursement of costs.**

(a) The total reimbursable cost of a DOE management and operating contract is the sum of the allowable direct costs necessary or incident to the performance of the contract, plus any properly allocable portion of allowable indirect costs, (including corporate or home office G&A expense, or branch office indirect expenses), if any, less applicable income and other credits. In determining allowability and reimbursability of costs, the following shall be considered:

(1) Allowability and reasonableness in accordance with 48 CFR 31.201-2(d) and 31.201-3;

(2) Allocability of a cost to management and operating contract. A cost is allocable if it is assignable or chargeable for work and performance of the contract in accordance with the relative benefits received or other equitable relationship;

(3) Application of generally accepted accounting principles and practices appropriate to identifying and measuring costs of performing the contract in accordance with this subpart;

(4) All exclusions of and limitations of types and amounts of items of cost set forth in the contract;

(5) Approvals by the contracting officer required under the contract terms; and

(6) Cost accounting standards if applicable.

(b) A contracting officer shall not resolve any questioned costs until the contracting officer has obtained:

(1) Adequate documentation with respect to such costs; and

(2) The opinion of the Department of Energy's auditor on the allowability of such costs.

(c) The contracting officer shall ensure that the documentation supporting the final settlement addresses the amount of the questioned costs and the subsequent disposition of such questioned costs.

(d) The contracting officer shall ensure, to the maximum extent practicable, that the Department of Energy's auditor is afforded an opportunity to attend any negotiation or meeting with the contractor regarding a determination of allowability.

**970.3102-1-4 Cost determination based on audit.**

The amount reimbursable under management and operating contracts shall be determined in accordance with the principles set forth in this subpart and in accordance with the terms of the respective contract on the basis of audit. In the event that the contractual terms differ, or are inconsistent with (see 48 CFR 970.3101-1 for approval of deviations) the principles stated in this subpart, the contractual terms control; however, it is expected that contractual terms be based on the principles stated in the subpart. The audit may be performed directly by DOE, or by the cognizant Federal agency pursuant to arrangements made by the DOE.

**970.3102-1-5 Contractor's system of accounting.**

(a) Careful DOE study of a management and operating contractor's usual accounting procedures shall be made prior to arriving at an understanding with the contractor as to the accounting system to be employed by the contractor during the period of contract performance.

(b) A contractor's customary accounting practices are usually accepted for management and operating contracts if they conform to generally accepted accounting principles, produce equitable results, are consistently applied, are not in conflict with the provisions of this subpart, are conducive to accurate costing of the contract work, and produce reports required by the DOE.

**970.3102-2 Direct and indirect costs.**

(a) Direct costs identified specifically with a management and operating contract are direct cost of performing that contract and are to be charged directly thereto. All costs specifically identified with other final cost objectives of the management and operating contractor are direct cost of those cost objectives and are not to be charged to the contract directly or indirectly. For reasons of practicality, any direct cost of minor dollar amount may be treated as an indirect cost if the accounting treatment.

(1) Is consistently applied; and

(2) Produces substantially the same results as treating the cost as a direct cost.

(b) Indirect cost are not subject to treatment as a direct cost and thus directly chargeable to a contract. After direct costs have been determined and charged directly to the contract or other work, indirect costs are those remaining to be allocated from an appropriate indirect cost accumulation account. The following principles and procedures shall apply to indirect costs to the extent that they are incurred under management and operating contracts.

(1) Indirect costs to the extent required to be or otherwise incurred in the accounting system of the operating contractor shall be accumulated by logical cost groupings with due consideration of the reasons for incurring such costs. Each grouping should be determined so as to permit distribution of the grouping on the basis of the benefits accruing to the cost objectives to which it is to be allocated. Generally, overhead and general and administrative (G&A) expenses are separately grouped. Similarly, the particular case may require subdivision of these groupings; e.g., building occupancy costs might be separable from those of personnel administration within a specific overhead group such as manufacturing overhead. This necessitates selecting a distribution base common to all cost objectives to which the grouping is to be allocated. The base should be selected so as to permit allocation of the grouping on the basis of the benefits accruing to the cost objectives. The number and composition of cost groupings should be governed by practical considerations and should not unduly complicate the allocation.

(2) Once an appropriate base for distributing indirect costs has been accepted, it shall not be fragmented by removing individual elements. For example, when a cost input base is used for the distribution of G&A costs, all items that would properly be part of the costs input base, whether allowable or unallowable, shall be included in the base and bear their pro rata share or G&A costs.

(3) The method of allocating indirect costs shall be in accordance with generally accepted accounting principles which are consistently applied.

(4) A base period for allocating indirect costs is the cost accounting period during which such costs are incurred and accumulated for distribution to work performed in that period.

#### **970.3102-3 Selected costs.**

##### **970.3102-3-1 Public relations and advertising.**

(a) *Public relations* means all functions and activities dedicated to:

(1) Maintaining, protection, and enhancing the image of a concern or its products; or

(2) Maintaining or promoting reciprocal understanding and favorable relations with the public at large, or any segment of the public. The term "public relations" includes activities associated with areas such as advertising, customer relations, community service, etc.

(b) *Advertising* means the use of media to promote the sale of products or services and to accomplish the activities referred to in paragraph (d) of this subsection regardless of the medium employed, when the advertiser has control over the form and content of what will appear, the media in which it will appear, and when it will appear. Advertising media include but are not limited to conventions, exhibits, free goods, samples, magazines, trade papers, direct mail, dealer cards, window displays, outdoor advertising, radio, and television.

(c) Public relations and advertising costs include the costs of media time and space, purchased services performed by outside organizations, as well as the applicable portion of salaries, travel, and fringe benefits of employees engaged in the functions and activities identified in paragraphs (a) and (b) of this section.

(d) The only advertising costs that are allowable are those specifically required by contract, approved in advance by the contracting officer, or that arise from requirements of the contract and that are exclusively for the following to the extent that they are determined by the contracting officer to be reasonable, necessary, and incident to contract performance:

(1) Recruiting personnel required for contract performance;

(2) Acquiring scarce items for contract performance;

(3) Disposing of scrap or surplus materials acquired for contract performance;

(4) The transfer of federally owned or originated technology to State and local governments and to the private sector; or

(5) Obtaining supplies and services including contract-required equipment, leases, banking services, etc.

(e) Allowable public relations costs include the following:

(1) Costs specifically required by contract, or approved in advance by the contracting officer.

(2) Costs of:

(i) Responding to inquiries on company policies and activities.

(ii) Communicating with the public, press, stockholders creditors, local communities, and customers, including responses to inquiries from and initiation of press releases and other communications with the news media.

(iii) Conducting general liaison with news media and government public relations officers, to the extent that such activities are limited to communication and liaison necessary to keep the public informed matters of public concern such as notice of contract awards, plant closures or openings, employee layoffs or rehires, financial information environmental impact of plant operations, etc.

(3) Costs of participation in community service activities (e.g., blood bank drives, charity drives, savings bond drives, disaster assistance, outreach programs, etc.), exclusive of contractor cash contributions and donations which are unallowable. The contractor's cost of services or contractor-owned property provided to support community service activities (e.g., the contractor's cost of making payroll deductions for employee contributions to a charity, cost of employee services provided to community organizations, or other similar, nominal in-kind participation) is allowable.

(4) Costs of plant tours, visitors centers, and open houses (but see paragraph (f)(5) of this section).

(f) Unallowable public relations and advertising costs include the following activities except when the principal purpose of the activity or event is to disseminate technical information or stimulate production in accordance with contract requirements:

(1) All advertising costs other than those specified in paragraph (d) of this section.

(2) Costs of air shows and other special events, such as conventions and trade shows including:

(i) Costs of displays, demonstrations and exhibits;

(ii) Costs of meeting rooms, hospitality suites, and other special facilities used in conjunction with shows and other special events; and

(iii) Salaries and wages of employees engaged in setting up and displaying exhibits, making demonstrations, and providing briefings.

(3) Costs of sponsoring meetings, symposia, seminars, and other special events.

(4) Costs of ceremonies such as corporate celebrations and new product announcements.

(5) Costs of promotional material, motion pictures, videotapes, brochures, handouts, magazines, and other media that are designed to benefit the contractor's organization by calling favorable public attention to contractor activities.

(g) Unallowable public relations and advertising costs include the following:

(1) Costs of souvenirs, models, imprinted clothing, buttons, and other mementos provided to customers or the public.

(2) Cost of memberships in civic and community organizations.

(3) All advertising and public relations costs, other than as specified in paragraphs (d), (e) and (f) of this section, whose primary purpose is to benefit the contractor's organization by promoting the sale of products or services by stimulating interest in a product or product line or by disseminating messages calling favorable attention to the contractor for purposes of enhancing the company image to sell the company's products or services unless such sales activities are required under the management and operating contract to support the DOE mission. Nothing in this paragraph (g)(3) modifies the express unallowability of costs listed in paragraphs (f), (g)(1) and (g)(2) of this section. The purpose of this paragraph is to provide criteria for determining whether advertising and public relations costs not specifically identified should be unallowable.

**970.3102-3-2 Compensation for personal services.**

(a) General. Compensation for personal services includes all remuneration paid currently or accrued, in whatever form and whether paid immediately or deferred, for services rendered by employees to the contractor during the period of contract performance (except as otherwise provided for severance pay costs in paragraph (b)(4)(i) of this subsection and for pension cost in paragraph (b)(1) of this subsection). It includes, but is not limited to, salaries; wages; directors' and executive committee members' fees; bonuses (including stock bonuses); incentive awards; employee stock options, stock appreciation rights, and stock ownership plans; employee insurance; fringe benefits; contributions to pension, annuity, and management employee incentive compensation plans; and allowances for off-site pay, incentive pay, location allowances, hardship pay, severance pay, and cost of living differential.

(b) Allowability. Reimbursable costs for compensation for personal services are to be set forth in a personnel

appendix in the contract as discussed at 970.3101-2. This personnel appendix shall be negotiated using the principles and policies of this 970.3102-3-2, and other pertinent parts of the DEAR. However, costs that are unallowable pursuant to other paragraphs of 970.3102-3 or contract terms shall not be allowable under this 970.3102-3-2 on the basis they constitute compensation for personnel services. Costs of compensation for personal services are reimbursable to the extent that:

(1) The compensation is for personal services work performed by the employee in the current year and must not represent a retroactive adjustment of prior year's salaries or wages (but see 970.3102-3-2(i), (j), (l), (m), and (n));

(2) The compensation in total is reasonable for the work performed; however, specific restrictions on individual compensation elements must be observed where they are prescribed;

(3) The compensation is based upon and conforms to the terms and conditions of the contractor's established compensation plan or practice followed so consistently as to imply, in effect, an agreement to make the payment;

(4) Any approvals prescribed by this 970.3102-3-2 are obtained. No assumption of allowability will exist where the contractor introduces major revisions of existing compensation plans or new plans and the contractor.

(i) Has not notified the cognizant contracting officer of the changes either before their implementation, or within a reasonable period after their implementation, and

(ii) Has not provided the Government, either before implementation or within a reasonable period after it, an opportunity to review the allowability of the changes.

(5) Costs that are unallowable under the contract terms or other paragraphs of this 970.3102-3 shall not be allowable under this 970.3102-3-2 solely on the basis that they constitute compensation for personal services.

(c) *Reasonableness.* Subject to 970.3102-3-2(d) of this subsection, compensation for personal services will be considered reasonable if the total compensation conforms generally to compensation paid by other firms of the same size, in the same industry, or in the same geographic area for similar services or work performed. This does not preclude the Government from challenging the reasonableness of an individual element of compensation where costs are excessive in comparison with compensation paid by other firms of the same size, same industry, or in

the same geographic area for similar services. In administering this principle, it is recognized that not every compensation case need be subjected in detail to these requirements. The requirements need be applied only when a general review reveals amounts or types of compensation that appear unreasonable or unjustified. In questionable cases, the contractor has responsibility to support the reasonableness of compensation in relation to the effort performed. Compensation costs under certain conditions give rise to the need for special consideration. Among such conditions are the following:

(1) Compensation to owners of closely held corporations, partners, sole proprietors, or members of their immediate families, or persons who are contractually committed to acquire a substantial financial interest in the contractor's enterprise. Determination should be made that salaries are reasonable for the personal services rendered rather than being a distribution of profits. Compensation in lieu of salary for services rendered by partners and sole proprietors will be allowed to the extent that it is reasonable and does not constitute a distribution of profits. For closely held corporations, compensation costs covered by this paragraph shall not be recognized in amounts exceeding those costs that are deductible as compensation under the Internal Revenue Code and its regulations.

(2) Any change in a contractor's compensation policy that results in a substantial increase in the contractor's level of compensation, particularly when it was concurrent with an increase in the ratio of Government contracts to other business, or any change in the treatment of allowability of specific types of compensation due to changes in the treatment of allowability of specific types of compensation due to changes in Government policy. No presumption of reasonableness will exist where major revisions of existing compensation plans or new plans are introduced by the contractor; and the contractor.

(i) Has not notified the cognizant contracting officer of the change either before their implementation or within a reasonable period after their implementation; and

(ii) Has not provided the Government, either before implementation or within a reasonable period after it, an opportunity to review the reasonableness of the changes.

(3) The contractor's business is such that its compensation levels are not subject to the restraints that normally

occur in the conduct of competitive business.

(4) The contractor incurs costs for compensation in excess of the amounts which are deductible under the Internal Revenue Code and its regulations.

(d) *DOE review and approval of compensation paid individual employees.* In determining the reasonableness of compensation, the compensation of each individual contractor employee normally need not be subjected to review and approval. Generally, the compensation paid individual employees should be left to the judgment of contractors subject to the limitations of DOE-approved compensation policies, programs, classification systems, and schedules, and amounts of money authorized for wage and salary increases for groups of employees. However, all compensation due an individual of \$80,000 or more shall require the contracting officer's or designee's review and approval. In addition, it will often be necessary that employee compensation be subjected to review and approval on an individual basis at a level below \$80,000, when the contracting officer finds it appropriate for the particular situation. The contract shall specifically provide for the approval by the contracting officer of the cost of compensating an individual contractor employee above the level determined by the contracting officer, if a total of 50 percent or more of such compensation is reimbursed under DOE cost-type contracts. For purposes of determining the level for individual review and approval, total compensation as used in this paragraph includes only the employee's salary and bonus or incentive compensation. As in the case of other personnel and compensation costs, it is intended that contracting officer review and approval of individual compensation normally will be prior to incurrence of costs.

(e) *Labor-management agreements.* Notwithstanding any other DOE requirements, costs of compensation are not allowable to the extent that they result from provisions of labor-management agreements that, as applied to work in performing Government contracts, are determined to be unreasonable because they are either unwarranted by the character and circumstances of the work or discriminatory against the Government. The application of the provisions of a labor-management agreement designed to apply to a given set of circumstances and conditions of employment (e.g., work involving extremely hazardous activities or work not requiring recurrent use of overtime) is unwarranted when applied to a

Government contract involving significantly different circumstances and conditions of employment (e.g., work involving less hazardous activities or work continually requiring use of overtime). It is discriminatory against the Government if it results in employee compensation (in whatever form or name) in excess of that being paid for similar non-Government work under comparable circumstances. Disallowance of costs will not be made under this paragraph (e) unless:

(1) The contractor has been permitted an opportunity to justify the costs; and

(2) Due consideration has been given to whether unusual conditions pertain to Government contract work, imposing burdens, hardships, or hazards on the contractor's employees, for which compensation that might otherwise appear unreasonable is required to attract and hold necessary personnel.

(f) *Salaries and wages.* Salaries and wages for current services include gross compensation paid to employees in the form of cash, stock (see paragraph (h)(2) of this subsection regarding valuation), products, or services, and are allowable.

(g) *Domestic and foreign differential pay.* When personal services are performed in a foreign country, compensation may also include a differential that may properly consider all expenses associated with foreign employment such as housing, cost of living adjustments, transportation, bonuses, additional Federal, state, local or foreign income taxes resulting from foreign assignment, and other related expenses.

(h) *Bonuses and incentive compensation.* Incentive compensation and cash bonuses based on production, cost reduction or efficient performance, suggestion awards, and safety awards are to be treated as allowable, to the extent that the contractor's overall compensation plan is determined to be reasonable and such costs are paid or accrued, pursuant to an agreement entered into in good faith between the contractor and the employees before the services were rendered, or pursuant to an established plan followed by the contractor so consistently as to imply, in effect, an agreement to make such payment (see 970.3101-2). In determining reasonableness, it will be necessary to take into account, not only bonuses and incentive compensation payments charged directly to the contract, but also payments charged indirectly to the contract through overhead. Bonuses, awards, and incentive compensation, when any of them are deferred, are to be treated as allowable to the extent provided in paragraph (m) of this subsection.

(1) Bonuses and incentive compensation paid to employees other than those whose pay is directly reimbursed will not be made allowable in on-site construction and management and operating contracts, where home office general and administrative expense is unallowable.

(2) When the costs of bonuses and incentive compensation are paid in the stock of the contractor or of an affiliate, the following additional restrictions apply:

(i) Valuation placed on the stock shall be the fair market value on the measurement date (i.e., the first date the number of shares awarded is known) determined upon the most objective basis available; and

(ii) Accruals for the cost of stock before issuing the stock to the employees shall be subject to adjustment according to the possibilities that the employees will not receive the stock and that their interest in the accruals will be forfeited.

(3) When the bonus and incentive compensation payments are deferred, the costs are subject to the requirements of paragraph (h)(1) of this subsection and of paragraph (m) of this subsection.

(i) *Severance pay.* (1) Severance pay, also commonly referred to as dismissal wages, is a payment in addition to regular salaries and wages by contractors to workers whose employment is being involuntarily terminated. Payments for early retirement incentive plans are covered in paragraph (l)(6) of this subsection.

(2) Severance pay to be allowable must meet the general allowability criteria in paragraph (i)(2)(i) of this subsection, and, depending upon whether the severance is normal or abnormal, criteria in paragraph (i)(2)(ii) of this subsection for normal severance pay or paragraph (i)(2)(iii) of this subsection for abnormal severance pay also apply. In addition, paragraphs (i)(2)(iv) and (v) of this subsection apply if the severance cost is for foreign nationals employed outside the United States.

(i) Severance pay is allowable only to the extent that, in each case, it is required by law, employer-employee agreement, established policy that constitutes, in effect, an implied agreement on the contractor's part, or circumstances of the particular employment. Payments made in the event of employment with a replacement contractor where continuity of employment with credit for prior length of service is preserved under substantially equal conditions of employment, or continued employment by the contractor at another facility,

subsidiary, affiliate, or parent company of the contractor are not severance pay and are unallowable.

(ii) Actual normal turnover severance payments shall be allocated to all work performed in the contractor's plant, or where the contractor provides for accrual of pay for normal severances, that method will be acceptable if the amount of the accrual is reasonable in light of payments actually made for normal severances over a representative past period and if amounts accrued are allocated to all work performed at the facility.

(iii) Abnormal or mass severance pay is of such a conjectural nature that measurement of costs by means of an accrual will not achieve equity to both parties. Thus, accruals for this purpose are not allowable. However, the Government recognizes its obligation to participate, to the extent of its fair share, in any specific payment. Thus, allowability will be considered on a case-by-case basis.

(iv) Notwithstanding the provision of paragraph (c) of this subsection, which references geographic area, under 41 U.S.C. 256(e)(1)(M), the costs of severance payments to foreign nationals employed under a service contract performed outside the United States are unallowable to the extent that such payments exceed amounts typically paid to employees providing similar services in the same industry in the United States.

(v) Further, under 41 U.S.C. 256(e)(1)(N), the costs of severance payments referred to in paragraph (i)(2)(iv) of this subsection are unallowable if the termination of employment is the result of the closing of, or curtailment of, activities at a United States facility in that country at the request of the government of that country.

(vi) The Head of the Contracting Activity may waive the application of the provisions of paragraphs (i)(2)(iv) and (v) of this subsection under the conditions specified in subpart 970.37.

(3) Subject to paragraph (a) of this subsection, the following standards apply in determining allowability of costs for severance pay plans of management and operating contractors:

(i) Payments should be made only upon involuntary termination by reduction in force (RIF) of an employee which results in a permanent separation from the employment of the contractor. However, payments may also be made upon voluntary separation of an employee within a RIF grouping, but not otherwise scheduled for termination, which thereby eliminates the need for

terminating another employee involuntarily.

(ii) Payments should not be provided for in the event of temporary layoffs; employment or offer of employment with a replacement contractor (employer) where continuity of employment with credit for prior length of service is preserved under substantially equal conditions of employment; early or normal retirement; or continued employment by the contractor at another facility, subsidiary, affiliate, or parent company of the contractor. Contractor employees should not have the option of refusing employment to receive severance pay.

(j) Backpay. (1) Backpay resulting from violations of Federal labor laws or the Civil Rights Act of 1964. Backpay may result from a negotiated settlement, order, or court decree that resolves a violation of Federal labor laws or the Civil Rights Act of 1964. Such backpay falls into two categories: one requiring the contractor to pay employees additional compensation for work performed for which they were underpaid, and the other resulting from other violations, such as when the employee was improperly discharged, discriminated against, or other circumstances for which the backpay was not additional compensation for work performed. Backpay resulting from underpaid work is compensation for the work performed and is allowable. All other backpay resulting from willful violation of Federal labor laws or the Civil Rights Act of 1964 is unallowable.

(2) Other backpay. Backpay may also result from payments to union employees (union and non-union) for the difference in their past and current wage rates for working without a contract or labor agreement during labor management negotiations. Such backpay is allowable. Backpay to nonunion employee based upon results of union agreement negotiations is allowable only if:

(i) A formal agreement or understanding exists between management and the employees concerning these payments, or

(ii) An established policy or practice exists and is followed by the contractor so consistently as to imply, in effect, an agreement to make such payment.

(k) Stock options, stock appreciation rights, and phantom stock plans. (1) The cost of stock options awarded to employees to purchase stock of the contractor or of an affiliate will be treated as deferred compensation and must comply with the requirements of paragraph (m) of this subsection and with the allowability criteria contained in paragraph (k)(2) of this subsection.

The allowable cost of stock appreciation rights, whether offered separately or combined with stock options, will be determined in the same manner as stock options.

(2) The allowable costs of stock options and stock appreciation rights will be limited to the difference between the option price or stock-appreciation-right price and the market price of the stock on the measurement date (i.e., the first date on which both the number of shares and the option or stock-appreciation-right price are known). Accordingly, when the option or stock-appreciation-right price is equal to or greater than the market price on the measurement date, then no costs are allowed for contract costing purposes.

(3) In phantom-stock-type plans, contractors assign or attribute contingent shares of stock to employees as if the employees own the stock, even though the employees neither purchase the stock nor receive title to it. Under these plans, an employee's account may be increased by the equivalent of dividends issued and any appreciation in the market price of the stock over the price of the stock on the measurement date (i.e., the first date the number of shares awarded is known). Such increases in employee accounts for dividend equivalents and market price appreciation are unallowable.

(l) *Pension costs.* (1) A pension plan is a deferred compensation plan that is established and maintained by one or more employers to provide systematically for paying benefits to plan participants after their retirement, provided that the benefits are paid for life or are payable for life at the option of the employee. Additional benefits such as permanent and total disability and death payments and survivorship payments to beneficiaries of deceased employees may be treated as pension costs, provided the benefits are an integral part of the pension plan and meet all the criteria pertaining to pension costs.

(2) Pension plans are normally segregated into two types of plans: defined benefit or defined contribution pension plans. Except as provided by other DOE directives, the cost of all defined benefit pension plans shall be measured, allocated, and accounted for in compliance with the provisions of CAS 412, Composition and Measurement of Pension Costs, and CAS 413, Adjustment and Allocation of Pension Cost. The costs of all defined contribution pension plans shall be measured, allocated, and accounted for in accordance with the provisions of CAS 412. Pension costs are allowable subject to directives issued by the Office

of Contract and Resource Management, within the Headquarters procurement organization, the referenced standards and the cost limitations and exclusions set forth below in this paragraph and in paragraphs (1)(3), (4), (5), (6), and (7) of this subsection.

(i) To be allowable in the current year, pension costs must be funded by the time set for filing the Federal income tax return or any extension thereof. Pension costs assigned to the current year, but not funded by the tax return time, shall not be allowable in any subsequent year.

(ii) Pension payments must be reasonable in amount and be paid pursuant to: an agreement entered into in good faith between the contractor and employees before the work or services are performed and the terms and conditions of the established plan. The cost of changes in pension plans which are discriminatory to the Government or are not intended to be applied consistently for all employees under similar circumstances in the future are not allowable.

(iii) Except as provided for early retirement benefits in paragraph (1)(6) of this subsection, one-time-only pension supplements not available to all participants of the basic plan are not allowable as pension costs unless the supplemental benefits represent a separate pension plan and the benefits are payable for life at the option of the employee.

(iv) Increases in payments to previously retired plan participants covering cost-of-living adjustments are allowable if paid in accordance with a policy or practice consistently followed.

(3) *Defined benefit pension plans.* This paragraph covers pension plans in which the benefits to be paid or the basis for determining such benefits are established in advance and the contributions are intended to provide the stated benefits. The cost limitations and exclusions pertaining to defined benefit plans are as follows:

(i) Normal costs of pension plans not funded in the year incurred, and all other components of pension costs (see CAS 412.40(a)(1)) assignable to the current accounting period but not funded during it, shall not be allowable in subsequent years (except that a payment made to a fund by the time set for filing the Federal income tax return or any extension thereof is considered to have been made during such taxable year). However, any part of a pension cost that is computed for a cost accounting period that is deferred pursuant to a waiver granted under the provisions of the Employee's Retirement Income Security Act of 1974 (ERISA) (see CAS 412.50(c)(3)), will be allowable

in those future accounting periods in which the funding does occur. The allowability of these deferred contributions will be limited to the amounts that would have been allowed had the funding occurred in the year the costs would have been assigned except for the waiver.

(ii) Any amount paid or funded before the time it becomes assignable and allowable shall be applied to future years, in order of time, as if actually paid and deductible in those years. The interest earned on such premature funding, based on the valuation rate of return, may be excluded from future years' computations of pension costs in accordance with CAS 412.50(a)(7).

(iii) Increased pension costs caused by delay in funding beyond 30 days after each quarter of the year to which they are assignable are unallowable. If a composite rate is used for allocating pension costs between the segments of a company and if, because of differences in the timing of the funding by the segments, an inequity exists, allowable pension costs for each segment will be limited to that particular segment's calculation of pension costs as provided for in CAS 413.50(c)(5). Determination of unallowable costs shall be made in accordance with the actuarial method used in calculating pension costs.

(iv) Allowability of the cost of indemnifying the Pension Benefit Guaranty Corporation (PBGC) under ERISA section 4062 or 4064 arising from terminating an employee deferred compensation plan will be considered on a case-by-case basis; provided that if insurance was required by the PBGC under ERISA section 4023, it was so obtained and the indemnification payment is not recoverable under the insurance. Consideration under the foregoing circumstances will be primarily for the purpose of appraising the extent to which the indemnification payment is allocable to Government work. If a beneficial or other equitable relationship exists, the Government will participate in the indemnification payment to the extent of its fair share.

(4) *Defined contribution pension plans.* This paragraph covers those pension plans in which the contributions to be made are established in advance and the level of benefits is determined by the contributions made. It also covers profit sharing, savings plans, and other such plans provided the plans fall within the definition of a pension plan in paragraph (1)(1) of this subsection.

(i) The pension cost assignable to a cost accounting period is the net contribution required to be made for that period after taking into account

dividends and other credits, where applicable. However, any portion of pension cost computed for a cost accounting period that is deferred pursuant to a waiver granted under the provisions of ERISA (see CAS 412.50(c)(3)) will be allowable in those future accounting periods when the funding does occur. The allowability of these deferred contributions will be limited to the amounts that would have been allowed had the funding been made in the year the costs would have been assigned except for the waiver.

(ii) Any amount paid or funded to the trust before the time it becomes assignable and allowable shall be applied to future years, in order of time, as if actually paid and deductible in such years.

(iii) The provisions of paragraph (1)(3)(vi) of this subsection concerning payments to PBGC apply to defined contribution plans.

(5) Pension plans using pay-as-you-go methods. A pension plan using pay-as-you-go methods is a plan in which the contractor recognizes pension cost only when benefits are paid to retired employees or their beneficiaries. Regardless of whether the payment of pension benefits contribution can or cannot be compelled, allowable costs for these types of plans shall not exceed an amount computed as follows:

(i) Compute, by using an actuarial cost method, the plan's actuarial liability for benefits earned by plan participants. This entire liability is always unfunded for a pay-as-you-go plan.

(ii) Compute a level amount which, including an interest equivalent, would amortize the unfunded actuarial liability over a period of no less than 10 or more than 40 years from the inception of the liability.

(iii) Compute, by using an actuarial cost method, a normal cost for the period.

(iv) The sum of paragraphs (1)(5) (i), (ii), and (iii) of this subsection represents the amount of pension costs assignable to the current period. This amount, however, is limited to the amount paid in the year.

(v) For purposes of determining contract cost where a pay-as-you-go plan is initiated as either a supplemental plan or an additional but separate plan to a basic funded plan, the plans will be treated as one plan; e.g., the actuarial cost method, past service amortization period, etc., of the basic plan will be used on the supplemental or additional pay-as-you-go plan in determining the proper costs assignable to the current period. Any costs in excess of those determined by using the actuarial cost method and assumptions

of the basic plan are unallowable. However, where assumption for salary progressions, mortality rates of the participants, and so forth are significantly different, the assumptions used for the basic and supplemental plan may be different.

(vi) The requirements of paragraphs (l)(3)(i) through (iv) of this subsection are also applicable to pay-as-you-go plans.

(6) Early retirement incentive plans. An early retirement incentive plan is a plan under which employees receive a bonus or incentive, over and above the requirement of the basic pension plan, to retire early. These plans normally are not applicable to all participants of the basic plan and do not represent life income settlements, and as such would not qualify as pension costs. However, for contract costing purposes, early retirement incentive payments are allowable subject to pension criteria contained in paragraphs (l)(3)(i) through (iv) provided:

(i) The costs are accounted for and allocated in accordance with the contractor's system of accounting for pension costs (see paragraph (l)(5)(v) of this subsection for supplemental pension benefits);

(ii) The payments are made in accordance with the terms and conditions of the contractor's plan;

(iii) The plan is applied only to active employees. The cost of extending the plan to employees who retired or were terminated before the adoption of the plan is unallowable; and

(iv) The total of the incentive payments to any employee may not exceed the amount of the employee's annual salary for the previous fiscal year before the employee's retirement.

(7) Employee stock ownership plans (ESOP). (i) An ESOP is an individual stock bonus plan designed specifically to invest in the stock of the employer corporation. The contractor's contributions to an Employee Stock Ownership Trust (ESOT) may be in the form of cash, stock, or property. Costs of ESOP's are allowable subject to the following conditions:

(A) Contributions by the contractor in any one year may not exceed 15 percent (25 percent when a money purchase plan is included) of salaries and wages of employees participating in the plan in any particular year.

(B) The contribution rate (ratio of contribution to salaries and wages of participating employees) may not exceed the last approved contribution rate except when approved by the contracting officer based upon justification provided by the contractor. When no contribution was made in the

previous year for an existing ESOP, or when a new ESOP is first established, and the contractor proposes to make a contribution in the current year, the contribution rate shall be subject to the contracting officer's approval.

(C) When a plan or agreement exists wherein the liability for the contribution can be compelled for a specific year, the expense associated with that liability is assignable only to that period. Any portion of the contribution not funded by the time set for filing of the Federal income tax return for that year or any extension thereof shall not be allowable in subsequent years.

(D) When a plan or agreement exists wherein the liability for the contribution cannot be compelled, the amount contributed for any year is assignable to that year provided the amount is funded by the time set for filing of the Federal income tax return for that year.

(E) When the contribution is in the form of stock, the value of the stock contribution shall be limited to the fair market value of the stock on the date that title is effectively transferred to the trust. Cash contributions shall be allowable only when the contractor furnishes evidence satisfactory to the contracting officer demonstrating that stock purchases by the ESOT are or will be at a fair market price; e.g., makes arrangements with the trust permitting the contracting officer to examine purchases of stock by the trust to determine that prices paid are at fair market value. When excessive prices are paid, the amount of the excess will be credited to the same indirect cost pools that were charged for the ESOP contributions in the year in which the stock purchase occurs. However, when the trust purchases the stock with borrowed funds which will be repaid over a period of years by cash contributions from the contractor to the trust, the excess price over fair market value shall be credited to the indirect cost pools pro rata over the period of years during which the contractor contributes the cash used by the trust to repay the loan. When the fair market value of unissued stock or stock of a closely held corporation is not readily determinable, the valuation will be made on a case-by-case basis taking into consideration the guidelines for valuation used by the IRS.

(ii) Amounts contributed to an ESOP arising from either:

(A) An additional investment tax credit (see 1975 Tax Reduction Act); or

(B) A payroll-based tax credit (see Economic Recovery Tax Act of 1981) are unallowable.

(iii) The requirements of paragraphs (l)(3)(ii) of this subsection are applicable to Employee Stock Ownership Plans.

(m) *Deferred compensation.* (1) Deferred compensation is an award given by an employer to compensate an employee in a future cost accounting period or periods for services rendered in one or more cost accounting periods before the date of receipt of compensation by the employee. Deferred compensation does not include the amount of year-end accruals for salaries, wages, or bonuses that are paid within a reasonable period of time after the end of a cost accounting period. Subject to 970.3102-3-2(a), deferred awards are allowable when they are based on current or future services. Awards made in periods subsequent to the period when the work being remunerated was performed are not allowable.

(2) The costs of deferred awards shall be measured, allocated, and accounted for in compliance with the provisions of CAS 415, Accounting for the Cost of Deferred Compensation.

(3) Deferred compensation payments to employees under awards made before the effective date of CAS 415 are allowable to the extent they would have been allowable under prior acquisition regulations.

(n) *Fringe benefits.* Fringe benefits are allowances and services provided by the contractor to its employees, as compensation, in addition to regular wages and salaries. Subject to the determination that total compensation is reasonable in accordance with this 970.3102-3-2, costs of fringe benefits such as pay for vacations, holidays, sick leave, military leave, employee insurance, pension, retirement plans, and supplemental unemployment benefit plans are to be treated as allowable, provided such fringe benefits meet the following conditions:

(1) The benefits contribute to the performance of contract work and are appropriate for reimbursement from public funds;

(2) Such benefit plans as exist in the contractor's private operations that are inconsistent with DOE published requirements are appropriately modified or disallowed;

(3) Employee benefit plans especially established to meet the particular needs of the contract are in conformity with published DOE policy and standards;

(4) Appropriate controls under the contract are established to assure that employees on contract work are treated no more or no less favorably than employees in the contractor's private operation, except to the extent that

paragraphs (n)(2) and (3) of this subsection apply;

(5) To the fullest extent possible, definite limitations or terminal points are established for each of the various benefit plans, so that DOE's full liability with respect thereto is established under the contract; and

(6) DOE has access to all information necessary to complete understanding of the means of computing or determining the cost of the benefits afforded contract employees and their dependents under the benefit plans.

(o) Training and education expenses. See 970.5231-1.

(p) Special compensation. The following costs are unallowable:

(1) Special compensation to employees pursuant to agreements which permit payments in excess of the contractor's normal severance pay practices, if their employment terminates following a change in the management control over, or ownership of, the contractor or a substantial portion of its assets.

(2) Special compensation to employees pursuant to agreements which permit payments resulting from a change, whether actual or prospective, in the management control over, or ownership of, the contractor or a portion of its assets which is contingent upon the employee remaining with the contractor for a stated period of time.

(q) *Limitation on allowability of compensation for certain contractor personnel.* Costs incurred for compensation of a senior executive in excess of the benchmark compensation amount determined applicable for the contractor fiscal year by the Administrator, Office of Federal Procurement Policy, are unallowable. Allowable costs of executive compensation shall be determined pursuant to Federal Acquisition Regulation 31.205-6(p).

#### **970.3102-3-3 Cost of money.**

Cost of money as an element of the cost of facilities capital (CAS 414) and cost of capital assets under construction (CAS 417) is not an allowable cost under DOE management and operating contracts. Under the provisions of CAS 414 and CAS 417, cost of money is an imputed cost applicable to contractor owned and financed tangible capital assets employed in contract performance or being constructed, fabricated, or developed for ultimate employment in contract performance. Cost of money is not applicable to DOE management and operating contracts since the Government provides for assets used, or under construction for use in performance of its contracts (such

as through Government furnished or contractor-acquired Government property contract provisions and/or through granting cash advances, including letters-of-credit.)

#### **970.3102-3-4 Depreciation.**

(a) Depreciation is allowable subject to the following:

(1) The charge represents normal depreciation on a contractor's plant and equipment used in performance of management and operating work.

(2) The charge to current operations is a distribution of the cost of acquisition of a tangible capital asset, less estimated residual value, over the estimated useful life of the asset, in a systematic and logical manner.

(3) Any generally accepted accounting method consistently applied to assets concerned having the approval of the Internal Revenue Service for Federal income tax purposes, if subject to the Internal Revenue Code of 1954, as amended, may be used including:

(i) The straight-line method;

(ii) The declining balance method, using a rate not exceeding twice the rate which would have been used had the annual allowance been computed under the method described in paragraph (a)(3)(i) of this subsection;

(iii) The sum-of-the-years digits method;

(iv) Any other consistent method productive of an annual allowance which, when added to all allowances for the period commencing with the use of the property and including the current year, does not, during the first two-thirds of the useful life of the property, exceed the total of such allowances which would have been used, had such allowances been computed under the method described in paragraph (a)(3)(ii) of this subsection.

(4) If a nonprofit or tax-exempt organization, the method shall be such that it could have had the approval of the Internal Revenue Service, had the organization been subject to the Internal Revenue Code of 1954, as amended.

(5) The contractor must use the same approved method of depreciation for costing its contract work as for costing its other work at the same facility.

(6) The method of depreciation shall produce equitable and reasonable results.

(b) Depreciation of the following is unallowable:

(1) Idle or excess facilities (machinery and equipment), other than reasonable standby facilities;

(2) Assets fully amortized or depreciated on the contractor's books;

(3) Unrealized appreciation of values of assets; and

(4) Accelerated amortization under Certificates of Necessity or other system in excess of normal depreciation, as computed under paragraph (a) of this subsection.

(c) In entering into contracts involving the use of "special facilities" under section 161 of the Atomic Energy Act of 1954, as amended (section 7 of Public Law 85-681 approved Aug. 19, 1958), the percentage of the total cost of such special facilities devoted to contract performance and chargeable to the DOE should not exceed the ratio between the period of contract deliveries and the anticipated useful life of such facilities.

#### **970.3102-3-5 Employee morale, health, welfare, food service, and dormitory costs.**

(a) Employee morale, health, and welfare activities are those services or benefits provided by the contractor to its employees to improve working conditions, employer-employee relations, employee morale, and employee performance. These activities include such items as house or employee publications, health or first-aid clinics, wellness/fitness centers, employee counseling services, awards for performance or awards made in recognition of employee achievements pursuant to an established contractor plan or policy, and, for the purpose of this subsection, food service and dormitory costs. However, these activities do not include, and should be differentiated from compensation for personal services as defined in 970.3102-3-2. Food and dormitory services include operating or furnishing facilities for cafeterias, dining rooms, canteens, lunch wagons, vending machines, living accommodations, or similar types of services for the contractor's employees at or near the contractor's facilities or site of the contract work.

(b) Costs of recreation, registration fees of employees participating in competitive fitness promotions, team activities, and sporting events are unallowable, except for the costs of employees' participation in company sponsored intramural sports teams or employee organizations designed to improve company loyalty, team work, or physical fitness.

(c) Except as limited by paragraph (d) of this subsection, the aggregate of costs incurred on account of all activities mentioned in paragraph (a) of this subsection, less income generated by all such activities, is allowable to the extent that the net aggregate cost of all such activities, as well as the net cost of each individual activity, is reasonable and allocable to the contract work. Additionally, advance understandings

with respect to the costs mentioned in paragraph (a) of this subsection are to be reached prior to the incurrence of these costs as required in 48 CFR 970.3101–2.

(d) Losses from the operation of food or dormitory services may be included as costs incurred under paragraph (c) of this subsection only if the contractor's objective is to operate such services at least on a break-even basis. Losses sustained because food services or lodging accommodations are furnished without charge or at prices or rates which obviously would not be conducive to operation on a break-even basis are not allowable, except in those instances where the contractor can demonstrate that unusual circumstances exist, such that, even with efficient management, operation of the services on a break-even basis would require charging inordinately high prices, or prices or rates higher than those charged by commercial establishments offering the same services in the same geographical areas. Typical examples of such unusual circumstances are:

(1) Where the contractor must provide food or dormitory services at remote locations where adequate commercial facilities are not reasonably available, or

(2) Where it is necessary to operate a facility at a lower volume than the facility could economically support. Cost of food and dormitory services shall include an allocable share of indirect expenses pertaining to these activities.

(e) In those situations where the contractor has an arrangement authorizing an employee association to provide or operate a service such as vending machines in the contractor's plant, and retain the profits derived therefrom, such profits shall be treated in the same manner as if the contractor were providing the service, except as provided in paragraph (f) of this subsection.

(f) Contributions by the contractor to an employee organization, including funds set over from vending machines receipts or similar sources, may be included as cost incurred under paragraph (c) of this subsection, only to the extent that the contractor demonstrates that an equivalent amount of the costs incurred by the employee organization would be allowable, if incurred by the contractor directly.

#### **970.3102–3–6 Fines, penalties and mischarging costs.**

It is Department of Energy policy not to reimburse management and operating contractors for fines and penalties except as provided in 48 CFR 970.5231–1(e)(12), Allowable Costs and Fixed Fee

(Management and Operating Contracts), and 48 CFR 970.5231–4, Preexisting Conditions.

#### **970.3102–3–7 Lobbying and political activity Costs.**

The following costs are unallowable, except for costs associated with providing information pursuant to 970.5231–2, Political Activity Cost Prohibition, unless approved by the contracting officer. Contractor costs incurred to influence either directly or indirectly:

- (a) Legislative action on any matter pending before Congress, a State legislature, or a legislative body of a political subdivision of a State; or
- (b) Federal, State, or executive body of a political subdivision of a State action on regulatory and contract matters.

#### **970.3102–3–8 General and administrative expenses.**

(a) For on-site work, the DOE considers that its fee allowance for management and operating contracts provides for the recognition of appropriate compensation for home or corporate office general and administrative expenses incurred in the general management of the contractor's business as a whole.

(b) The policy in paragraph (a) of this subsection is intended to preclude the payment of general and administrative expenses merely because they are incurred or accounted for at or by a contractor's home or corporate office and not the operating site. The DOE recognizes some benefit of such cost to the DOE program. The basis of recognition through fee allowance is associated with the difficulty of determining and assessing the dollar value of such expenses that might be applicable to or have benefit to a management and operating contract. Conventional allocation techniques; *i.e.*, total operating costs, labor dollars or hours, etc., are generally not considered appropriate because they normally distribute such expenses over a base representative of contractor investment (in terms of its own resources, including labor, material, overhead, etc.). Contractor investments and home office contributions are minimal under DOE's operating and management contracts in as much as they are totally financed and supported by DOE advance payments under the letter-of-credit method and by DOE's provision of government-owned and project-exclusive facilities, property, and other needed resources.

(c) Notwithstanding the concept in paragraph (a) of this subsection, it is recognized that from time to time the fee amounts established for a management

and operating contract, to meet the purpose cited in 970.1504–1–2 and consideration of the factors in 970.1504–1–5, may be considered insufficient to adequately recognize a contractor's general and administrative expenses incurred in general management and administration of the contractor's business as a whole and which appear to have a directly benefitting relationship to the DOE program. Such recognitions may be the basis of requesting fee amounts in excess of the limitations set forth in 970.1504–1–6 or alternatively, in any particular case, the contractor may be compensated on the basis of cost in accordance with 970.3102–1–1 if the Head of the Contracting Activity or other approving contract official authorizes or approves the procedure and a fair and reasonable amount can be agreed upon. Such amount shall normally be in addition to the applicable fee amounts.

(d) The DOE allows company general and administrative expenses under off-site architect-engineer, supply and research contracts with commercial contractors performing the work in their own facilities. Contractor's general and administrative expenses, may, however, be included for reimbursement under such DOE off-site architect-engineer, supply and research contracts, only to the extent that they are established, after careful examination, to be allowable in nature an properly allocable to the work. Work performed in a contractor's own facilities under a management and operating or construction contract may likewise be allowed to bear the properly allocable portion of allowable company general and administrative expense.

#### **970.3102–3–9 Plant reconversion costs.**

Plant reconversion costs are those incurred in the restoration of the contractor's facilities to approximately the same condition existing immediately prior to the commencement of the contract work, fair wear and tear excepted.

#### **970.3102–3–10 Precontract costs.**

Precontract costs are those incurred prior to the effective date of the contract directly pursuant to the negotiation and in anticipation of the award of the contract, where such incurrence is necessary to comply with the proposed contract delivery schedule. Such costs are allowable to the extent that they would have been allowable if incurred after the effective date of the contract. They do not include costs of preparing bids or of participation in the negotiation. The allowability of

precontract costs is dependent upon appropriate coverage in the contract.

**970.3102-3-11 Professional and consultant service costs.**

Technical and professional consultants, as used in this subpart, refer to private individuals acting in their own behalf, who make their services available on a fee or per diem basis. It does not refer to employees of firms acting in the firm's behalf whose services may be made available by the firm on, for example, a fixed rate basis. Consultant arrangements may permit bringing to contract work, the services of outstanding specialists who would not be available on a full-time basis, or whose employment on a full-time basis would not be economically feasible. Costs of such outside consultant services are normally allowable (however, see 970.5231-1 regarding compensation of an individual who is employed by another contractor and concurrently performing work on a full-time annual basis under a DOE cost-type contract), provided that the services are essential to, and will make a material contribution to, the performance of contract work; the services may be performed more economically or more successfully by a consultant than by the contractor's regular personnel; the fee or per diem charged is reasonable; and, when approved by the contracting officer. If the cost of such services is charged directly to the DOE contract, the cost of like items properly chargeable only to other work of the contractor must be eliminated from indirect costs allocable to the DOE contract (see 970.3102-2).

**970.3102-3-12 Relocation costs.**

(a) Relocation costs are costs incident to the permanent change of duty assignment (for an indefinite period or for a stated period of not less than 12 months) of an existing employee or upon recruitment of a new employee. The following types of costs are allowable as noted, subject to provisions of paragraphs (b), (c), and (d) of this subsection.

(1) Costs of travel of the employee and members of his/her immediate family and transportation of household and personal effects to the new location.

(2) Costs of finding a new home, such as advance trips by employees and spouses to locate living quarters, and temporary lodging during the transition periods, not exceeding separate cumulative totals of 60 days for employees and 45 days for spouses and dependents, including advance trip time.

(3) Closing costs (*i.e.*, brokerage fees, legal fees, appraisal fees, points, finance charges, *etc.*) incident to the disposition of actual residence owned by the employee when notified of transfer; Provided that closing costs when added to the continuing costs described in (a)(6) of this subsection shall not exceed 14% of the sales price of the property sold.

(4) Other necessary and reasonable miscellaneous expenses incident to relocation, such as disconnection and connecting household appliances; automobile registration; drivers license and use taxes; cutting and fitting rugs, draperies, and curtains; forfeited utility fees and deposits; and purchase of insurance against damage to or loss of personal property while in transit.

(5) Costs incident to the acquisition of a home in a new location, except that these costs will not be allowable for existing employees or newly recruited employees who prior to the relocation were not homeowners and the total costs shall not exceed 5% of the purchase price of the new home.

(6) Continuing costs of ownership of the vacant former actual residence being sold, such as maintenance of building and grounds (exclusive of fixing up expenses), utilities, taxes, property insurance, mortgage interest, *etc.*, after settlement date or lease date of new permanent residence; provided that when added to the closing costs described in (a)(3) of this subsection, the costs shall not exceed 14% of the sales price of the property sold.

(7) Mortgage interest differential payments, except that these costs are not allowable for existing or newly recruited employees who prior to the relocation were not homeowners, and the total payments are limited to an amount determined as follows:

(i) Difference between the mortgage interest rates of the old and new residence times the current balance of the old mortgage times 3 years; and

(ii) When mortgage differential payments are made on a lump sum basis and the employee leaves or is transferred again in less than 3 years, the amount initially recognized shall be proportionately adjusted to reflect payments only for the actual time of the relocation.

(8) Rental differential payments covering situations where relocated employees retain ownership of a vacated home in the old location and rent at the new location. The rented quarters at the new location must be comparable to those vacated, and the allowable differential payment may not exceed the actual rental costs for the

new home, less the fair market rent for the vacated home times 3 years.

(9) Cost of canceling an unexpired lease.

(b) The costs described in paragraph (a) of this subsection must also meet the following criteria to be considered allowable.

(1) The move is for the benefit of the Government.

(2) Reimbursement must be in accordance with an established policy or practice and program that is consistently followed and is designed to motivate employees to relocate promptly and economically.

(3) Amounts to be reimbursed do not exceed the employee's actual expenses, except that for miscellaneous costs of the type discussed in paragraph (a)(4) of this subsection, a flat amount, not to exceed \$1,000, may be paid in lieu of actual costs.

(c) The following types of costs are not allowable:

(1) Loss on sale of a home.

(2) Continuing mortgage principle payments on residence being sold.

(3) Cost incident to the acquisition of a home in a new location as follows:

(i) Real estate brokers fees and commissions;

(ii) Costs of litigation;

(iii) Real and personal property insurance against damage or loss of property;

(iv) Mortgage life insurance;

(v) Owner's title policy insurance when such insurance was not previously carried by the employees on the old residence (however, costs of a mortgage title policy is allowable) and;

(vi) Property taxes and operating or maintenance costs.

(4) Payments for employee's income taxes or FICA (social security taxes) incident to reimbursed relocation costs.

(5) Costs incident to furnishing equity or nonequity loans to employees or making arrangements with lenders for employees to obtain lower-than-market rate mortgage loans.

(d) If relocation costs for an employee have been allowed and the employee resigns within 12 months for reasons within the employee's control, it is expected the contractor shall refund or credit the relocation costs to the Government.

(e) Contractor payments to an independent relocation assistance firm handling acquisitions and sales of houses of transferred employees are allowable in amounts which otherwise represent payment for itemized cost which are allowable in accordance with the provisions of this subsection.

**970.3102-3-13 Trade, business, technical and professional activity costs.**

(a) The costs of memberships in trade, business and technical organizations are unallowable, except as approved by the contracting officer.

(b) In considering approval of membership dues, the contracting officer shall:

(1) Ensure that dues payments to an organization are clearly justified and provide necessary and specific agency benefit;

(2) Do not constitute payments for, or in support of partisan and political activity; and,

(3) Are solely for purposes of enhancing trade, business, or technical knowledge necessary for, and related to, performance of DOE contracts.

**970.3102-3-14 Travel costs.**

(a)(1) Commercial air travel. It is the policy of the DOE to require management and operating contractors to use the lowest commercial airfare accommodations for all necessary travel under the contract, except when such accommodations are not reasonably available. Airfare costs in excess of the lesser of the lowest available commercial discount airfare, Government contract airfare, or customary standard (coach or equivalent) airfare, shall be disallowed except where the use of such accommodations would: require circuitous routing; require travel during unreasonable hours; excessively prolong travel; result in increased cost that would offset transportation savings; would offer accommodations not reasonably adequate for the physical or medical needs of the traveler; or are not reasonably available to meet necessary mission requirements. The contractor shall be required to establish appropriate airfare travel policies and procedures requiring the use of the lowest available commercial airfare consistent with this paragraph and prudent travel management. Where a contractor can reasonably demonstrate to the contracting officer, or designee, the nonavailability of discount airfare or Government contract airfare for a particular trip or, on an overall basis, that it is the contractor's practice to make routine use of such airfare, specific contractor determinations of nonavailability should generally not be questioned, unless a pattern of avoidance is detected. However, in order for airfare costs in excess of the customary standard commercial airfare to be allowable; e.g., use of first-class airfare, the contractor must be able to justify and document on a case-by-case

basis the applicable condition(s) set forth in this paragraph.

(2) Air travel by other than commercial carrier. "Cost of travel by contractor-owned, -leased, or -chartered aircraft," as used in this paragraph, includes the cost of lease, charter, operation (including personnel costs), maintenance, depreciation, insurance and other related costs. Costs of travel via contractor-owned, -leased, and -chartered aircraft shall not exceed the cost of commercial air travel accommodations, unless the management and operating contractor can demonstrate that costs in excess of such amounts are necessary for contract performance and that the increase in cost, if any, in comparison with alternative means of transportation is commensurate with the advantage gained.

(b) Government-owned, commercial rental, and company-furnished vehicles. Commercial rental automobile costs in excess of the cost of a Government-furnished automobile or, when a Government-furnished automobile is not available, the cost of a Government-contract rental automobile available under a GSA Federal Supply Schedule contract, is unallowable unless:

(1) A Government-furnished or a Government contract rental automobile is not reasonably available to the traveler, or

(2) The traveler's use and the cost of a commercial rental automobile are justified and authorized as more advantageous to the Government.

(3) The costs of contractor-owned or -leased vehicles include the costs of lease, operation, maintenance, depreciation, insurance, and other similar costs. These costs are unallowable except as approved by the contracting officer. That portion of the cost of company-furnished automobiles that relates to personal use by employees, including transportation to and from work is unallowable.

(c) *Lodging, meals and incidental expenses.* (1) Costs for lodging, meals, and incidental expenses incurred by management and operating contractor personnel traveling on official business in the performance of contract work are allowable costs but subject to the limitations set forth in this subsection. Payments for lodging, meals, and incidental expenses may be based on per diem, actual expenses, or a combination thereof, provided the method used results in a reasonable cost to DOE.

(2) Except as provided in paragraph (c)(3) of this subsection, management and operating contractor payments for lodging, meals, and incidental expenses

(as defined in the regulations cited in paragraphs (c)(2) (i) through (iii) of this subsection) shall be considered to be reasonable and allowable cost only to the extent that they do not exceed, on a daily basis, the maximum per diem rates in effect at the time of travel as set forth in the:

(i) Federal Travel Regulation (41 CFR Chapters 300 through 304) prescribed by the General Services Administration, for travel in the conterminous 48 United States.

(ii) Joint Travel Regulations, Volume 2, DOD Civilian Personnel, Appendix A, prescribed by the Department of Defense, for travel in Alaska, Hawaii, the Commonwealth of Puerto Rico, and territories and possessions of the United States; or

(iii) Standardized Regulations (Government Civilians, Foreign Areas), section 925, "Maximum Travel Per Diem Allowances for Foreign Areas," prescribed by the Department of State, for travel in areas not covered in paragraphs (c)(2) (i) and (ii) of this subsection.

(3) In special or unusual situations, management and operating contractor personnel may be paid for actual expenses in excess of the above-referenced maximum per diem rates provided such payments do not exceed the higher amounts authorized for Federal civilian employees as permitted in the regulations referenced in paragraph (c)(2) (i), (ii) or (iii) of this subsection and all of the following conditions are met:

(i) One of the conditions warranting approval of the actual expense method, as set forth in the regulations referenced in paragraph (c)(2) (i), (ii) or (iii) of this subsection exist.

(ii) A written justification for payment of the higher amounts is approved by an officer or appropriate official of the management and operating contractor's organization.

(iii) Documentation exists to support the payment of actual expenses incurred and each employee expenditure in excess of \$25.00 is supported by a receipt. The approved justification required by paragraph (c)(3)(ii) and, if applicable, DOE advance approvals required under paragraph (c)(5) of this subsection must also be retained.

(4) Paragraphs (c)(2) and (c)(3) of this subsection do not incorporate the regulations cited in paragraphs (c)(2) (i), (ii) and (iii) of this subsection in their entirety. Only the coverage in the referenced regulations dealing with special or unusual situations, the maximum per diem rates and the definitions of lodging, meals and

incidental expenses are to be applied to management and operating contractors.

(5) An advance agreement with respect to compliance with paragraphs (c)(2) and (c)(3) of this subsection will be established in the personnel appendix of the contract. The management and operating contractor shall also be required to obtain advance approval from DOE, if it becomes necessary for the contractor to exercise the authority to make payments based in the higher actual expense method repetitively or on a continuing basis in a particular area. It is not intended that individual contractor authorizations to pay actual expenses in excess of applicable maximum per diem rates be approved in advance by DOE. Such before the fact, case-by-case approvals should only be invoked when the management and operating contractor does not have acceptable travel cost policies, procedures or practices in effect.

(6)(i) The maximum per diem rates referenced in paragraph (c)(2) of this subsection generally would not constitute a reasonable daily charge:

(A) When no lodging costs are incurred; and/or

(B) On partial travel days (*e.g.*, same day of departure and return).

(ii) Appropriate downward adjustments from the maximum per diem rates would normally be required under these circumstances. While these adjustments need not be calculated pursuant to the Federal Travel Regulation, Joint Travel Regulations, or Standardized Regulations, they must result in a reasonable charge.

#### **970.3102-3-15 Cost related to legal and other proceedings.**

(a) Contractor costs incurred in connection with a criminal, civil or administrative proceeding involving contractor violation of, or failure to comply with, a Federal, State, local or foreign statute or regulation are subject to the allowable costs limitations established in section 8 of The Major Fraud Act of 1988, Public Law 100-700 (41 U.S.C. 256).

(b) Implementation of the Major Fraud Act's contract cost limitations is specified in the applicable cost principles clauses at 970.5231-1(e)(33). Definitive cost principle criteria for determining the allowability of an M&O contractor's costs incurred in connection with a criminal, civil or administrative proceeding are set forth in the contract clause at 970.5231-3, Cost Prohibitions Related to Legal and Other Proceedings. Any change made to the cost principle criteria specified therein constitutes a deviation requiring

Senior Procurement Executive approval pursuant to 970.3101-1.

#### **970.3102-3-16 Overtime, shift, and holiday premiums.**

(a) Overtime, shift, and holiday premiums are allowable only to the extent provided in the contract or approved by the contracting officer. The amount of such premiums charged to a management and operating contract shall be equitable in relation to the amount of such costs charged to other work currently performed in the contractor's plant and the factors which necessitate incurrence of the costs. When the necessity for overtime, shift, and holiday work arises from inadequacy of the contractor's plant or department to perform its total workload on a purely straight-time basis, inclusions in overhead for apportionment to all work of the plant or department, as the case may be, appears appropriate. When particular work, DOE or other, is being specially expedited to a point that its fair share of the contractor's purely straight-time efforts on a single-shift basis will not get the particular job completed within the time desired, direct charging of the related premiums appears appropriate.

(b) When premiums for overtime, shift, and holiday work are charged direct to the work concerned, if the operating overhead of the plant or related department is distributed on the basis of direct labor (cost or hours), the premiums should be excluded from the direct labor base for purposes of overhead distribution. That is, the direct labor base should be, as appropriate, direct labor straight-time cost or direct labor hours actually worked. While the premiums for authorized overtime, shift, and holiday work are acceptable as reimbursable costs, it is generally recognized that direct labor hours worked on an overtime, shift, or holiday basis should participate in indirect costs to the same extent as hours worked on a straight-time basis.

#### **970.3102-3-17 Page charges in scientific journals.**

It is a policy of the DOE to permit DOE contractors to budget for and pay page charges for scientific journal publication, as a necessary part of research costs, in all cases where:

(a) The research papers report work supported by the Government.

(b) The charges are levied impartially on all research papers published by the journal, whether by non-Government or by Government authors.

(c) Payment of such charges is in no sense a condition for acceptance of manuscripts by the journal.

(d) The journals involved are not operated for profit.

(e) The author does not receive an emolument from the journal for the research paper.

#### **970.3102-3-18 Preparatory and make-ready costs.**

Since indirect costs are usually apportioned to individual jobs wholly or substantially on the basis of the direct labor applied to the particular job, a contract will absorb no overhead by apportionment prior to the inception of the actual performance of direct work on the contract. The effort of the contractor's overhead organization in preparing for one job and in getting it underway, will thus be absorbed by jobs previously commenced and still being performed; later, the job, which in its initial stages of preparation and make-ready was relieved of expenses that were actually applicable to it, will partially absorb, through their apportionment as overhead, similar costs equally applicable in fact to other, subsequently undertaken jobs. This procedure is in accordance with generally accepted accounting practices and normally is reasonably equitable in its results. The initial advantages and subsequent disadvantages to the individual contract that result from consistent application of the procedure tend to offset each other and balance out. It is quite appropriate, however, to employ the direct charge method in connection with overhead costs in preparing for actual performance by segregating such preparatory and make-ready costs and identifying them specifically with the contract to which the effort actually pertains. However, if preparatory and make ready costs are charged direct to a DOE contract, care must be taken, as performance of the DOE contract work proceeds toward completion, to segregate subsequent indirect expenses similarly applicable to the preparation for, and commencement of, other jobs and to account for them as direct charges to those other jobs.

#### **970.3102-3-19 Facilities (plant and equipment).**

(a) *Use of Government-owned facilities.* If the Government furnishes to the contractor, or the contractor acquires at Government expense, Government-owned equipment with which to do all or a significant amount of the work under the DOE contract, on which equipment the Government is bearing the expenses of depreciation, maintenance, insurance, and taxes, appropriate procedures must be established to avoid apportioning to DOE work performed with DOE-owned

equipment, a share of the expenses of depreciation, maintenance, insurance and taxes on the contractor's equipment not used to perform such work. If the Government-owned equipment is placed in a segregated area, that area should be accounted for as a separate department. If the Government-owned equipment is not placed at the separate area, other steps must be taken to avoid what would amount to a double equipment burden on work performed with the Government-owned facilities. Such work shall be so accounted for as to be relieved of charges for expenses related to contractor's equipment not used in its performance.

(b) *Contractor's costs covering plant and equipment.* Charges relating to contractor-owned plant and equipment shall be restricted to the applicable costs, such as depreciation, maintenance, insurance, and taxes, and shall not be on a rental basis. (Compensation in excess of costs is covered by the fixed fee.) Rentals of plant or equipment owned by third parties are normally allowable, if the rates are reasonable in the light of the type, value, condition of the property involved, and option and other provisions of the lease agreement. However, where the plant and equipment used by the contractor is rented by the contractor under a sale and lease-back agreement, only the normal costs (such as depreciation, maintenance, insurance, and taxes) that would have been incurred if the contractor had retained title to the facilities, should be allowed. Allowances for plant and equipment rented under agreements that are not arms-length transactions should be similarly restrictive.

#### **970.3102-3-20 Special funds in the construction industry.**

Costs of special "funds," financed by employer contributions, in the construction industry for such purposes as methods and materials research, public and industry relations, market development, disaster relief, etc., are unallowable, except as specifically authorized by the contracting officer and provided for in the contract.

#### **970.3102-3-21 Procurement: Subcontracts, contractor-affiliated sources, and leases.**

(a) *Subcontracts.* Award and management policies for subcontracts placed under operating contracts when necessary to the performance of the required services and work efforts of the management and operating contractor are set forth in 970.44. The cost of

performing such subcontracts shall be allowable under the DOE contract when:

(1) The award/approval is otherwise in accord with the contract terms and conditions and the provisions of 970.44 and

(2) The reimbursement of subcontractor costs of the management and operating contractor is in accordance with the provisions of the DOE cost principles set forth in 48 CFR part 31, as appropriate to the type of subcontractor being selected; i.e., commercial, educational, state/local government, or nonprofit organization.

(b) Procurement or transfer from contractor-affiliated sources (See 970.4402-3). Allowance for all equipment, materials, supplies, and services which are sold or transferred between any division, subsidiary, or affiliate of a management and operating contractor under a common control shall be on the basis of cost incurred in accordance with the terms of the contract; except, when it is the established practice of the transferring organization to price inter-organization transfers of equipment, materials, supplies, and services at other than cost for commercial work of the contractor or any division, subsidiary, or affiliate of the contractor under a common control, allowance may be at a price when:

(1) It is based on an "established catalog or market price of commercial items sold in substantial quantities to the general public" in accordance with 48 CFR subpart 15.4 or

(2) It is the result of "adequate price competition" in accordance with 48 CFR subpart 15.4 and is the price at which an award was made to the affiliated organization, after obtaining quotations of an equal basis from such organization and one or more outside sources which normally produce the item or its equivalent in significant quantity, provided that in either case:

(i) The price is not in excess of the transferor's current sales price to its most favored customer (including any division, subsidiary, or affiliate of the contractor under a common control) for a like quantity under comparable conditions, and

(ii) The price is not determined to be unreasonable by the contracting officer, provided, however, that if the price is determined unreasonable, such determination must be supported by an enumeration of facts on which it is based and approved at a level above the contracting officer. The price determined in accordance with paragraph (a) of this subsection should be adjusted, when appropriate, to reflect the quantities being procured and may be adjusted upward or downward to

reflect the actual cost of any modifications necessary because of contract requirements.

(c) *Leases.* Contractor lease payments will be considered an allowable cost when a leasing arrangement is not prohibited by the contract terms (e.g., see 970.5244-1). If a lease for property, plant or equipment (land and/or depreciable assets) is required to be classified as a capital lease under generally accepted accounting principles (GAAP), imputed interest costs determined in accordance with GAAP for any such contractor lease shall be an allowable contract charge if the following are met:

(1) The specific decision to enter into a capital leasing arrangement is authorized by DOE in accordance with applicable DOE procedures, prior to execution of the lease,

(2) The lease is accounted for in accordance with GAAP, and

(3) The imputed interest costs are separately accounted for in special DOE accounts established for the recordation of such costs.

#### **970.3170 Contract Clauses.**

(a) The contracting officer shall insert the clause at 48 CFR 970.5231-1, Allowable Cost and Fixed Fee (Management and Operating Contracts), in all management and operating contracts.

(1) The contracting officer shall include the clause with its Alternate I when necessary to address situations where the fee is for a period of time or different fees are allowed for various phases of the work.

(2) The contracting officer shall include the clause with its Alternate II when personnel costs and related expenses will be incurred by the contractor in accordance with established policies, programs, and schedules that are applicable to the contractor's private operations and consistently followed throughout the contractor's organization.

(3) The contracting officer shall include the clause with its Alternate III if the contractor will perform construction.

(4) The contracting officer shall include the clause with its Alternate IV if no contractor-owned equipment is being utilized in the performance of the contract.

(5) The contracting officer shall include the clause with its Alternate V in contracts with for-profit contractors.

(b) The contracting officer shall insert the clause at 48 CFR 970.5231-2, Political Activity Cost Prohibition, in all management and operating contracts.

(c) The contracting officer shall insert the clause at 48 CFR 970.5231-3, Cost Prohibitions Related to Legal and Other Proceedings, in all management and operating contracts.

(d) The contracting officer shall insert the clause at 48 CFR 970.5231-4, Preexisting Conditions, in all management and operating contracts.

(1) The contracting officer shall include the clause with its Alternate I in contracts with incumbent management and operating contractors.

(2) The contracting officer shall include the clause with its Alternate II in contracts with management and operating contractors not previously working at that particular site or facility.

### **Subpart 970.32—Contract Financing**

#### **970.3200 Policy.**

It is the policy of the DOE to finance management and operating contracts through advance payments and the use of special bank accounts. Appropriate procedures for properly managing and controlling funds for obligation and expenditure under a management and operating contract are maintained by the Chief Financial Officer of DOE.

#### **970.3200-1 Reduction or suspension of advance, partial, or progress payments.**

(a) The procedures prescribed at 48 CFR 32.006 shall be followed regarding the reduction or suspension of payments under management and operating contracts.

(b) Agency head responsibilities under 48 CFR 32.006 have been delegated to the Senior Procurement Executive.

(c) The remedy coordination official is responsible for receiving, assessing, and making recommendations to the Senior Procurement Executive.

#### **970.3200-1-1 Contract clause.**

The contracting officer shall insert the clause at 48 CFR 970.5232-1, Reduction or suspension of contract payments, in management and operating contracts.

#### **970.3204 Advance payments.**

##### **970.3204-1 Applicability.**

(a) The Head of the Contracting Activity shall authorize advance payments without interest, and approve the findings, determinations and the contract terms and conditions concerning advance payments in accordance with the procedures set forth in 48 CFR subpart 32.4, Advance Payments, as supplemented by 48 CFR subpart 932.4.

(b) Advance payments shall be made under a letter-of-credit arrangement for deposit in a special bank account.

(c) Prior to providing any advance payments, the contracting officer shall enter into an agreement with the contractor and a financial institution regarding a special bank account where the advanced funds are to be deposited by the Government. Such agreement shall: (1) Provide that DOE shall retain title to the unexpended balance of funds in the special bank account including revenues if any, deposited by the contractor, and that such title shall be superior to any claim or lien of the bank of deposit; and

(2) Incorporate as necessary or appropriate, additional financial provisions required by Treasury or Departmental financial regulations.

(d) Deviations from the requirements cited in paragraph (c) of this subsection shall be considered a deviation requiring approval of the Head of the Contracting Activity.

(e) Letter-of-credit arrangements shall be prepared in accordance with 48 CFR 32.406, Letters of Credit, and shall be coordinated between the procurement and finance organizations.

#### **970.3204-2 Special bank account agreement.**

The following agreement shall be used with special bank accounts in accordance with 970.3204-1(c).

Agreement entered into this .. day of ..., 19 .., between the United States of America (hereinafter called the Government) represented herein by the Department of Energy (hereinafter called the "DOE"), and .... (hereinafter called the "Contractor,") a corporation under the laws of the State of ....., and ....., (hereinafter called the "Bank,") a banking corporation under the laws of ....., located at .....

#### **Recitals**

(a) On the date of ..., 19 .., DOE and the Contractor entered into Contract(s) No. ...., or a supplemental agreement thereto, providing for the making of advances of Government funds to the contractor a copy of such advance provisions has been furnished to the Bank.

(b) DOE requires that amounts advanced to the Contractor under said contract or supplemental agreement be deposited in a Special Bank Account or accounts with a bank designated by the Treasury Department as depository and financial agent of the Government (Section 10 of the Act of June 11, 1942, 56 Stat. 356; 12 U.S.C. 265), separate from any of the Contractor's general or other funds; and, the Bank being such a bank, the parties are agreeable to so depositing said amounts with the Bank.

(c) This Special Bank Account shall be designated "... (Name of Contractor), ... (Contract Number), Department of Energy Special Bank Account."

#### **Covenants**

In consideration of the foregoing, and for other good and valuable considerations, it is agreed that,

(1) The Government shall have title to the credit balance in said account to secure the return of all advances made to the contractor, which title shall be superior to any lien or claim of the Bank or others with respect to such account.

(2) The Bank will be bound by the provisions of said contract or contracts relating to the deposit and withdrawal of funds in the above Special Bank Account, but shall not be responsible for the application of funds properly withdrawn from said account. After receipt by the Bank of written directions from the contracting officer, or from the duly authorized representative of the contracting officer, the Bank shall act thereon and shall be under no liability to any party hereto for any action taken in accordance with the said written directions.

(3) The Government, or its authorized representatives, shall have access to the books and records maintained by the Bank with respect to such Special Bank Account at all reasonable times and for all reasonable purposes, including, without limitation, the inspection or copying of such books and records and any and all memoranda, checks, correspondence, or documents pertaining thereto. Except as agreed upon by the Government and the Bank, all books and records pertaining to the Special Bank Account in the possession of the Bank relating to the Special Bank Account agreement shall be preserved by the Bank for a period of three (3) years after final payment under the contract to which the Special Bank Account agreement pertains or otherwise disposed of in such manners as may be agreed upon by the Government and the Bank.

(4) In the event of the services of any writ of attachment, levy of execution, or commencement of garnishment proceedings with respect to the Special Bank Account, the Bank will promptly notify the Head of the Contracting Activity, DOE.

In witness whereof the parties hereto have caused this Agreement to be executed, as of the day and year first above written.

(Signatures and Official Titles) \_\_\_\_\_

#### **970.3204-3 Contract clause.**

The clause at 970.5232-2, Payments and Advances, shall be included in management and operating contracts when advances of funds are to be placed in a special bank account.

(a) The contracting officer shall insert the basic clause with its Alternate I if a separate fixed-fee is provided for a separate item of work.

(b) The contracting officer shall insert the basic clause with its Alternate II when award-fee provisions in the basic clause are used.

(c) The contracting officer shall insert the basic clause with its Alternate III in management and operating contracts with integrated contractors.

**970.3270 Standard financial management clauses.**

(a) The contracting officer shall insert the clause at 48 CFR 970.5232-3, Accounts, Records, and Inspection, in all management and operating contracts.

(1) If the contract includes the clause at 48 CFR 52.215-22, Price Reduction for Defective Cost or Pricing Data, the contracting officer shall use the clause with its Alternate I.

(2) If the contract is a cost-reimbursement contract involving an estimated cost exceeding \$5 million and expected to run for more than 2 years, or any other cost-reimbursement contract determined by the Head of the Contracting Activity in which the contractor has an established internal audit organization, the contracting officer shall insert the clause with its Alternate II.

(b) The contracting officer shall insert the clause at 48 CFR 970.5232-4, Obligation of funds, in all management and operating contracts. The contracting officer may use the clause with its Alternate I in contracts which, expressly or otherwise, provide a contractual basis for equivalent controls in a separate clause.

**Subpart 970.34—Major System Acquisition****970.3400 General requirements.****970.3400-1 Mission-oriented solicitation.**

Contractors shall be required to promptly advise the DOE contracting officer of any advance notices of, or solicitations for, requirements which would logically involve DOE facilities or resources operated or managed by the contractor, which are received from another agency pursuant to 48 CFR 34.005. Management and operating contracts shall provide that the contractor shall not respond or otherwise propose to participate in response to the requirements of such solicitations unless the contractor has obtained the prior written approval of the DOE manager of the field activity having cognizance over the contract. Such approval shall not be given except in compliance with applicable DOE directives, and with the concurrence of the cognizant Senior Program Official.

**970.35—Research and development contracting****970.3500 Scope of Subpart.**

This subpart implements 48 CFR 35.017 regarding the establishment, use, review, and termination of Federally Funded Research and Development Centers (FFRDCs) sponsored by the Department of Energy.

**970.3501 Federally funded research and development centers.****970.3501-1 Sponsoring agreements.**

(a) The contract award document constitutes the sponsoring agreement between the Department of Energy and the contractor operating an FFRDC.

(b) The contract statement of work shall define the purpose and mission of the FFRDC.

(c) Other elements of the sponsoring agreement which shall be incorporated into the contract include:

(1) The appropriate termination clause of the contract (as prescribed in 48 CFR Subpart 49.5).

(2) The plan for the identification, use, and disposition of retained earnings developed pursuant to 48 CFR 970.1504-1-3(c)(6), if applicable;

(3) The clause entitled "Federally Funded Research and Development Center Sponsoring Agreement," which, in part, prescribes limitations on the FFRDC competing with the private sector, and requirements for the FFRDC's acceptance of work from a nonsponsor; and

(4) Other terms and conditions considered necessary for the particular circumstances of the FFRDC (e.g., advance understandings on particular cost items).

**970.3501-2 Using an FFRDC.**

The contractor may only accept work from a nonsponsor (as defined in 48 CFR 35.017) in accordance with the requirements of DOE Order 481.1, Work for Others (Non-Department of Energy Funded Work).

**970.3501-3 Reviewing FFRDC's.**

(a) All Department of Energy sponsored FFRDC's are operated by management and operating contractors.

(b) Coincident with the review required by 48 CFR 17.605(b) and 48 CFR 970.1702-1(b) regarding the decision to extend or compete a management and operating contract, the contracting officer shall, in accordance with internal Departmental procedures:

(1) Conduct the review required by 48 CFR 35.017-4 concerning the use and need for the FFRDC; and

(2) Recommend for Secretarial approval, the continuation or termination of the Department's sponsorship of an FFRDC at the time authorization is required to extend or compete a management and operating contract.

**970.3501-4 Contract clause.**

The contracting officer shall insert the clause at 48 CFR 970.5235-1, Federally Funded Research and Development Center Sponsoring Agreement, in all

solicitations and contracts for the management and operation of an FFRDC sponsored by the Department of Energy.

**Subpart 970.36—Construction and Architect-Engineer Contracts****970.3605 Contract clauses.****970.3605-1 Other contracts.**

The clause in 48 CFR 52.236-8, Other Contracts, shall be used in all management and operating contracts.

**970.3605-2 Special construction clause for operating contracts.**

The clause in 48 CFR 970.5236-1, Government Facility Subcontract Approval, shall be used in management and operating contracts when the contractor will not perform covered work with its own forces but may procure construction by subcontract.

**Subpart 970.37 Facilities Management Contracting****970.3701 General.****970.3701-1 Severance payments to foreign nationals.****970.3701-1-1 Waiver of cost allowability provisions.**

(a) The Head of the Contracting Activity may waive the application of the provisions of 48 CFR 970.3102-3-2(i)(2)(iv) and (v) in accordance with 41 U.S.C. 256(e)(2) if:

(1) The application of the provisions would adversely affect the continuation of a program, project, or activity that provides significant support services for Department of Energy employees posted outside the United States;

(2) The contractor has taken, or plans to take, appropriate actions within its control to minimize the amount and number of incidents of payment of severance pay to employees under the contract who are foreign nationals; and

(3) The payment of severance pay under the contract is necessary to comply with a law that is generally applicable to a significant number of businesses in the country in which the foreign national receiving the payment performed services or is necessary to comply with a collective bargaining agreement.

(b) [Reserved]

**970.3701-1-2 Solicitation provision and contract clause.**

(a) The solicitation provision at 970.5237-1, Waiver of Limitations on Severance Payments to Foreign Nationals, shall be included in solicitations and resulting contracts involving support services for Department of Energy operations

outside of the United States expected to exceed \$500,000, when, prior to the solicitation, the limitations on severance to foreign nationals has been waived.

(b) The contracting officer shall use the clause with its Alternate I when the Head of the Contracting Activity may waive the limitations on severance to foreign nationals after contract award.

#### **970.3770 Facilities management.**

##### **970.3770-1 Policy.**

Contractors managing DOE facilities shall be required to comply with the DOE Directives applicable to facilities management.

##### **970.3770-2 Contract clause.**

The contracting officer shall insert the clause at 48 CFR 970.5237-2, Facilities Management, in all management and operating contracts.

#### **Subpart 970.41—Acquisition of Utility Services**

##### **970.4102 Acquiring utility services.**

##### **970.4102-1 Policy.**

(a) Utility services defined at 48 CFR 41.101 for the furnishing of electricity, gas (natural or manufactured), steam, water, and/or sewerage to facilities owned or leased by DOE shall be acquired directly by DOE and not by a contractor using a subcontractor arrangement, except as provided in paragraph (b) of this subsection.

(b) Where it is determined to be in the best interest of the Government, a DOE contracting activity may authorize a management and operating contractor for a facility to acquire such utility service for the facility, after requesting and receiving concurrence to make such an authorization from the Director, Public Utilities Branch, Headquarters. Any request for such concurrence should be included in the Utility Service Requirements and Options Studies required by DOE directives in subseries 4540 (Public Services). Alternatively, it may be made in a separate document submitted to the Director of that office early in the acquisition cycle. Any request shall set forth why it is in the best interest of the DOE to acquire utility service(s) by subcontract, *i.e.*, what the benefits are, such as economic advantage.

(c) The requirements of 48 CFR part 41, this section, and DOE directives in subseries 4540 shall be applied to a subcontract level acquisition for furnishing utility services to a facility owned or leased by DOE.

#### **Subpart 970.43—Contract Modifications**

##### **970.4302 Changes.**

##### **970.4302-1 Contract clause.**

The contracting officer shall insert the clause at 48 CFR 970.5243-1, Changes, in all management and operating contracts.

#### **Subpart 970.44—Management and Operating Contractor Purchasing**

##### **970.4400 Scope.**

This subpart prescribes policies and procedures concerning the purchasing systems and activities of management and operating contractors.

##### **970.4401 Responsibilities.**

##### **970.4401-1 General.**

(a) In the Department of Energy, overall responsibility for the oversight of the performance of management and operating contractors, including their purchasing activities, rests with the cognizant DOE contracting activity and, in particular, the Head of the Contracting Activity (HCA). Contracting officers are responsible for the management and operating contractors' conformance with this subpart and the applicable terms and conditions of their contracts, and for determining whether those purchasing activities provide timely and effective support to DOE programs.

(b) In carrying out their overall responsibilities, HCAs shall:

(1) Require management and operating contractors to maintain written descriptions of their individual purchasing systems and methods and further require that, upon award or extension of the contract, the entire written description be submitted to the contracting officer for review and acceptance;

(2) Require that any changes to the management and operating contractor's written description having any substantive impact upon the contractor's purchasing system and methods be submitted to the contracting officer for review and acceptance prior to issuance;

(3) Ensure the review of individual purchasing actions of certain types, or above stated dollar levels, by the contracting officer pursuant to 48 CFR Subpart 44.2 or as set forth in the contractor's approved system and methods; and

(4) Ensure that periodic appraisals of the contractor's management of all facets of the purchasing function, including compliance with the contractor's approved system and

methods, are performed by the contracting officer. Such appraisals shall be performed through either of the following methodologies:

(i) Contractor Purchasing System Reviews, conducted in accordance with 48 CFR Subpart 44.3; or

(ii) When approved by the contracting officer, contractor participation in the conduct of the Balanced Scorecard performance measurement and performance management system.

(c) In performing the reviews required by paragraphs (b)(1) and (2), and the appraisals required by paragraph (b)(4) of this subsection, HCAs shall assure that contracting officers determine that the contractors' written systems and methods are consistent with this subpart and the applicable terms and conditions of their contracts.

##### **970.4401-2 Review and approval.**

(a) The Heads of the Contracting Activities shall establish thresholds, by subcontract type and dollar level, for the review and approval of proposed subcontracting actions by each management and operating contractor under their cognizance. Such thresholds may not exceed the authority delegated to the Head of the Contracting Activity by the Senior Procurement Executive. In establishing these thresholds, the Heads of the Contracting Activities should consider such factors as the following:

(1) The nature of work to be performed under the management and operating contract;

(2) The size, experience, ability, reliability, and organization of the management and operating contractor's purchasing function;

(3) The internal controls, procedures, and organizational stature of the management and operating contractor's purchasing function; and

(4) Policies with respect to such reviews and approvals established by the Senior Procurement Executive.

(b) Prior approval shall be required for the subcontracting of any work a contractor is obligated to perform under a contract entered into under section 41, entitled Production of Special Nuclear Material, of the Atomic Energy Act of 1954, as amended.

(c) The Heads of the Contracting Activities shall take such action as may be required to insure compliance with the procedure for purchasing from contractor-affiliated sources or the purchase of specific items, or classes of items, which by the terms of the contract may require DOE approval.

(d) The Heads of the Contracting Activities may raise or lower the review and approval thresholds established pursuant to paragraph (a) of this

subsection at any time. Such action may be considered upon the periodic review of the contractor's purchasing system, but in any case those adjusted thresholds may not exceed the approval authority delegated to the Head of the Contracting Activity by the Senior Procurement Executive.

(e) DOE approvals of specific proposed purchases pursuant to this Subpart shall communicate that such approval does not relieve the management and operating contractor of any obligation under its prime contract with DOE; is given without prejudice to any rights or claims of the Government thereunder; creates no obligation on the part of the Government to the subcontractor, and is not a predetermination of the allowability of costs to be incurred under the subcontract.

(f) Contracting officers shall assure that management and operating contractors establish and maintain subcontract files which contain those documents essential to present an accurate and adequate record of all purchasing transactions.

(g) Contracting officers shall assure that management and operating contractors document purchases in writing, setting forth the information and data used in determining that the purchases are in the best interest of the Government. The scope and detail of this documentation shall be consistent with the nature, dollar value, and complexity of the purchase.

(h) The Heads of the Contracting Activities shall assure that the contracting activity establishes and maintains files of the documents associated with the review and approval of subcontract actions subject to DOE review and approval. Those files shall include, among other necessary documentation, an appraisal of the proposed action by the contracting activity and a copy of the approving or disapproving document forwarded to the management and operating contractor, including a listing of any deficiencies, a listing of any required corrective actions, any suggestions, or other relevant comments.

#### **970.4401-3 Advance notification.**

(a) Contracting officers shall assure that the written description of the management and operating contractor's purchasing system and methods provides for advance notice to the DOE contracting officer of the proposed award of the following specified types of subcontracts, except as stated in paragraph (b) of this subsection:

(1) Pursuant to section 304(b) of the Federal Property and Administrative

Service Act of 1949, as amended (41 U.S.C. 254(b)):

(i) Cost reimbursement-type subcontracts of any award value; and

(ii) Fixed price-type subcontracts which exceed the simplified acquisition threshold, or 5 percent of the total estimated cost of the prime contract.

(2) Purchases from contractor-affiliated sources over a value established by the HCA.

(b) Pursuant to section 602(d)(13) of the Act (40 U.S.C. 474(13)) referred to in paragraph (a) of this section, the advance notification requirement for the types of purchases listed in paragraphs (a) (1) and (2) of this subsection shall not apply to subcontracts relating to functions derived from the Atomic Energy Commission.

(c) The advance notice shall contain, at a minimum, a description of work, estimated cost, type of contract or reimbursement provisions, and extent of competition, or justification for a noncompetitive purchase procurement. The contracting officer may at any time request additional information that must be furnished promptly and prior to award of the subcontract.

#### **970.4402 Contractor purchasing system.**

##### **970.4402-1 Policy.**

(a) DOE contracts for the management and operation of its facilities, the design and production of nuclear weapons, energy research and development, and the performance of other services. These management and operating (M&O) contractors have been selected for their technical and managerial expertise and are expected to bring to bear these technical and managerial skills to accomplish the significant Federal mission(s) described in their contracts with, and work plans approved by, DOE.

(b) Purchasing done by management and operating contractors is one area in which the particular skills of the contractors will be brought to bear in order to more readily accomplish the contractors' assigned missions. The contracting procedures of the contractor's organization, therefore, form the basis for the development of a purchasing system and methods that will comply with its contract with DOE and this subpart.

##### **970.4402-2 General requirements.**

The following shall apply to the purchasing systems of management and operating contractors:

(a) The objective of a management and operating contractor's purchasing system is to deliver to its customers on a timely basis those best value products

and services necessary to accomplish the purposes of the Government's contract. To achieve this objective, contractors are expected to use their experience, expertise and initiative consistent with this subpart.

(b) The purchasing systems and methods used by management and operating contractors shall be well-defined, consistently applied, and shall follow purchasing practices appropriate for the requirement and dollar value of the purchase. It is anticipated that purchasing practices and procedures will vary among contractors and according to the type and kinds of purchases to be made.

(c) Contractor purchases are not Federal procurements, and are not directly subject to the Federal Acquisition Regulations in 48 CFR. Nonetheless, certain Federal laws, Executive Orders, and regulations may affect contractor purchasing, as required by statute, regulation, or contract terms and conditions.

(d) Contractor purchasing systems shall identify and apply the best in commercial purchasing practices and procedures (although nothing precludes the adoption of Federal procurement practices and procedures) to achieve system objectives. Where specific requirements do not otherwise apply, the contractor purchasing system shall provide for appropriate measures to ensure the:

(1) Acquisition of quality products and services at fair and reasonable prices;

(2) Use of capable and reliable subcontractors who either:

(i) Have track records of successful past performance, or

(ii) Can demonstrate a current superior ability to perform;

(3) Minimization of acquisition lead-time and administrative costs of purchasing;

(4) Use of effective competitive techniques;

(5) Reduction of performance risks associated with subcontractors, and facilitation of quality relationships which can include techniques such as partnering agreements, ombudsmen, and alternative disputes procedures;

(6) Use of self-assessment and benchmarking techniques to support continuous improvement in purchasing;

(7) Maintenance of the highest professional and ethical standards;

(8) Maintenance of file documentation appropriate to the value of the purchase and which is adequate to establish the propriety of the transaction and the price paid; and

(9) Maximization of opportunities for small business, HUBZone small

business, small disadvantaged business, and woman-owned small business concerns to participate in contract performance.

**970.4402-3 Purchasing from contractor-affiliated sources.**

(a) A management and operating contractor may purchase from sources affiliated with the contractor (any division, subsidiary, or affiliate of the contractor or its parent company) in the same manner as from other sources, provided:

(1) The management and operating contractor's purchasing function is independent of the proposed contractor-affiliated source;

(2) The same terms and conditions would apply if the purchase were from a third party;

(3) Award is made in accordance with policies and procedures designed to permit effective competition which have been approved by the contracting officer. (This requirement for competition shall not preclude acquisition of technical services from contractor-affiliated entities where those entities have a special expertise, and the basis therefor is documented.); and

(4) The award is legally enforceable where the entities are separately incorporated.

(b) Subcontracts for performance of contract work itself (as distinguished from the purchase of supplies and services needed in connection with the performance of work) require DOE authorization and may involve an adjustment of the contractor's fee, if any. If the management and operating contractor seeks authorization to have some part of the contract work performed by a contractor-affiliated source, and that contractor's performance of that work was a factor in the negotiated fee, DOE approval would normally require:

(1) That the contractor-affiliated source perform such work without fee or profit, or

(2) An equitable downward adjustment to the management and operating contractor's fee, if any.

(c) Determination on cost of money allowance as prescribed at 48 CFR 31.205-10 shall be treated as follows:

(1) When a purchase from a contractor-affiliated source results from competition and is in accord with provisions and conditions of paragraphs (a)(1) through (a)(4) of this subsection, the contractor-affiliated source may include cost of money as an allowable element of the costs of its goods or services supplied to the contractor; provided:

(i) The purchase is based on cost as set forth in 48 CFR 970.3102-3-21 and

(ii) The cost of money amount is computed in accordance with 48 CFR 31.205-10 and related procedures (see 48 CFR 970.30).

(2) When a purchase from a contractor-affiliated source is made non-competitively, cost of money shall not be considered an allowable element of the cost of the contractor-affiliated source purchase.

**970.4402-4 Nuclear material transfers.**

(a) Management and operating contractors, in preparing subcontracts or other agreements in which monetary payments or credits depend on the quantity and quality of nuclear material, shall be required to assure that each such subcontract or agreement contains a:

(1) Description of the material to be transferred;

(2) Provision specifying the method by which the quantities are to be measured and reported;

(3) Provision specifying the procedures to be used in resolving any differences arising as a result of such measurements;

(4) Provision for the use of an independent third party as an umpire to settle unresolved differences in the analytical samples; and

(5) Provision specifying in detail which party shall bear the costs of resolving a difference and what constitutes such costs.

(b) The provisions providing for resolution of measurement differences must be such that resolution is always accomplished, while at the same time minimizing any advantage one party may have over the other.

**970.4403 Contract clause.**

The contracting officer shall insert the clause at 970.5244-1, Contractor Purchasing System, in all management and operating contracts.

**Subpart 970.45—Government Property**

**970.4501 General.**

**970.4501-1 Contract clause.**

(a) The contracting officer shall insert the clause at 970.5245-1, Property, in management and operating contracts. Paragraph (f)(1)(iii) of the clause applies to a non-profit contractor only to the extent specifically provided in the individual contract. Specific managerial personnel may be listed in paragraph (j), provided their listing is consistent with the clause and the DEAR.

(b) The contracting officer shall insert the basic clause with its Alternate I in contracts with nonprofit contractors.

**Subpart 970.49—Termination of Contracts**

**970.4905 Contract termination clause.**

**970.4905-1 Termination for convenience of the Government and default.**

(a) The contracting officer shall include the clause at 48 CFR 52.249-6, Termination (Cost Reimbursement), as modified pursuant to paragraph (b) of this subsection, in all cost-reimbursement management and operating contracts, regardless of whether the contract is for production, or research and development with an educational or nonprofit institution.

(b) The contracting officer shall modify paragraph (i) of the clause to insert "as supplemented in Subpart 970.31 of the Department of Energy Acquisition Regulation," after the phrase, "Part 31 of the Federal Acquisition Regulation."

**Subpart 970.50—Extraordinary Contractual Actions**

**970.5070 Indemnification.**

**970.5070-1 Scope and applicability.**

(a) Section 170d. of the Atomic Energy Act of 1954, as amended, requires DOE to enter into agreements of indemnity with contractors whose work involves the risk of public liability for the occurrence of a nuclear incident or precautionary evacuation.

(b) Details of such indemnification are discussed at 48 CFR 950.70.

**970.5070-2 General.**

DOE contractors with whom statutory nuclear hazards indemnity agreements under the authority of section 170d. of the Atomic Energy Act of 1954, as amended, are executed will not normally be required or permitted to furnish financial protection by purchase of insurance to cover public liability for nuclear incidents. However, if authorized by the DOE Headquarters office having responsibility for contractor casualty insurance programs, DOE contractors may be:

(a) Permitted to furnish financial protection to themselves, or

(b) Permitted to continue to carry such insurance at cost to the Government if they currently maintain insurance for such liability.

**970.5070-3 Contract clauses.**

(a) The clause at 48 CFR 952.250-70, Nuclear Hazards Indemnity Agreement, shall be included in all management and operating contracts involving the risk of public liability for the occurrence of a nuclear incident or precautionary evacuation arising out of or in

connection with the contract work, including such events caused by a product delivered to a DOE-owned, facility for use by DOE or its contractors. The clause at 48 CFR 952.250–70 also shall be included in any management and operating contract for the design of a DOE facility, the construction or operation of which may involve the risk of public liability for a nuclear incident or a precautionary evacuation.

(b) The clause at 48 CFR 952.250–70 shall not be included in contracts in which the contractor is subject to Nuclear Regulatory Commission (NRC) financial protection requirements under section 170b. of the Act or NRC agreements of indemnification under section 170 c. or k. of the Act for activities to be performed under the contract.

### **Subpart 970.52—Solicitation Provisions and Contract Clauses for Management and Operating Contracts**

#### **970.5200 Scope of subpart.**

This subpart prescribes solicitation provisions and contract clauses for use in management and operating contracts. The provisions and clauses contained in this subpart supplement the provisions and clauses prescribed in the FAR and in other parts of the DEAR, and, pursuant to the individual provision or clause prescription, are to be used in addition to or in place of such clauses. To assist Departmental contracting personnel in determining the applicability of FAR and DEAR clauses to management and operating contracts, additional guidance is published and made available by the Office of Procurement and Assistance Policy, within the Headquarters procurement organization.

#### **970.5201 Text of provisions and clauses.**

##### **970.5203–1 Management controls**

As prescribed in 48 CFR 970.0370–2(a), insert the following clause:  
Management Controls (Month and Year TBE)

(a)(1) The contractor shall be responsible for maintaining, as an integral part of its organization, effective systems of management controls for both administrative and programmatic functions. Management controls comprise the plan of organization, methods and procedures adopted by management to reasonably ensure that: the mission and functions assigned to the contractor are properly executed; efficient and effective operations are promoted; resources are safeguarded against theft, fraud, waste, and unauthorized use; all obligations and costs that are incurred under the contract are in compliance with applicable clauses and other current terms, conditions, and intended purposes; all revenues, expenditures, and all other transactions and

assets are properly recorded, managed, and reported; and financial, statistical, and other reports necessary to maintain accountability and managerial control are accurate, reliable, and timely.

(2) The systems of controls employed by the contractor shall be documented and satisfactory to DOE, and shall be developed and maintained in accordance with the Comptroller General's standards for internal controls, as set forth in General Accounting Office Policy and Procedures Manual for Guidance to Federal Agencies, (Oct 1984), as amended.

(3) Such systems shall be an integral part of the contractor's management functions, including defining specific roles and responsibilities for each level of management, and holding employees accountable for the adequacy of the management systems and internal controls in their areas of assigned responsibility.

(4) The contractor shall, as part of the internal audit program required elsewhere in this contract, periodically review the management systems and internal controls employed in programs and administrative areas to ensure that they are adequate to provide reasonable assurance that the objectives of the system are being accomplished and that these systems and controls are working effectively.

(b) The contractor shall be responsible for maintaining, as a part of its operational responsibilities, a baseline quality assurance program that implements documented performance, quality standards, and control and assessment techniques.

(End of Clause)

##### **970.5203–2 Performance improvement and collaboration.**

As prescribed in 48 CFR 970.0370–2(b), insert the following clause:

Performance Improvement and Collaboration (Month and Year TBE)

(a) The contractor agrees that it shall affirmatively identify, evaluate, and institute practices, where appropriate, that will improve performance in the areas of environmental and health, safety, scientific and technical, security, business and administrative, and any other areas of performance in the management and operation of the contract. This may entail the alteration of existing practices or the institution of new procedures to more effectively or efficiently perform any aspect of contract performance or reduce overall cost of operation under the contract. Such improvements may result from changes in organization, simplification of systems while retaining necessary controls, or any other approaches consistent with the statement of work and performance measures of this contract.

(b) The contractor agrees to work collaboratively with the Department, all other management and operating, DOE major facilities management contractors and affiliated contractors which manage or operate DOE sites or facilities for the following purposes: (i) to exchange information generally, (ii) to evaluate concepts that may be of benefit in resolving

common issues, in confronting common problems, or in reducing costs of operations, and (iii) to otherwise identify and implement DOE-complex-wide management improvements discussed in paragraph (a). In doing so, it shall also affirmatively provide information relating to its management improvements to such contractors, including lessons learned, subject to security considerations and the protection of data proprietary to third parties.

(c) The contractor may consult with the contracting officer in those instances in which improvements being considered pursuant to paragraph (a) involve the cooperation of the DOE. The contractor may request the assistance of the contracting officer in the communication of the success of improvements to other management and operating contractors in accordance with paragraph (b) of this clause.

(d) The contractor shall notify the contracting officer and seek approval where necessary to fulfill its obligations under the contract. Compliance with this clause in no way alters the obligations of the Contractor under any other provision of this contract.

(End of Clause)

##### **970.5203–3 Contractor's organization.**

As prescribed in 48 CFR 970.0371–9, insert the following clause:

Contractor's Organization (Month and Year TBE)

(a) *Organization chart.* As promptly as possible after the execution of this contract, the contractor shall furnish to the contracting officer a chart showing the names, duties, and organization of key personnel (see 48 CFR 952.215–70) to be employed in connection with the work, and shall furnish from time to time supplementary information reflecting changes therein.

(b) *Supervisory representative of contractor.* Unless otherwise directed by the contracting officer, a competent full-time resident supervisory representative of the contractor satisfactory to the contracting officer shall be in charge of the work at the site, and any work off-site, at all times.

(c) *Control of employees.* The contractor shall be responsible for maintaining satisfactory standards of employee competency, conduct, and integrity and shall be responsible for taking such disciplinary action with respect to its employees as may be necessary. In the event the contractor fails to remove any employee from the contract work whom DOE deems incompetent, careless, or insubordinate, or whose continued employment on the work is deemed by DOE to be contrary to the public interest, the Government reserves the right to require the contractor to remove the employee.

(d) *Standards and procedures.* The contractor shall establish such standards and procedures as are necessary to implement the requirements set forth in 48 CFR 970.0371. Such standards and procedures shall be subject to the approval of the contracting officer.

(End of Clause)

**970.5204-1 Counterintelligence.**

(a) As prescribed in 48 CFR 970.0404-4(a), insert the following clause in contracts containing the clauses at 48 CFR 952.204-2, Security, and 48 CFR 952.204-70, Classification/Declassification:

Counterintelligence (Month and Year TBE)

(a) The contractor shall take all reasonable precautions in the work under this contract to protect DOE programs, facilities, technology, personnel, unclassified sensitive information and classified matter from foreign intelligence threats and activities conducted for governmental or industrial purposes, in accordance with DOE Order 5670.3, Counterintelligence Program; Executive Order 12333, U.S. Intelligence Activities; and other pertinent national and Departmental Counterintelligence requirements.

(b) The contractor shall appoint a qualified employee(s) to function as the Contractor Counterintelligence Officer. The Contractor Counterintelligence Officer will be responsible for conducting defensive Counterintelligence briefings and debriefings of employees traveling to foreign countries or interacting with foreign nationals; providing thoroughly documented written reports relative to targeting, suspicious activity and other matters of Counterintelligence interest; immediately reporting targeting, suspicious activity and other Counterintelligence concerns to the DOE Headquarters Counterintelligence Division; and providing assistance to other elements of the U.S. Intelligence Community as stated in the aforementioned Executive Order, the DOE Counterintelligence Order, and other pertinent national and Departmental Counterintelligence requirements.  
(End of Clause)

**970.5204-2 Laws, regulations, and DOE directives.**

As prescribed in 48 CFR 970.0470-2, insert the following clause:

Laws, Regulations, and DOE Directives  
(Month and Year TBE)

(a) In performing work under this contract, the contractor shall comply with the requirements of applicable Federal, State, and local laws and regulations (including DOE regulations), unless relief has been granted in writing by the appropriate regulatory agency. A List of Applicable Laws and Regulations (List A) may be appended to this contract for information purposes. Omission of any applicable law or regulation from List A does not affect the obligation of the contractor to comply with such law or regulation pursuant to this paragraph.

(b) In performing work under this contract, the contractor shall comply with the requirements of those Department of Energy directives, or parts thereof, identified in the List of Applicable Directives (List B) appended to this contract. Except as otherwise provided for in paragraph (d) of this clause, the contracting officer may, from time to time and at any time, revise List B by unilateral modification to the contract to add, modify, or delete specific requirements.

Prior to revising List B, the contracting officer shall notify the contractor in writing of the Department's intent to revise List B and provide the contractor with the opportunity to assess the effect of the contractor's compliance with the revised list on contract cost and funding, technical performance, and schedule; and identify any potential inconsistencies between the revised list and the other terms and conditions of the contract. Within 30 days after receipt of the contracting officer's notice, the contractor shall advise the contracting officer in writing of the potential impact of the contractor's compliance with the revised list. Based on the information provided by the contractor and any other information available, the contracting officer shall decide whether to revise List B and so advise the contractor not later than 30 days prior to the effective date of the revision of List B. The contractor and the contracting officer shall identify and, if appropriate, agree to any changes to other contract terms and conditions, including cost and schedule, associated with the revision of List B pursuant to the clause of this contract entitled, "Changes."

(c) Environmental, safety, and health (ES&H) requirements appropriate for work conducted under this contract may be determined by a DOE approved process to evaluate the work and the associated hazards and identify an appropriately tailored set of standards, practices, and controls, such as a tailoring process included in a DOE approved Safety Management System implemented under the clause entitled "Integration of Environment, Safety, and Health into Work Planning and Execution." When such a process is used, the set of tailored (ES&H) requirements, as approved by DOE pursuant to the process, shall be incorporated into List B as contract requirements with full force and effect. These requirements shall supersede, in whole or in part, the contractual environmental, safety, and health requirements previously made applicable to the contract by List B. If the tailored set of requirements identifies an alternative requirement varying from an ES&H requirement of an applicable law or regulation, the contractor shall request an exemption or other appropriate regulatory relief specified in the regulation.

(d) Except as otherwise directed by the contracting officer, the contractor shall procure all necessary permits or licenses required for the performance of work under this contract.

(e) Regardless of the performer of the work, the contractor is responsible for compliance with the requirements of this clause. The contractor is responsible for flowing down the requirements of this clause to subcontracts at any tier to the extent necessary to ensure the contractor's compliance with the requirements.

(End of Clause)

**970.5204-3 Access to and ownership of records.**

As prescribed in 48 CFR 970.0407-1-3, insert the following clause:

Access to and Ownership of Records  
(Month and Year TBE)

(a) Government-owned records. Except as provided in paragraph (b) of this clause, all records acquired or generated by the contractor in its performance of this contract shall be the property of the Government and shall be delivered to the Government or otherwise disposed of by the contractor either as the contracting officer may from time to time direct during the process of the work or, in any event, as the contracting officer shall direct upon completion or termination of the contract.

(b) Contractor-owned records. The following records are considered the property of the contractor and are not within the scope of paragraph (a) of this clause. [The contracting officer shall identify which of the following categories of records will be included in the clause.]

(1) Employment-related records (such as workers' compensation files; employee relations records, records on salary and employee benefits; drug testing records, labor negotiation records; records on ethics, employee concerns, and other employee related investigations conducted under an expectation of confidentiality; employee assistance program records; and personnel and medical/health-related records and similar files), and non-employee patient medical/health related records, except for those records described by the contract as being maintained in Privacy Act systems of records.

(2) Confidential contractor financial information, and correspondence between the contractor and other segments of the contractor located away from the DOE facility (*i.e.*, the contractor's corporate headquarters);

(3) Records relating to any procurement action by the contractor, except for records that under 48 CFR 970.5232-3, Accounts, Records, and Inspection, are described as the property of the Government; and

(4) Legal records, including legal opinions, litigation files, and documents covered by the attorney-client and attorney work product privileges; and

(5) The following categories of records maintained pursuant to the technology transfer clause of this contract:

(i) Executed license agreements, including exhibits or appendices containing information on royalties, royalty rates, other financial information, or commercialization plans, and all related documents, notes and correspondence.

(ii) The contractor's protected Cooperative Research and Development Agreement (CRADA) information and appendices to a CRADA that contain licensing terms and conditions, or royalty or royalty rate information.

(iii) Patent, copyright, mask work, and trademark application files and related contractor invention disclosures, documents and correspondence, where the contractor has elected rights or has permission to assert rights and has not relinquished such rights or turned such rights over to the Government.

(c) Contract completion or termination. In the event of completion or termination of this contract, copies of any of the contractor-owned records identified in paragraph (b) of this clause, upon the request of the Government, shall be delivered to DOE or its

designees, including successor contractors. Upon delivery, title to such records shall vest in DOE or its designees, and such records shall be protected in accordance with applicable federal laws (including the Privacy Act), as appropriate.

(d) Inspection, copying, and audit of records. All records acquired or generated by the contractor under this contract in the possession of the contractor, including those described at paragraph (b) of this clause, shall be subject to inspection, copying, and audit by the Government or its designees at all reasonable times, and the contractor shall afford the Government or its designees reasonable facilities for such inspection, copying, and audit; provided, however, that upon request by the contracting officer, the contractor shall deliver such records to a location specified by the contracting officer for inspection, copying, and audit. The Government or its designees shall use such records in accordance with applicable federal laws (including the Privacy Act), as appropriate.

(e) Applicability. Paragraphs (b), (c), and (d) of this clause apply to all records without regard to the date or origination of such records.

(f) Records retention standards. Special records retention standards, described at DOE Order 200.1, Information Management Program (version in effect on effective date of contract), are applicable for the classes of records described therein, whether or not the records are owned by the Government or the contractor. In addition, the contractor shall retain individual radiation exposure records generated in the performance of work under this contract until DOE authorizes disposal. The Government may waive application of these record retention schedules, if, upon termination or completion of the contract, the Government exercises its right under paragraph (c) of this clause to obtain copies and delivery of records described in paragraphs (a) and (b) of this clause.

(g) Subcontracts. The contractor shall include the requirements of this clause in all subcontracts that are of a cost-reimbursement type if any of the following factors is present:

(1) The value of the subcontract is greater than \$2 million (unless specifically waived by the contracting officer);

(2) The contracting officer determines that the subcontract is, or involves, a critical task related to the contract; or

(3) The subcontract includes 48 CFR 970.5223-1, Integration of Environment, Safety, and Health into Work Planning and Execution, or similar clause.

(End of Clause)

#### **970.5208-1 Printing.**

As prescribed in 48 CFR 970.0808-3, insert the following clause:

Printing (Month and Year TBE)

(a) To the extent that duplicating or printing services may be required in the performance of this contract, the Contractor shall provide or secure such services in accordance with the Government Printing and Binding Regulations, Title 44 of the U.S. Code, and DOE Directives relative thereto.

(b) The term "Printing" includes the following processes: composition,

platemaking, presswork, binding, microform publishing, or the end items produced by such processes. Provided, however, that performance of a requirement under this contract involving the duplication of less than 5,000 copies of a single page, or no more than 25,000 units in the aggregate of multiple pages, will not be deemed to be printing.

(c) Printing services not obtained in compliance with this guidance shall result in the cost of such printing being disallowed.

(d) The Contractor shall include the substance of this clause in all subcontracts hereunder which require printing (as that term is defined in Title I of the U.S. Government Printing and Binding Regulations).

(End of Clause)

#### **970.5209-1 Requirement for guarantee of performance.**

As prescribed in 48 CFR 970.0970-2, the contracting officer shall insert the following provision in solicitations for management and operating contracts:

Requirement for Guarantee of Performance (Month and Year TBE)

The successful offeror is required by other provisions of this solicitation to organize a dedicated corporate entity to carry out the work under the contract to be awarded as a result of this solicitation. The successful offeror will be required, as part of the determination of responsibility of the newly organized, dedicated corporate entity and as a condition of the award of the contract to that entity, to furnish a guarantee of that entity's performance. That guarantee of performance must be satisfactory in all respects to the Department of Energy.

(End of Clause)

#### **970.5215-1 Total available fee: Base fee amount and performance fee amount.**

As prescribed in 48 CFR 970.1504-5(a), insert the following clause. The clause should be tailored to reflect the contract's actual inclusion of base fee amount and performance fee amount.

Total Available Fee: Base Fee Amount and Performance Fee Amount (Month and Year TBE)

(a) Total available fee. Total available fee, consisting of a base fee amount (which may be zero) and a performance fee amount (consisting of an incentive fee component for objective performance requirements, an award fee component for subjective performance requirements, or both) determined in accordance with the provisions of this clause, is available for payment in accordance with the clause of this contract entitled, "Payments and advances."

(b) Fee Negotiations. Prior to the beginning of each fiscal year under this contract, or other appropriate period as mutually agreed upon and, if exceeding one year, approved by the Senior Procurement Executive, or designee, the contracting officer and Contractor shall enter into negotiation of the requirements for the year or appropriate period, including the evaluation areas and individual requirements subject to

incentives, the total available fee, and the allocation of fee. The contracting officer shall modify this contract at the conclusion of each negotiation to reflect the negotiated requirements, evaluation areas and individual requirements subject to incentives, the total available fee, and the allocation of fee. In the event the parties fail to agree on the requirements, the evaluation areas and individual requirements subject to incentives, the total available fee, or the allocation of fee, a unilateral determination will be made by the contracting officer. The total available fee amount shall be allocated to a twelve month cycle composed of one or more evaluation periods, or such longer period as may be mutually agreed to between the parties and approved by the Senior Procurement Executive, or designee.

(c) Determination of Total Available Fee Amount Earned. (1) The Government shall, at the conclusion of each specified evaluation period, evaluate the contractor's performance of all requirements, including performance based incentives completed during the period, and determine the total available fee amount earned. At the contracting officer's discretion, evaluation of incentivized performance may occur at the scheduled completion of specific incentivized requirements.

(2) The DOE Operations/Field Office Manager, or designee, will be (insert title of DOE Operations/Field Office Manager, or designee). The contractor agrees that the determination as to the total available fee earned is a unilateral determination made by the DOE Operations/Field Office Manager, or designee.

(3) The evaluation of contractor performance shall be in accordance with the Performance Evaluation and Measurement Plan(s) described in subparagraph (d) of this clause unless otherwise set forth in the contract. The Contractor shall be promptly advised in writing of the fee determination, and the basis of the fee determination. In the event that the contractor's performance is considered to be less than the level of performance set forth in the Statement of Work, as amended to include the current Work Authorization Directive or similar document, for any contract requirement, it will be considered by the DOE Operations/Field Office Manager, or designee, who may at his/her discretion adjust the fee determination to reflect such performance. Any such adjustment shall be in accordance with the clause entitled, "Conditional Payment of Fee, Profit, or Incentives" if contained in the contract.

(d) Performance Evaluation and Measurement Plan(s). To the extent not set forth elsewhere in the contract:

(1) The Government shall establish a Performance Evaluation and Measurement Plan(s) upon which the determination of the total available fee amount earned shall be based. The Performance Evaluation and Measurement Plan(s) will address all of the requirements of contract performance specified in the contract directly or by reference. A copy of the Performance Evaluation and Measurement Plan(s) shall be provided to the Contractor:

(i) prior to the start of an evaluation period if the requirements, evaluation areas, specific

incentives, amount of fee, and allocation of fee to such evaluation areas and specific incentives have been mutually agreed to by the parties; or

(ii) not later than thirty days prior to the scheduled start date of the evaluation period, if the requirements, evaluation areas, specific incentives, amount of fee, and allocation of fee to such evaluation areas and specific incentives have been unilaterally established by the contracting officer.

(2) The Performance Evaluation and Measurement Plan(s) will set forth the criteria upon which the Contractor will be evaluated relating to any technical, schedule, management, and/or cost objectives selected for evaluation. Such criteria should be objective, but may also include subjective criteria. The Plan(s) shall also set forth the method by which the total available fee amount will be allocated and the amount earned determined.

(3) The Performance Evaluation and Measurement Plan(s) may, consistent with the contract statement of work, be revised during the period of performance. The contracting officer shall notify the contractor:

(i) of such unilateral changes at least ninety calendar days prior to the end of the affected evaluation period and at least thirty calendar days prior to the effective date of the change;

(ii) of such bilateral changes at least sixty calendar days prior to the end of the affected evaluation period; or

(iii) if such change, whether unilateral or bilateral, is urgent and high priority, at least thirty calendar days prior to the end of the evaluation period.

(e) Schedule for total available fee amount earned determinations. The DOE Operations/Field Office Manager, or designee, shall issue the final total available fee amount earned determination in accordance with the schedule set forth in the Performance Evaluation and Measurement Plan(s). However, a determination must be made within sixty calendar days after the receipt by the contracting officer of the Contractor's self-assessment, if one is required or permitted by paragraph (f) of this clause, or seventy calendar days after the end of the evaluation period, whichever is later. If the contracting officer evaluates the Contractor's performance of specific requirements on their completion, the payment of any earned fee amount must be made within seventy calendar days (or such other time period as mutually agreed to between the contracting officer and the Contractor) after such completion. If the determination is delayed beyond that date, the Contractor shall be entitled to interest on the determined total available fee amount earned at the rate established by the Secretary of the Treasury under section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611) that is in effect on the payment date. This rate is referred to as the "Renegotiation Board Interest Rate," and is published in the **Federal Register** semiannually on or about January 1 and July 1. The interest on any late total available fee amount earned determination will accrue daily and be compounded in 30-day increments inclusive from the first day after the schedule determination date through the actual date the determination is issued. That

is, interest accrued at the end of any 30-day period will be added to the determined amount of fee earned and be subject to interest if not paid in the succeeding 30-day period.

(End of Clause)

Alternate I (Month and Year TBE). As prescribed in 48 CFR 970.1504-5(a)(1), when the award fee cycle consists of two or more evaluation periods, add the following to paragraph (c):

(4) At the sole discretion of the Government, unearned total available fee amounts may be carried over from one evaluation period to the next, so long as the periods are within the same award fee cycle.

Alternate II (Month and Year TBE). As prescribed in 48 CFR 970.1504-5(a)(2), when the award fee cycle consists of one evaluation period, add the following to paragraph (c):

(4) Award fee not earned during the evaluation period shall not be allocated to future evaluation periods.

Alternate III (Month and Year TBE). As prescribed in 48 CFR 970.1504-5(a)(3), when the DOE Operations/Field Office Manager, or designee, requires the contractor to submit a self-assessment, add the following as paragraph (f):

(f) Contractor self-assessment. Following each evaluation period, the Contractor shall submit a self-assessment within (*Insert Number*) calendar days after the end of the period. This self-assessment shall address both the strengths and weaknesses of the Contractor's performance during the evaluation period. Where deficiencies in performance are noted, the Contractor shall describe the actions planned or taken to correct such deficiencies and avoid their recurrence. The DOE Operations/Field Office Manager, or designee, will review the Contractor's self-assessment, if submitted, as part of its independent evaluation of the contractor's management during the period. A self-assessment, in and of itself may not be the only basis for the award fee determination.

Alternate IV (Month and Year TBE). As prescribed in 48 CFR 970.1504-5(a)(4), when the DOE Operations/Field Office Manager, or designee, permits the contractor to submit a self-assessment at the contractor's option, add the following text as paragraph (f):

(f) Contractor self-assessment. Following each evaluation period, the Contractor may submit a self-assessment, provided such assessment is submitted within (*Insert Number*) calendar days after the end of the period. This self-assessment shall address both the strengths and weaknesses of the Contractor's performance during the evaluation period. Where deficiencies in performance are noted, the Contractor shall describe the actions planned or taken to correct such deficiencies and avoid their recurrence. The DOE Operations/Field Office Manager, or designee, will review the Contractor's self-assessment, if submitted, as part of its independent evaluation of the Contractor's management during the period. A self-assessment, in and of itself may not be the only basis for the award fee determination.

## 970.5215-2 Make-or-buy plan.

As prescribed in 48 CFR 970.1504-5(b), insert the following clause:

Make-or-Buy Plan (Month and Year TBE)

(a) *Definitions.* *Buy item* means a work activity, supply, or service to be produced or performed by an outside source, including a subcontractor or an affiliate, subsidiary, or division of the contractor.

*Make item* means a work activity, supply, or service to be produced or performed by the contractor using its personnel and other resources at the Department of Energy facility or site.

*Make-or-buy plan* means a contractor's written program for the contract that identifies work efforts or requirements that either are "make items" or "buy items".

(b) *Make-or-buy plan.* The contractor shall develop and implement a make-or-buy plan that establishes a preference for providing supplies and services on a least-cost basis, subject to any specific make or buy criteria identified in the contract or otherwise provided by the contracting officer. In developing and implementing its make-or-buy plan, the contractor agrees to assess subcontracting opportunities and implement subcontracting decisions in accordance with the following:

(1) The contractor shall conduct internal productivity improvement and cost-reduction programs so that in-house performance options can be made more efficient and cost-effective.

(2) The contractor shall consider subcontracting opportunities with the maximum practicable regard for open communications with potentially affected employees and their representatives. Similarly, a contractor shall communicate its plans, activities, cost-benefit analyses, and decisions to those stakeholders, including representatives of the community and local businesses, likely to be affected by such actions.

(c) *Submission and approval.* For new contract awards, the contractor shall submit an initial make-or-buy plan, for approval, within 180 days after contract award. If the existing contract is to be extended, the contractor shall submit a make-or-buy plan for review and approval at least 90 days prior to the commencement of the negotiations for the extension. The following documentation shall be prepared and submitted:

(1) A description of each work item, and if appropriate, the identification of the associated Work Authorization or Work Breakdown Structure element;

(2) The categorization of each work item as "must make," "must buy," or "can make or buy," with the reasons for such categorization in consideration of the program specific make or buy criteria (including least cost considerations). For non-core capabilities categorized as "must make," a cost/benefit analysis must be performed for each item if:

(i) The contractor is not the least-cost performer, and

(ii) A program specific make-or-buy criterion does not otherwise justify a "must make" categorization;

(3) A decision to either "make" or "buy" in consideration of the program specific

make or buy criteria (including least cost considerations) for work effort categorized as "can make or buy";

(4) Identification of potential suppliers and subcontractors, if known, and their location and size status;

(5) A recommendation to defer a make or buy decision where categorization of an identifiable work effort is impracticable at the time of initial development of the plan and a schedule for future re-evaluation;

(6) A description of the impact of a change in current practice of making or buying on the existing work force; and

(7) Any additional information appropriate to support and explain the plan.

(d) *Conduct of operations.* Once a make-or-buy plan is approved, the contractor shall perform in accordance with the plan.

(e) *Changes to the make-or-buy plan.* The make-or-buy plan established in accordance with paragraph (b) of this clause shall remain in effect for the term of the contract, unless:

(1) A lesser period is provided either for the total plan or for individual items or work effort;

(2) The circumstances supporting the make-or-buy decisions change, or

(3) New work is identified.

At least annually, the contractor shall review its approved make-or-buy plan to ensure that it reflects current conditions. Changes to the approved make-or-buy plan shall be submitted in advance of the effective date of the proposed change in sufficient time to permit evaluation and review. Changes shall be submitted in accordance with the instructions provided by the contracting officer. Modification of the make-or-buy plan to incorporate proposed changes or additions shall be effective upon the contractor's receipt of the contracting officer's written approval.

(End of Clause)

#### **970.5215-3 Conditional payment of fee, profit, or incentives.**

As prescribed in 48 CFR 970.1504-5(c), insert the following clause:

#### **Conditional Payment of Fee, Profit, or Incentives (Month and Year TBE)**

In order for the Contractor to receive all otherwise earned fee, fixed fee, profit, or share of cost savings under the contract in an evaluation period, the Contractor must meet the minimum requirements in paragraphs (a) and (b) of this clause, and if Alternate I is applicable, (a) through (d) of this clause. If the Contractor does not meet the minimum requirements, the DOE Operations/Field Office Manager or designee may make a unilateral determination to reduce the evaluation period's otherwise earned fee, fixed fee, profit or share of cost savings as described in the following paragraphs of this clause.

(a) *Minimum requirements for Environment, Safety & Health (ES&H) Program.* The Contractor shall develop, obtain DOE approval of, and implement a Safety Management System in accordance with the provisions of the clause entitled, "Integration of Environment, Safety and Health into Work Planning and Execution,"

if included in the contract, or as otherwise agreed to with the contracting officer. The minimal performance requirements of the system will be set forth in the approved Safety Management System, or similar document. If the Contractor fails to obtain approval of the Safety Management System or fails to achieve the minimum performance requirements of the system during the evaluation period, the DOE Operations/Field Office Manager or designee, at his/her sole discretion, may reduce any otherwise earned fees, fixed fee, profit or share of cost savings for the evaluation period by an amount up to the amount earned.

(b) *Minimum requirements for catastrophic event.* If, in the performance of this contract, there is a catastrophic event (such as a fatality, or a serious workplace-related injury or illness to one or more Federal, contractor, or subcontractor employees or the general public, loss of control over classified or special nuclear material, or significant damage to the environment), the DOE Operations/Field Office Manager or designee may reduce any otherwise earned fee for the evaluation period by an amount up to the amount earned. In determining any diminution of fee, fixed fee, profit, or share of cost savings resulting from a catastrophic event, the DOE Operations/Field Office Manager or designee will consider whether willful misconduct and/or negligence contributed to the occurrence and will take into consideration any mitigating circumstances presented by the contractor or other sources.

(End of Clause)

*Alternate I (Month and Year TBE).* As prescribed in 48 CFR 970.1504-5(c), for contracts awarded on a cost-plus-award-fee, incentive fee or multiple fee basis, add the following paragraphs (c) and (d):

(c) *Minimum requirements for specified level of performance.* (1) At a minimum the Contractor must perform the following:

(i) the requirements with specific incentives at the level of performance set forth in the Statement of Work, Work Authorization Directive, or similar document unless an otherwise minimal level of performance has been established in the specific incentive;

(ii) all of the performance requirements directly related to requirements specifically incentivized at a level of performance such that the overall performance of these related requirements is at an acceptable level; and

(iii) all other requirements at a level of performance such that the total performance of the contract is not jeopardized.

(2) The evaluation of the Contractor's achievement of the level of performance shall be unilaterally determined by the contracting officer. To the extent that the Contractor fails to achieve the minimum performance levels specified in the Statement of Work, Work Authorization Directive, or similar document, during the evaluation period, the DOE Operations/Field Office Manager, or designee, may reduce any otherwise earned fee, fixed fee, profit, or shared net savings for the evaluation period. Such reduction shall not result in the total of earned fee, fixed fee, profit, or shared net savings being less than

25% of the total available fee amount. Such 25% shall include base fee, if any.

(d) *Minimum requirements for cost performance.* (1) Requirements incentivized by other than cost incentives must be performed within their specified cost constraint and must not adversely impact the costs of performing unrelated activities.

(2) The performance of requirements with a specific cost incentive must not adversely impact the costs of performing unrelated requirements.

(3) The Contractor's performance within the stipulated cost performance levels for the evaluation period shall be determined by the contracting officer. To the extent the Contractor fails to achieve the stipulated cost performance levels, the DOE Operations/Field Office Manager, or designee, at his/her sole discretion, may reduce in whole or in part any otherwise earned fee, fixed fee, profit, or shared net savings for the evaluation period. Such reduction shall not result in the total of earned fee, fixed fee, profit or shared net savings being less than 25% of the total available fee amount. Such 25% shall include base fee, if any.

#### **970.5215-4 Cost reduction.**

As prescribed in 48 CFR 970.1504-5(d), insert the following clause:

#### **Cost Reduction (Month and Year TBE)**

(a) *General.* It is the Department of Energy's (DOE's) intent to have its facilities and laboratories operated in an efficient and effective manner. To this end, the Contractor shall assess its operations and identify areas where cost reductions would bring cost efficiency to operations without adversely affecting the level of performance required by the contract. The Contractor, to the maximum extent practical, shall identify areas where cost reductions may be effected, and develop and submit Cost Reduction Proposals (CRPs) to the contracting officer. If accepted, the Contractor may share in any shared net savings from accepted CRPs in accordance with paragraph (g) of this clause.

(b) *Definitions.* *Administrative cost* is the contractor cost of developing and administering the CRP.

*Design, process, or method change* is a change to a design, process, or method which has established cost, technical and schedule baseline, is defined, and is subject to a formal control procedure. Such a change must be innovative, initiated by the contractor, and applied to a specific project or program.

*Development cost* is the Contractor cost of up-front planning, engineering, prototyping, and testing of a design, process, or method.

*DOE cost* is the Government cost incurred implementing and validating the CRP.

*Implementation cost* is the Contractor cost of tooling, facilities, documentation, etc., required to effect a design, process, or method change once it has been tested and approved.

*Net Savings* means a reduction in the total amount (to include all related costs and fee) of performing the effort where the savings revert to DOE control and may be available for deobligation. Such savings may result from a specific cost reduction effort which is

negotiated on a cost-plus-incentive-fee, fixed-price incentive, or firm-fixed-price basis, or may result directly from a design, process, or method change. They may also be savings resulting from formal or informal direction given by DOE or from changes in the mission, work scope, or routine reorganization of the Contractor due to changes in the budget.

*Shared Net Savings* are those net savings which result from:

(1) A specific cost reduction effort which is negotiated on a cost-plus-incentive-fee or fixed-price incentive basis, and is the difference between the negotiated target cost of performing an effort as negotiated and the actual allowable cost of performing that effort; or

(2) A design, process, or method change, which occurs in the fiscal year in which the change is accepted and the subsequent fiscal year, and is the difference between the estimated cost of performing an effort as originally planned and the actual allowable cost of performing that same effort utilizing a revised plan intended to reduce costs along with any Contractor development costs, implementation costs, administrative costs, and DOE costs associated with the revised plan. Administrative costs and DOE costs are only included at the discretion of the contracting officer. Savings resulting from formal or informal direction given by the DOE or changes in the mission, work scope, or routine reorganization of the Contractor due to changes in the budget are not to be considered as shared net savings for purposes of this clause and do not qualify for incentive sharing.

(c) *Procedure for submission of CRPs.* (1) CRPs for the establishment of cost-plus-incentive-fee, fixed-price incentive, or firm-fixed-price efforts or for design, process, or methods changes submitted by the Contractor shall contain, at a minimum, the following:

(i) *Current Method (Baseline)*—A verifiable description of the current scope of work, cost, and schedule to be impacted by the initiative, and supporting documentation.

(ii) *New Method (New Proposed Baseline)*—A verifiable description of the new scope of work, cost, and schedule, how the initiative will be accomplished, and supporting documentation.

(iii) *Feasibility Assessment*—A description and evaluation of the proposed initiative and benefits, risks, and impacts of implementation. This evaluation shall include an assessment of the difference between the current method (baseline) and proposed new method including all related costs.

(2) In addition, CRPs for the establishment of cost-plus-incentive-fee, fixed-price incentive, or firm-fixed-price efforts shall contain, at a minimum, the following:

(i) The proposed contractual arrangement and the justification for its use; and

(ii) A detailed cost/price estimate and supporting rationale. If the approach is proposed on an incentive basis, minimum and maximum cost estimates should be included along with any proposed sharing arrangements.

(d) *Evaluation and Decision.* All CRPs must be submitted to and approved by the contracting officer. Included in the

information provided by the CRP must be a discussion of the extent the proposed cost reduction effort may:

(1) Pose a risk to the health and safety of workers, the community, or to the environment;

(2) Result in a waiver or deviation from DOE requirements, such as DOE Orders and joint oversight agreements;

(3) Require a change in other contractual agreements;

(4) Result in significant organizational and personnel impacts;

(5) Create a negative impact on the cost, schedule, or scope of work in another area;

(6) Pose a potential negative impact on the credibility of the Contractor or the DOE; and

(7) Impact successful and timely completion of any of the work in the cost, technical, and schedule baseline.

(e) *Acceptance or Rejection of CRPs.*

Acceptance or rejection of a CRP is a unilateral determination made by the contracting officer. The contracting officer will notify the Contractor that a CRP has been accepted, rejected, or deferred within (*Insert Number*) days of receipt. The only CRPs that will be considered for acceptance are those which the Contractor can demonstrate, at a minimum, will:

(1) Result in net savings (in the sharing period if a design, process, or method change);

(2) Not reappear as costs in subsequent periods; and

(3) Not result in any impairment of essential functions.

(f) The failure of the contracting officer to notify the Contractor of the acceptance, rejection, or deferral of a CRP within the specified time shall not be construed as approval.

(g) *Adjustment to Original Estimated Cost and Fee.* If a CRP is established on a cost-plus-incentive-fee, fixed-price incentive or firm-fixed-price basis, the originally estimated cost and fee for the total effort shall be adjusted to remove the estimated cost and fee amount associated with the CRP effort.

(h) *Sharing Arrangement.* If a CRP is accepted, the Contractor may share in the shared net savings. For a CRP negotiated on a cost-plus-incentive-fee or fixed-price incentive basis, with the specific incentive arrangement (negotiated target costs, target fees, share lines, ceilings, profit, etc.) set forth in the contractual document authorizing the effort, the Contractor's share shall be the actual fee or profit resulting from such an arrangement. For a CRP negotiated as a cost savings incentive resulting from a design, process, or method change, the Contractor's share shall be a percentage, not to exceed 25% of the shared net savings. The specific percentage and sharing period shall be set forth in the contractual document.

(i) *Validation of Shared Net Savings.* The contracting officer shall validate actual shared net savings. If actual shared net savings cannot be validated, the contractor will not be entitled to a share of the net shared savings.

(j) *Relationship to Other Incentives.* Only those benefits of an accepted CRP not rewardable under other clauses of this contract shall be rewarded under this clause.

(k) *Subcontracts.* The Contractor may include a clause similar to this clause in any subcontract. In calculating any estimated shared net savings in a CRP under this contract, the Contractor's administration, development, and implementation costs shall include any subcontractor's allowable costs, and any CRP incentive payments to a subcontractor resulting from the acceptance of such CRP. The Contractor may choose any arrangement for subcontractor CRP incentive payments, provided that the payments not reduce the DOE's share of shared net savings. (End of Clause)

#### 970.5215-5 Limitation on fee.

As prescribed in 48 CFR 970.1504-5(e), the contracting officer shall insert the following provision:

##### Limitation on Fee (Month and Year TBE)

(a) For the purpose of this solicitation, fee amounts shall not exceed the total available fee allowed by the fee policy at 48 CFR 970.1504-1-1, or as specifically stated elsewhere in the solicitation.

(b) The Government reserves the unilateral right, in the event an offeror's proposal is selected for award, to limit: fixed fee to not exceed an amount established pursuant to 48 CFR 970.1504-1-5; and total available fee to not exceed an amount established pursuant to 48 CFR 970.1504-1-9; or fixed fee or total available fee to an amount as specifically stated elsewhere in the solicitation.

(End of Clause)

#### 970.5222-1 Collective bargaining agreements—management and operating contracts.

As prescribed in 48 CFR 970.2201-1-3, insert the following clause:

##### Collective Bargaining Agreements—Management and Operating Contracts (Month and Year TBE)

When negotiating collective bargaining agreements applicable to the work force under this contract, the Contractor shall use its best efforts to ensure such agreements contain provisions designed to assure continuity of services. All such agreements entered into during the contract period of performance should provide that grievances and disputes involving the interpretation or application of the agreement will be settled without resorting to strike, lockout, or other interruption of normal operations. For this purpose, each collective bargaining agreement should provide an effective grievance procedure with arbitration as its final step, unless the parties mutually agree upon some other method of assuring continuity of operations. As part of such agreements, management and labor should agree to cooperate fully with the Federal Mediation and Conciliation Service. The contractor shall include the substance of this clause in any subcontracts for protective services or other services performed on the DOE-owned site which will affect the continuity of operation of the facility. (End of Clause)

**970.5222-2 Overtime management.**

As prescribed in 48 CFR 970.2201-2-2, insert the following clause:

**Overtime Management (Month and Year TBE)**

(a) The contractor shall maintain adequate internal controls to ensure that employee overtime is authorized only if cost effective and necessary to ensure performance of work under this contract.

(b) The contractor shall notify the contracting officer when in any given year it is likely that overtime usage as a percentage of payroll may exceed 4%.

(c) The contracting officer may require the submission, for approval, of a formal annual overtime control plan whenever contractor overtime usage as a percentage of payroll has exceeded, or is likely to exceed, 4%, or if the contracting officer otherwise deems overtime expenditures excessive. The plan shall include, at a minimum:

- (1) An overtime premium fund (maximum dollar amount);
  - (2) Specific controls for casual overtime for non-exempt employees;
  - (3) Specific parameters for allowability of exempt overtime;
  - (4) An evaluation of alternatives to the use of overtime; and
  - (5) Submission of a semi-annual report that includes for exempt and non-exempt employees:
    - (i) Total cost of overtime;
    - (ii) Total cost of straight time;
    - (iii) Overtime cost as a percentage of straight-time cost;
    - (iv) Total overtime hours;
    - (v) Total straight-time hours; and
    - (vi) Overtime hours as a percentage of straight-time hours.
- (End of Clause)

**970.5223-1 Integration of environment, safety, and health into work planning and execution.**

As prescribed in 48 CFR 970.2303-2(a), insert the following clause:

**Integration of Environment, Safety, and Health Into Work Planning and Execution (Month and Year TBE)**

- (a) For the purposes of this clause,
  - (1) Safety encompasses environment, safety and health, including pollution prevention and waste minimization; and
  - (2) Employees include subcontractor employees.
- (b) In performing work under this contract, the contractor shall perform work safely, in a manner that ensures adequate protection for employees, the public, and the environment, and shall be accountable for the safe performance of work. The contractor shall exercise a degree of care commensurate with the work and the associated hazards. The contractor shall ensure that management of environment, safety and health (ES&H) functions and activities becomes an integral but visible part of the contractor's work planning and execution processes. The contractor shall, in the performance of work, ensure that:

(1) Line management is responsible for the protection of employees, the public, and the environment. Line management includes those contractor and subcontractor employees managing or supervising employees performing work.

(2) Clear and unambiguous lines of authority and responsibility for ensuring (ES&H) are established and maintained at all organizational levels.

(3) Personnel possess the experience, knowledge, skills, and abilities that are necessary to discharge their responsibilities.

(4) Resources are effectively allocated to address ES&H, programmatic, and operational considerations. Protecting employees, the public, and the environment is a priority whenever activities are planned and performed.

(5) Before work is performed, the associated hazards are evaluated and an agreed-upon set of ES&H standards and requirements are established which, if properly implemented, provide adequate assurance that employees, the public, and the environment are protected from adverse consequences.

(6) Administrative and engineering controls to prevent and mitigate hazards are tailored to the work being performed and associated hazards. Emphasis should be on designing the work and/or controls to reduce or eliminate the hazards and to prevent accidents and unplanned releases and exposures.

(7) The conditions and requirements to be satisfied for operations to be initiated and conducted are established and agreed-upon by DOE and the contractor. These agreed-upon conditions and requirements are requirements of the contract and binding upon the contractor. The extent of documentation and level of authority for agreement shall be tailored to the complexity and hazards associated with the work and shall be established in a Safety Management System.

(c) The contractor shall manage and perform work in accordance with a documented Safety Management System (System) that fulfills all conditions in paragraph (b) of this clause at a minimum. Documentation of the System shall describe how the contractor will:

- (1) Define the scope of work;
- (2) Identify and analyze hazards associated with the work;
- (3) Develop and implement hazard controls;
- (4) Perform work within controls; and
- (5) Provide feedback on adequacy of controls and continue to improve safety management.

(d) The System shall describe how the contractor will establish, document, and implement safety performance objectives, performance measures, and commitments in response to DOE program and budget execution guidance while maintaining the integrity of the System. The System shall also describe how the contractor will measure system effectiveness.

(e) The contractor shall submit to the contracting officer documentation of its System for review and approval. Dates for submittal, discussions, and revisions to the

System will be established by the contracting officer. Guidance on the preparation, content, review, and approval of the System will be provided by the contracting officer. On an annual basis, the contractor shall review and update, for DOE approval, its safety performance objectives, performance measures, and commitments consistent with and in response to DOE's program and budget execution guidance and direction. Resources shall be identified and allocated to meet the safety objectives and performance commitments as well as maintain the integrity of the entire System. Accordingly, the System shall be integrated with the contractor's business processes for work planning, budgeting, authorization, execution, and change control.

(f) The contractor shall comply with, and assist the Department of Energy in complying with, ES&H requirements of all applicable laws and regulations, and applicable directives identified in the clause of this contract entitled "Laws, Regulations, and DOE Directives." The contractor shall cooperate with Federal and non-Federal agencies having jurisdiction over ES&H matters under this contract.

(g) The contractor shall promptly evaluate and resolve any noncompliance with applicable ES&H requirements and the System. If the contractor fails to provide resolution or if, at any time, the contractor's acts or failure to act causes substantial harm or an imminent danger to the environment or health and safety of employees or the public, the contracting officer may issue an order stopping work in whole or in part. Any stop work order issued by a contracting officer under this clause (or issued by the contractor to a subcontractor in accordance with paragraph (i) of this clause) shall be without prejudice to any other legal or contractual rights of the Government. In the event that the contracting officer issues a stop work order, an order authorizing the resumption of the work may be issued at the discretion of the contracting officer. The contractor shall not be entitled to an extension of time or additional fee or damages by reason of, or in connection with, any work stoppage ordered in accordance with this clause.

(h) Regardless of the performer of the work, the contractor is responsible for compliance with the ES&H requirements applicable to this contract. The contractor is responsible for flowing down the ES&H requirements applicable to this contract to subcontracts at any tier to the extent necessary to ensure the contractor's compliance with the requirements.

(i) The contractor shall include a clause substantially the same as this clause in subcontracts involving complex or hazardous work on site at a DOE-owned or -leased facility. Such subcontracts shall provide for the right to stop work under the conditions described in paragraph (g) of this clause. Depending on the complexity and hazards associated with the work, the contractor may require that the subcontractor submit a Safety Management System for the contractor's review and approval.

(End of Clause)

**970.5223-2 Acquisition and use of environmentally preferable products and services.**

As prescribed in 48 CFR 970.2304-2, insert the following clause:

Acquisition and Use of Environmentally Preferable Products and Services (Month and Year TBE)

(a) In the performance of this contract, the Contractor shall comply with the requirements of the following issuances:

(1) Executive Order 13101 of September 14, 1998, entitled "Greening the Government Through Waste Prevention, Recycling and Federal Acquisition."

(2) Section 6002 of the Resource Conservation and Recovery Act (RCRA) of 1976, as amended (42 U.S.C. 6962, Pub. L. 94-580, 90 Stat. 2822).

(3) Title 40 of the Code of Federal Regulations, Subchapter I, Part 247 (Comprehensive Guidelines for the Procurement of Products Containing Recovered Materials) and such other Subchapter I Parts or Comprehensive Procurement Guidelines as the Environmental Protection Agency may issue from time to time as guidelines for the procurement of products that contain recovered/recycled materials.

(4) "U.S. Department of Energy Affirmative Procurement Program for Products Containing Recovered Materials" and related guidance document(s), as they are identified in writing by the Department.

(b) The Contractor shall prepare and submit reports on matters related to the use of environmentally preferable products and services from time to time in accordance with written direction (e.g., in a specified format) from the contracting officer.

(c) In complying with the requirements of paragraph (a) of this clause, the Contractor shall coordinate its concerns and seek implementing guidance on Federal and Departmental policy, plans, and program guidance with the DOE recycling point of contact, who shall be identified by the contracting officer. Reports required pursuant to paragraph (b) of this clause, shall be submitted through the DOE recycling point of contact.

(End of Clause)

**970.5223-3 Agreement regarding workplace substance abuse programs at DOE facilities.**

As prescribed in 970.2305-4(a), the contracting officer shall insert the following provision:

Agreement Regarding Workplace Substance Abuse Programs at DOE Sites (Month and Year TBE)

(a) Any contract awarded as a result of this solicitation will be subject to the policies, criteria, and procedures of 10 CFR part 707, Workplace Substance Abuse Programs at DOE Sites.

(b) By submission of its offer, the officer agrees to provide to the contracting officer, within 30 days after notification of selection for award, or award of a contract, whichever occurs first, pursuant to this solicitation, its written workplace substance abuse program

consistent with the requirements of 10 CFR part 707.

(c) Failure of the offeror to agree to the condition of responsibility set forth in paragraph (b) of this provision, renders the offeror unqualified and ineligible for award. (End of Provision)

**970.5223-4 Workplace substance abuse programs at DOE sites.**

As prescribed in 48 CFR 970.2305-4(b), insert the following clause:

Workplace Substance Abuse Programs at DOE Sites (Month and Year TBE)

(a) Program Implementation. The contractor shall, consistent with 10 CFR part 707, Workplace Substance Abuse Programs at DOE Sites, incorporated herein by reference with full force and effect, develop, implement, and maintain a workplace substance abuse program.

(b) Remedies. In addition to any other remedies available to the Government, the contractor's failure to comply with the requirements of 10 CFR part 707 or to perform in a manner consistent with its approved program may render the contractor subject to: the suspension of contract payments, or, where applicable, a reduction in award fee; termination for default; and suspension or debarment.

(c) Subcontracts. (1) The contractor agrees to notify the contracting officer reasonably in advance of, but not later than 30 days prior to, the award of any subcontract the contractor believes may be subject to the requirements of 10 CFR part 707.

(2) The DOE prime contractor shall require all subcontracts subject to the provisions of 10 CFR part 707 to agree to develop and implement a workplace substance abuse program that complies with the requirements of 10 CFR part 707, Workplace Substance Abuse Programs at DOE Sites, as a condition for award of the subcontract. The DOE prime contractor shall review and approve each subcontractor's program, and shall periodically monitor each subcontractor's implementation of the program for effectiveness and compliance with 10 CFR part 707.

(3) The contractor agrees to include, and require the inclusion of, the requirements of this clause in all subcontracts, at any tier, that are subject to the provisions of 10 CFR part 707.

(End of clause)

**970.5226-1 Diversity Plan.**

As prescribed in 48 CFR 970.2671-2, insert the following clause:

Diversity Plan (Month and Year TBE)

The Contractor shall submit a Diversity Plan to the contracting officer for approval within 90 days after the effective date of this contract. The contractor shall submit an update to its Plan with its annual fee proposal. Guidance for preparation of a Diversity Plan is provided in Appendix \_\_\_\_\_. The Plan shall include innovative strategies for increasing opportunities to fully use the talents and capabilities of a diverse workforce. The Plan shall address, at a minimum, the Contractor's approach for promoting

diversity through (1) the Contractor's work force, (2) educational outreach, (3) community involvement and outreach, (4) subcontracting, and (5) economic development (including technology transfer). (End of Clause)

**970.5226-2 Workforce restructuring under section 3161 of the National Defense Authorization Act for Fiscal Year 1993.**

As prescribed in 48 CFR 970.2672-3, insert the following clause:

Workforce Restructuring under Section 3161 of the National Defense Authorization Act for Fiscal Year 1993 (Month and Year TBE)

(a) Consistent with the objectives of Section 3161 of the National Defense Authorization Act for Fiscal Year 1993, 42 U.S.C. 7274h, in instances where the Department of Energy has determined that a change in workforce at a Department of Energy Defense Nuclear Facility is necessary, the contractor agrees to (1) comply with the Department of Energy Workforce Restructuring Plan for the facility, if applicable, and (2) use its best efforts to accomplish workforce restructuring or displacement so as to mitigate social and economic impacts.

(b) The requirements of this clause shall be included in subcontracts at any tier (except subcontracts for commercial items pursuant to 41 U.S.C. 403) expected to exceed \$500,000.

(End of Clause)

**970.5226-3 Community Commitment.**

As prescribed in 48 CFR 970.2673-2, insert the following clause:

Community Commitment (Month and Year TBE)

It is the policy of the DOE to be a constructive partner in the geographic region in which DOE conducts its business. The basic elements of this policy include: (1) recognizing the diverse interests of the region and its stakeholders, (2) engaging regional stakeholders in issues and concerns of mutual interest, and (3) recognizing that giving back to the community is a worthwhile business practice. Accordingly, the Contractor agrees that its business operations and performance under the Contract will be consistent with the intent of the policy and elements set forth above. (End of Clause)

**970.5227-1 Rights in Data—Facilities.**

As prescribed in 48 CFR 970.2704-3(a), insert the following clause:

Rights in Data—Facilities (Month and Year TBE)

(a) *Definitions.* (1) *Computer data bases*, as used in this clause, means a collection of data in a form capable of, and for the purpose of, being stored in, processed, and operated on by a computer. The term does not include computer software.

(2) *Computer software*, as used in this clause, means (i) computer programs which are data comprising a series of instructions, rules, routines, or statements, regardless of the media in which recorded, that allow or

cause a computer to perform a specific operation or series of operations and (ii) data comprising source code listings, design details, algorithms, processes, flow charts, formulae, and related material that would enable the computer program to be produced, created, or compiled. The term does not include computer data bases.

(3) *Data*, as used in this clause, means recorded information, regardless of form or the media on which it may be recorded. The term includes technical data and computer software. The term "data" does not include data incidental to the administration of this contract, such as financial, administrative, cost and pricing, or management information.

(4) *Limited rights data*, as used in this clause, means data, other than computer software, developed at private expense that embody trade secrets or are commercial or financial and confidential or privileged. The Government's rights to use, duplicate, or disclose limited rights data are as set forth in the Limited Rights Notice of subparagraph (e) of this clause.

(5) *Restricted computer software*, as used in this clause, means computer software developed at private expense and that is a trade secret; is commercial or financial and is confidential or privileged; or is published copyrighted computer software, including minor modifications of any such computer software. The Government's rights to use, duplicate, or disclose restricted computer software are as set forth in the Restricted Rights Notice of paragraph (f) of this clause.

(6) *Technical data*, as used in this clause, means recorded data, regardless of form or characteristic, that are of a scientific or technical nature. Technical data does not include computer software, but does include manuals and instructional materials and technical data formatted as a computer data base.

(7) *Unlimited rights*, as used in this clause, means the rights of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, including by electronic means, and perform publicly and display publicly, in any manner, including by electronic means, and for any purpose whatsoever, and to have or permit others to do so.

(b) *Allocation of Rights*. (1) The Government shall have:

(i) Ownership of all technical data and computer software first produced in the performance of this Contract;

(ii) Unlimited rights in technical data and computer software specifically used in the performance of this Contract, except as provided herein regarding copyright, limited rights data, or restricted computer software, or except for other data specifically protected by statute for a period of time or, where, approved by DOE, appropriate instances of the DOE Work for Others Program;

(iii) The right to inspect technical data and computer software first produced or specifically used in the performance of this Contract at all reasonable times. The Contractor shall make available all necessary facilities to allow DOE personnel to perform such inspection;

(iv) The right to have all technical data and computer software first produced or

specifically used in the performance of this Contract delivered to the Government or otherwise disposed of by the Contractor, either as the contracting officer may from time to time direct during the progress of the work or in any event as the contracting officer shall direct upon completion or termination of this Contract. The Contractor agrees to leave a copy of such data at the facility or plant to which such data relate, and to make available for access or to deliver to the Government such data upon request by the contracting officer. If such data are limited rights data or restricted computer software, the rights of the Government in such data shall be governed solely by the provisions of paragraph (e) of this clause ("Rights in Limited Rights Data") or paragraph (f) of this clause ("Rights in Restricted Computer Software"); and

(v) The right to remove, cancel, correct, or ignore any markings not authorized by the terms of this Contract on any data furnished hereunder if, in response to a written inquiry by DOE concerning the propriety of the markings, the Contractor fails to respond thereto within 60 days or fails to substantiate the propriety of the markings. In either case DOE will notify the Contractor of the action taken.

(2) The Contractor shall have:

(i) The right to withhold limited rights data and restricted computer software unless otherwise provided in accordance with the provisions of this clause; and

(ii) The right to use for its private purposes, subject to patent, security or other provisions of this Contract, data it first produces in the performance of this Contract, except for data in DOE's Uranium Enrichment Technology, including diffusion, centrifuge, and atomic vapor laser isotope separation, provided the data requirements of this Contract have been met as of the date of the private use of such data.

(3) The Contractor agrees that for limited rights data or restricted computer software or other technical, business or financial data in the form of recorded information which it receives from, or is given access to by, DOE or a third party, including a DOE Contractor or subcontractor, and for technical data or computer software it first produces under this Contract which is authorized to be marked by DOE, the Contractor shall treat such data in accordance with any restrictive legend contained thereon.

(c) *Copyrighted Material*. (1) The Contractor shall not, without prior written authorization of the Patent Counsel, assert copyright in any technical data or computer software first produced in the performance of this contract. To the extent such authorization is granted, the Government reserves for itself and others acting on its behalf, a nonexclusive, paid-up, irrevocable, world-wide license for Governmental purposes to publish, distribute, translate, duplicate, exhibit, and perform any such data copyrighted by the Contractor.

(2) The Contractor agrees not to include in the technical data or computer software delivered under the contract any material copyrighted by the Contractor and not to knowingly include any material copyrighted by others without first granting or obtaining

at no cost a license therein for the benefit of the Government of the same scope as set forth in paragraph (c)(1) of this clause. If the Contractor believes that such copyrighted material for which the license cannot be obtained must be included in the technical data or computer software to be delivered, rather than merely incorporated therein by reference, the Contractor shall obtain the written authorization of the contracting officer to include such material in the technical data or computer software prior to its delivery.

(d) *Subcontracting*. (1) Unless otherwise directed by the contracting officer, the Contractor agrees to use in subcontracts in which technical data or computer software is expected to be produced or in subcontracts for supplies that contain a requirement for production or delivery of data in accordance with the policy and procedures of 48 CFR Subpart 27.4 as supplemented by 48 CFR 927.401 through 927.409, the clause entitled, "Rights in Data-General" at 48 CFR 52.227-14 modified in accordance with 927.409(a) and including Alternate V. Alternates II through IV of that clause may be included as appropriate with the prior approval of DOE Patent Counsel, and the Contractor shall not acquire rights in a subcontractor's limited rights data or restricted computer software, except through the use of Alternates II or III, respectively, without the prior approval of DOE Patent Counsel. The clause at 48 CFR 52.227-16, Additional Data Requirements, shall be included in subcontracts in accordance with DEAR 927.409(h). The contractor shall use instead the Rights in Data-Facilities clause at 48 CFR 970.5227-1 in subcontracts, including subcontracts for related support services, involving the design or operation of any plants or facilities or specially designed equipment for such plants or facilities that are managed or operated under its contract with DOE.

(2) It is the responsibility of the Contractor to obtain from its subcontractors technical data and computer software and rights therein, on behalf of the Government, necessary to fulfill the Contractor's obligations to the Government with respect to such data. In the event of refusal by a subcontractor to accept a clause affording the Government such rights, the Contractor shall:

(i) Promptly submit written notice to the contracting officer setting forth reasons or the subcontractor's refusal and other pertinent information which may expedite disposition of the matter, and (ii) Not proceed with the subcontract without the written authorization of the contracting officer.

(3) Neither the Contractor nor higher-tier subcontractors shall use their power to award subcontracts as economic leverage to acquire rights in a subcontractor's limited rights data or restricted computer software for their private use.

(e) *Rights in Limited Rights Data*. Except as may be otherwise specified in this Contract as data which are not subject to this paragraph, the Contractor agrees to and does hereby grant to the Government an irrevocable, nonexclusive, paid-up license by or for the Government, in any limited rights data of the Contractor specifically used in the performance of this Contract, provided,

however, that to the extent that any limited rights data when furnished or delivered is specifically identified by the Contractor at the time of initial delivery to the Government or a representative of the Government, such data shall not be used within or outside the Government except as provided in the "Limited Rights Notice" set forth. All such limited rights data shall be marked with the following "Limited Rights Notice":

#### Limited Rights Notice

These data contain "limited rights data," furnished under Contract No. \_\_\_\_ with the United States Department of Energy which may be duplicated and used by the Government with the express limitations that the "limited rights data" may not be disclosed outside the Government or be used for purposes of manufacture without prior permission of the Contractor, except that further disclosure or use may be made solely for the following purposes:

(a) Use (except for manufacture) by support services contractors within the scope of their contracts;

(b) This "limited rights data" may be disclosed for evaluation purposes under the restriction that the "limited rights data" be retained in confidence and not be further disclosed;

(c) This "limited rights data" may be disclosed to other contractors participating in the Government's program of which this Contract is a part for information or use (except for manufacture) in connection with the work performed under their contracts and under the restriction that the "limited rights data" be retained in confidence and not be further disclosed;

(d) This "limited rights data" may be used by the Government or others on its behalf for emergency repair or overhaul work under the restriction that the "limited rights data" be retained in confidence and not be further disclosed; and

(e) Release to a foreign government, or instrumentality thereof, as the interests of the United States Government may require, for information or evaluation, or for emergency repair or overhaul work by such government. This Notice shall be marked on any reproduction of this data in whole or in part. (End of Notice)

(f) Rights in Restricted Computer Software.

(1) Except as may be otherwise specified in this Contract as data which are not subject to this paragraph, the Contractor agrees to and does hereby grant to the Government an irrevocable, nonexclusive, paid-up, license by or for the Government, in any restricted computer software of the Contractor specifically used in the performance of this Contract, provided, however, that to the extent that any restricted computer software when furnished or delivered is specifically identified by the Contractor at the time of initial delivery to the Government or a representative of the Government, such data shall not be used within or outside the Government except as provided in the "Restricted Rights Notice" set forth below. All such restricted computer software shall be marked with the following "Restricted Rights Notice":

#### Restricted Rights Notice—Long Form

(a) This computer software is submitted with restricted rights under Department of Energy Contract No. \_\_\_\_ . It may not be used, reproduced, or disclosed by the Government except as provided in paragraph (b) of this notice.

(b) This computer software may be:

(1) Used or copied for use in or with the computer or computers for which it was acquired, including use at any Government installation to which such computer or computers may be transferred;

(2) Used, copied for use, in a backup or replacement computer if any computer for which it was acquired is inoperative or is replaced;

(3) Reproduced for safekeeping (archives) or backup purposes;

(4) Modified, adapted, or combined with other computer software, provided that only the portions of the derivative software consisting of the restricted computer software are to be made subject to the same restricted rights; and

(5) Disclosed to and reproduced for use by contractors under a service contract (of the type defined in 48 CFR 37.101) in accordance with subparagraphs (b)(1) through (4) of this Notice, provided the Government makes such disclosure or reproduction subject to these restricted rights.

(c) Notwithstanding the foregoing, if this computer software has been published under copyright, it is licensed to the Government, without disclosure prohibitions, with the rights set forth in the restricted rights notice above.

(d) This Notice shall be marked on any reproduction of this computer software, in whole or in part.

(End of Notice)

(2) Where it is impractical to include the Restricted Rights Notice on restricted computer software, the following short-form Notice may be used:

#### Restricted Rights Notice—Short Form

Use, reproduction, or disclosure is subject to restrictions set forth in the Long Form Notice of DOE Contract No. \_\_\_\_ with (name of Contractor ).

(End of Notice)

(3) If the software is embedded, or if it is commercially impractical to mark it with human readable text, then the symbol R and the clause date (mo/yr), in brackets or a box, a [R-mo/yr], may be used. This will be read to mean restricted computer software, subject to the rights of the Government as described in the Long Form Notice, in effect as of the date indicated next to the symbol. The symbol shall not be used to mark human readable material. In the event this Contract contains any variation to the rights in the Long Form Notice, then the contract number must also be cited.

(4) If restricted computer software is delivered with the copyright notice of 17 U.S.C. 401, the software will be presumed to be published copyrighted computer software licensed to the Government without disclosure prohibitions and with unlimited rights, unless the Contractor includes the following statement with such copyright

notice "Unpublished-rights reserved under the Copyright Laws of the United States."

(g) *Relationship to patents.* Nothing contained in this clause creates or is intended to imply a license to the Government in any patent or is intended to be construed as affecting the scope of any licenses or other rights otherwise granted to the Government under any patent.

(End of Clause)

*Alternate 1 (Month and Year TBE).* As prescribed in 48 CFR 970.2704–3(a), where access to Category C–24 restricted data is contemplated in the performance of a contract the contracting officer shall insert the phrase "and except Restricted Data in category C–24, 10 CFR part 725, in which DOE has reserved the right to receive reasonable compensation for the use of its inventions and discoveries, including related data and technology" after "laser isotope separation" and before the comma in paragraph (b)(2)(ii) of the clause at 48 CFR 970.5227–1, Rights in Data—Facilities, as appropriate.

(End of Clause)

#### 970.5227–2 Rights in Data—Technology Transfer.

As prescribed in 48 CFR 970.2704–3(b), insert the following clause:

Rights in Data Technology Transfer (Month and Year TBE)

(a) *Definitions.* (1) *Computer data bases*, as used in this clause, means a collection of data in a form capable of, and for the purpose of, being stored in, processed, and operated on by a computer. The term does not include computer software.

(2) *Computer software*, as used in this clause, means (i) computer programs which are data comprising a series of instructions, rules, routines, or statements, regardless of the media in which recorded, that allow or cause a computer to perform a specific operation or series of operations and (ii) data comprising source code listings, design details, algorithms, processes, flow charts, formulae, and related material that would enable the computer program to be produced, created, or compiled. The term does not include computer data bases.

(3) *Data*, as used in this clause, means recorded information, regardless of form or the media on which it may be recorded. The term includes technical data and computer software. The term "data" does not include data incidental to the administration of this contract, such as financial, administrative, cost and pricing, or management information.

(4) *Limited rights data*, as used in this clause, means data, other than computer software, developed at private expense that embody trade secrets or are commercial or financial and confidential or privileged. The Government's rights to use, duplicate, or disclose limited rights data are as set forth in the Limited Rights Notice of paragraph (g) of this clause.

(5) *Restricted computer software*, as used in this clause, means computer software developed at private expense and that is a

trade secret; is commercial or financial and is confidential or privileged; or is published copyrighted computer software, including minor modifications of any such computer software. The Government's rights to use, duplicate, or disclose restricted computer software are as set forth in the Restricted Rights Notice of subparagraph (h) of this clause.

(6) *Technical data*, as used in this clause, means recorded data, regardless of form or characteristic, that are of a scientific or technical nature. Technical data does not include computer software, but does include manuals and instructional materials and technical data formatted as a computer data base.

(7) *Unlimited rights*, as used in this clause, means the rights of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, including by electronic means, and perform publicly and display publicly, in any manner, including by electronic means, and for any purpose whatsoever, and to have or permit others to do so.

(b) *Allocation of Rights*. (1) The Government shall have:

(i) Ownership of all technical data and computer software first produced in the performance of this Contract;

(ii) Unlimited rights in technical data and computer software specifically used in the performance of this Contract, except as provided herein regarding copyright, limited rights data, or restricted computer software, and except for data subject to the withholding provisions for protected Cooperative Research and Development Agreement (CRADA) information in accordance with Technology Transfer actions under this Contract, or other data specifically protected by statute for a period of time or, where, approved by DOE, appropriate instances of the DOE Work for Others Program;

(iii) The right to inspect technical data and computer software first produced or specifically used in the performance of this Contract at all reasonable times. The Contractor shall make available all necessary facilities to allow DOE personnel to perform such inspection;

(iv) The right to have all technical data and computer software first produced or specifically used in the performance of this Contract delivered to the Government or otherwise disposed of by the Contractor, either as the contracting officer may from time to time direct during the progress of the work or in any event as the contracting officer shall direct upon completion or termination of this Contract. The Contractor agrees to leave a copy of such data at the facility or plant to which such data relate, and to make available for access or to deliver to the Government such data upon request by the contracting officer. If such data are limited rights data or restricted computer software, the rights of the Government in such data shall be governed solely by the provisions of paragraph (g) of this clause ("Rights in Limited Rights Data") or paragraph (h) of this clause ("Rights in Restricted Computer Software"); and (v) The right to remove, cancel, correct, or ignore any

markings not authorized by the terms of this Contract on any data furnished hereunder if, in response to a written inquiry by DOE concerning the propriety of the markings, the Contractor fails to respond thereto within 60 days or fails to substantiate the propriety of the markings. In either case DOE will notify the Contractor of the action taken.

(2) The Contractor shall have:

(i) The right to withhold limited rights data and restricted computer software unless otherwise provided in provisions of this clause;

(ii) The right to use for its private purposes, subject to patent, security or other provisions of this Contract, data it first produces in the performance of this Contract, except for data in DOE's Uranium Enrichment Technology, including diffusion, centrifuge, and atomic vapor laser isotope separation, provided the data requirements of this Contract have been met as of the date of the private use of such data; and

(iii) The right to assert copyright subsisting in scientific and technical articles as provided in paragraph (d) of this clause and the right to request permission to assert copyright subsisting in works other than scientific and technical articles as provided in paragraph (e) of this clause.

(3) The Contractor agrees that for limited rights data or restricted computer software or other technical business or financial data in the form of recorded information which it receives from, or is given access to by DOE or a third party, including a DOE contractor or subcontractor, and for technical data or computer software it first produces under this Contract which is authorized to be marked by DOE, the Contractor shall treat such data in accordance with any restrictive legend contained thereon.

(c) *Copyright (General)*. (1) The Contractor agrees not to mark, register, or otherwise assert copyright in any data in a published or unpublished work, other than as set forth in paragraphs (d) and (e) of this clause.

(2) Except for material to which the Contractor has obtained the right to assert copyright in accordance with either paragraph (d) or (e) of this clause, the Contractor agrees not to include in the data delivered under this Contract any material copyrighted by the Contractor and not to knowingly include any material copyrighted by others without first granting or obtaining at no cost a license therein for the benefit of the Government of the same scope as set forth in paragraph (d) of this clause. If the Contractor believes that such copyrighted material for which the license cannot be obtained must be included in the data to be delivered, rather than merely incorporated therein by reference, the Contractor shall obtain the written authorization of the contracting officer to include such material in the data prior to its delivery.

(d) *Copyrighted works (scientific and technical articles)*. (1) The Contractor shall have the right to assert, without prior approval of the contracting officer, copyright subsisting in scientific and technical articles composed under this contract or based on or containing data first produced in the performance of this Contract, and published in academic, technical or professional

journals, symposia, proceedings, or similar works. When assertion of copyright is made, the Contractor shall affix the applicable copyright notice of 17 U.S.C. 401 or 402 and acknowledgment of Government sponsorship (including contract number) on the data when such data are delivered to the Government as well as when the data are published or deposited for registration as a published work in the U.S. Copyright Office. The Contractor grants to the Government, and others acting on its behalf, a nonexclusive, paid-up, irrevocable, world-wide license in such copyrighted data to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government.

(2) The contractor shall mark each scientific or technical article first produced or composed under this Contract and submitted for journal publication or similar means of dissemination with a notice, similar in all material respects to the following, on the front reflecting the Government's non-exclusive, paid-up, irrevocable, world-wide license in the copyright.

**Notice:** This manuscript has been authored by [insert the name of the Contractor] under Contract No. [insert the contract number] with the U.S. Department of Energy. The United States Government retains and the publisher, by accepting the article for publication, acknowledges that the United States Government retains a non-exclusive, paid-up, irrevocable, world-wide license to publish or reproduce the published form of this manuscript, or allow others to do so, for United States Government purposes.

(End of Notice)

(3) The title to the copyright of the original of unclassified graduate theses and the original of related unclassified scientific papers shall vest in the author thereof, subject to the right of DOE to retain duplicates of such documents and to use such documents for any purpose whatsoever without any claim on the part of the author or the contractor for additional compensation.

(e) *Copyrighted works (other than scientific and technical articles and data produced under a CRADA)*. The Contractor may obtain permission to assert copyright subsisting in technical data and computer software first produced by the Contractor in performance of this Contract, where the Contractor can show that commercialization would be enhanced by such copyright protection, subject to the following:

(1) Contractor Request to Assert Copyright.

(i) For data other than scientific and technical articles and data produced under a CRADA, the Contractor shall submit in writing to Patent Counsel its request to assert copyright in data first produced in the performance of this Contract pursuant to this clause. The right of the Contractor to copyright data first produced under a CRADA is as described in the individual CRADA. Each request by the Contractor must include:

(A) The identity of the data (including any computer program) for which the Contractor requests permission to assert copyright, as

well as an abstract which is descriptive of the data and is suitable for dissemination purposes, (B) The program under which it was funded, (C) Whether, to the best knowledge of the Contractor, the data is subject to an international treaty or agreement, (D) Whether the data is subject to export control, (E) A statement that the Contractor plans to commercialize the data in compliance with the clause of this contract entitled, "Technology Transfer Mission," within five (5) years after obtaining permission to assert copyright or, on a case-by-case basis, a specified longer period where the Contractor can demonstrate that the ability to commercialize effectively is dependent upon such longer period, and (F) For data other than computer software, a statement explaining why the assertion of copyright is necessary to enhance commercialization and is consistent with DOE's dissemination responsibilities.

(ii) For data that is developed using other funding sources in addition to DOE funding, the permission to assert copyright in accordance with this clause must also be obtained by the Contractor from all other funding sources prior to the Contractor's request to Patent Counsel. The request shall include the Contractor's certification or other documentation acceptable to Patent Counsel demonstrating such permission has been obtained.

(iii) Permission for the Contractor to assert copyright in excepted categories of data as determined by DOE will be expressly withheld. Such excepted categories include data whose release (A) would be detrimental to national security, *i.e.*, involve classified information or data or sensitive information under Section 148 of the Atomic Energy Act of 1954, as amended, or are subject to export control for nonproliferation and other nuclear-related national security purposes, (B) would not enhance the appropriate transfer or dissemination and commercialization of such data, (C) would have a negative impact on U.S. industrial competitiveness, (D) would prevent DOE from meeting its obligations under treaties and international agreements, or (E) would be detrimental to one or more of DOE's programs. Additional excepted categories may be added by the Assistant General Counsel for Technology Transfer and Intellectual Property. Where data are determined to be under export control restriction, the Contractor may obtain permission to assert copyright subject to the provisions of this clause for purposes of limited commercialization in a manner that complies with export control statutes and applicable regulations. In addition, notwithstanding any other provision of this Contract, all data developed with Naval Reactors' funding and those data that are classified fall within excepted categories. The rights of the Contractor in data are subject to the disposition of data rights in the treaties and international agreements identified under this Contract as well as those additional treaties and international agreements which DOE may from time to time identify by unilateral amendment to the Contract; such amendment listing added treaties and international agreements is

effective only for data which is developed after the date such treaty or international agreement is added to this Contract. Also, the Contractor will not be permitted to assert copyright in data in the form of various technical reports generated by the Contractor under the Contract without first obtaining the advanced written permission of the contracting officer.

(2) DOE Review and Response to Contractor's Request. The Patent Counsel shall use its best efforts to respond in writing within 90 days of receipt of a complete request by the Contractor to assert copyright in technical data and computer software pursuant to this clause. Such response shall either give or withhold DOE's permission for the Contractor to assert copyright or advise the Contractor that DOE needs additional time to respond, and the reasons therefor.

(3) Permission for Contractor to Assert Copyright.

(i) For computer software, the Contractor shall furnish to the DOE designated, centralized software distribution and control point, the Energy Science and Technology Software Center, at the time permission to assert copyright is given under paragraph (e)(2) of this clause: (A) an abstract describing the software suitable for publication, (B) the source code for each software program, and (C) the object code and at least the minimum support documentation needed by a technically competent user to understand and use the software. The Patent Counsel, for good cause shown by the Contractor, may allow the minimum support documentation to be delivered within 60 days after permission to assert copyright is given or at such time the minimum support documentation becomes available. The Contractor acknowledges that the DOE designated software distribution and control point may provide a technical description of the software in an announcement identifying its availability from the copyright holder.

(ii) Unless otherwise directed by the contracting officer, for data other than computer software to which the Contractor has received permission to assert copyright under paragraph (e)(2) of this clause above, the Contractor shall within sixty (60) days of obtaining such permission furnish to DOE's Office of Scientific and Technical Information (OSTI) a copy of such data as well as an abstract of the data suitable for dissemination purposes. The Contractor acknowledges that OSTI may provide an abstract of the data in an announcement to DOE, its contractors and to the public identifying its availability from the copyright holder.

(iii) For a five year period or such other specified period as specifically approved by Patent Counsel beginning on the date the Contractor is given permission to assert copyright in data, the Contractor grants to the Government, and others acting on its behalf, a paid-up, nonexclusive, irrevocable worldwide license in such copyrighted data to reproduce, prepare derivative works and perform publicly and display publicly, by or on behalf of the Government. Upon request, the initial period may be extended after DOE approval. The DOE approval will be based on the standard that the work is still

commercially available and the market demand is being met.

(iv) After the period approved by Patent Counsel for application of the limited Government license described in paragraph (e)(3)(iii) of this clause, or if, prior to the end of such period(s), the Contractor abandons commercialization activities pertaining to the data to which the Contractor has been given permission to assert copyright, the Contractor grants to the Government, and others acting on its behalf, a paid-up, nonexclusive, irrevocable worldwide license in such copyrighted data to reproduce, distribute copies to the public, prepare derivative works, perform publicly and display publicly, and to permit others to do so.

(v) Whenever the Contractor asserts copyright in data pursuant to this paragraph (e), the Contractor shall affix the applicable copyright notice of 17 U.S.C. 401 or 402 on the copyrighted data and also an acknowledgment of the Government sponsorship and license rights of paragraphs (e)(3) (iii) and (iv) of this clause. Such action shall be taken when the data are delivered to the Government, published, licensed or deposited for registration as a published work in the U.S. Copyright Office. The acknowledgment of Government sponsorship and license rights shall be as follows: Notice: These data were produced by (insert name of Contractor) under Contract No. \_\_\_\_ with the Department of Energy. For (period approved by DOE Patent Counsel) from (date permission to assert copyright was obtained), the Government is granted for itself and others acting on its behalf a nonexclusive, paid-up, irrevocable worldwide license in this data to reproduce, prepare derivative works, and perform publicly and display publicly, by or on behalf of the Government. There is provision for the possible extension of the term of this license. Subsequent to that period or any extension granted, the Government is granted for itself and others acting on its behalf a nonexclusive, paid-up, irrevocable worldwide license in this data to reproduce, prepare derivative works, distribute copies to the public, perform publicly and display publicly, and to permit others to do so. The specific term of the license can be identified by inquiry made to Contractor or DOE. Neither the United States nor the United States Department of Energy, nor any of their employees, makes any warranty, express or implied, or assumes any legal liability or responsibility for the accuracy, completeness, or usefulness of any data, apparatus, product, or process disclosed, or represents that its use would not infringe privately owned rights. (End of Notice)

(vi) With respect to any data to which the Contractor has received permission to assert copyright, the DOE has the right, during the five (5) year or specified longer period approved by Patent Counsel as provided for in paragraph (e) of this clause, to request the Contractor to grant a nonexclusive, partially exclusive or exclusive license in any field of use to a responsible applicant(s) upon terms that are reasonable under the circumstances, and if the Contractor refuses such request, to grant such license itself, if the DOE determines that the Contractor has not made

a satisfactory demonstration that either it or its licensee(s) is actively pursuing commercialization of the data as set forth in subparagraph (e)(1)(A) of this clause. Before licensing under this subparagraph (vi), DOE shall furnish the Contractor a written request for the Contractor to grant the stated license, and the Contractor shall be allowed thirty (30) days (or such longer period as may be authorized by the contracting officer for good cause shown in writing by the Contractor) after such notice to show cause why the license should not be granted. The Contractor shall have the right to appeal the decision of the DOE to grant the stated license to the Invention Licensing Appeal Board as set forth in 10 CFR 781.65—"Appeals."

(vii) No costs shall be allowable for maintenance of copyrighted data, primarily for the benefit of the Contractor and/or a licensee which exceeds DOE Program needs, except as expressly provided in writing by the contracting officer. The Contractor may use its net royalty income to effect such maintenance costs.

(viii) At any time the Contractor abandons commercialization activities for data for which the Contractor has received permission to assert copyright in accordance with this clause, it shall advise OSTI and Patent Counsel and upon request assign the copyright to the Government so that the Government can distribute the data to the public.

(4) The following notice may be placed on computer software prior to any publication and prior to the Contractor's obtaining permission from the Department of Energy to assert copyright in the computer software pursuant to paragraph (c)(3) of this section.

**Notice:** This computer software was prepared by [insert the Contractor's name and the individual author], hereinafter the Contractor, under Contract [insert the Contract Number] with the Department of Energy (DOE). All rights in the computer software are reserved by DOE on behalf of the United States Government and the Contractor as provided in the Contract. You are authorized to use this computer software for Governmental purposes but it is not to be released or distributed to the public. NEITHER THE GOVERNMENT NOR THE CONTRACTOR MAKES ANY WARRANTY, EXPRESS OR IMPLIED, OR ASSUMES ANY LIABILITY FOR THE USE OF THIS SOFTWARE. This notice including this sentence must appear on any copies of this computer software.

(End of Notice)

(5) a similar notice can be used for data, other than computer software, upon approval of DOE Patent Counsel.

(f) Subcontracting. (1) Unless otherwise directed by the contracting officer, the Contractor agrees to use in subcontracts in which technical data or computer software is expected to be produced or in subcontracts for supplies that contain a requirement for production or delivery of data in accordance with the policy and procedures of 48 CFR Subpart 27.4 as supplemented by 48 CFR 927.401 through 927.409, the clause entitled, "Rights in Data-General" at 48 CFR 52.227-14 modified in accordance with 927.409(a) and including Alternate V. Alternates II

through IV of that clause may be included as appropriate with the prior approval of DOE Patent Counsel, and the Contractor shall not acquire rights in a subcontractor's limited rights data or restricted computer software, except through the use of Alternates II or III, respectively, without the prior approval of DOE Patent Counsel. The clause at 48 CFR 52.227-16, Additional Data Requirements, shall be included in subcontracts in accordance with 48 CFR 927.409(h). The Contractor shall use instead the Rights in Data-Facilities clause at 48 CFR 970.5227-1 in subcontracts, including subcontracts for related support services, involving the design or operation of any plants or facilities or specially designed equipment for such plants or facilities that are managed or operated under its contract with DOE.

(2) It is the responsibility of the Contractor to obtain from its subcontractors technical data and computer software and rights therein, on behalf of the Government, necessary to fulfill the Contractor's obligations to the Government with respect to such data. In the event of refusal by a subcontractor to accept a clause affording the Government such rights, the Contractor shall:

(i) Promptly submit written notice to the contracting officer setting forth reasons or the subcontractor's refusal and other pertinent information which may expedite disposition of the matter, and

(ii) Not proceed with the subcontract without the written authorization of the contracting officer.

(3) Neither the Contractor nor higher-tier subcontractors shall use their power to award subcontracts as economic leverage to acquire rights in a subcontractor's limited rights data and restricted computer software for their private use.

(g) Rights in Limited Rights Data. Except as may be otherwise specified in this Contract as data which are not subject to this paragraph, the Contractor agrees to and does hereby grant to the Government an irrevocable nonexclusive, paid-up license by or for the Government, in any limited rights data of the Contractor specifically used in the performance of this Contract, provided, however, that to the extent that any limited rights data when furnished or delivered is specifically identified by the Contractor at the time of initial delivery to the Government or a representative of the Government, such data shall not be used within or outside the Government except as provided in the "Limited Rights Notice" set forth below. All such limited rights data shall be marked with the following "Limited Rights Notice:"

#### Limited Rights Notice

These data contain "limited rights data," furnished under Contract No. \_\_\_\_ with the United States Department of Energy which may be duplicated and used by the Government with the express limitations that the "limited rights data" may not be disclosed outside the Government or be used for purposes of manufacture without prior permission of the Contractor, except that further disclosure or use may be made solely for the following purposes:

(a) Use (except for manufacture) by support services contractors within the scope of their contracts;

(b) This "limited rights data" may be disclosed for evaluation purposes under the restriction that the "limited rights data" be retained in confidence and not be further disclosed;

(c) This "limited rights data" may be disclosed to other contractors participating in the Government's program of which this Contract is a part for information or use (except for manufacture) in connection with the work performed under their contracts and under the restriction that the "limited rights data" be retained in confidence and not be further disclosed;

(d) This "limited rights data" may be used by the Government or others on its behalf for emergency repair or overhaul work under the restriction that the "limited rights data" be retained in confidence and not be further disclosed; and

(e) Release to a foreign government, or instrumentality thereof, as the interests of the United States Government may require, for information or evaluation, or for emergency repair or overhaul work by such government.

This Notice shall be marked on any reproduction of this data in whole or in part. (End of Notice)

(h) Rights in Restricted Computer Software. (1) Except as may be otherwise specified in this Contract as data which are not subject to this paragraph, the Contractor agrees to and does hereby grant to the Government an irrevocable, nonexclusive, paid-up, license by or for the Government, in any restricted computer software of the Contractor specifically used in the performance of this Contract; provided, however, that to the extent that any restricted computer software when furnished or delivered is specifically identified by the Contractor at the time of initial delivery to the Government or a representative of the Government, such data shall not be used within or outside the Government except as provided in the "Restricted Rights Notice" set forth below. All such restricted computer software shall be marked with the following "Restricted Rights Notice:"

#### Restricted Rights Notice—Long Form

(a) This computer software is submitted with restricted rights under Department of Energy Contract No. \_\_\_\_\_. It may not be used, reproduced, or disclosed by the Government except as provided in paragraph (b) of this notice.

(b) This computer software may be:

(1) Used or copied for use in or with the computer or computers for which it was acquired, including use at any Government installation to which such computer or computers may be transferred;

(2) Used, copied for use, in a backup or replacement computer if any computer for which it was acquired is inoperative or is replaced;

(3) Reproduced for safekeeping (archives) or backup purposes;

(4) Modified, adapted, or combined with other computer software, provided that only the portions of the derivative software consisting of the restricted computer software are to be made subject to the same restricted rights; and

(5) Disclosed to and reproduced for use by contractors under a service contract (of the

type defined in 48 CFR 37.101) in accordance with subparagraphs (b)(1) through (4) of this Notice, provided the Government makes such disclosure or reproduction subject to these restricted rights.

(c) Notwithstanding the foregoing, if this computer software has been published under copyright, it is licensed to the Government, without disclosure prohibitions, with the rights set forth in the restricted rights notice above.

(d) This Notice shall be marked on any reproduction of this computer software, in whole or in part.

(End of Notice)

(2) Where it is impractical to include the Restricted Rights Notice on restricted computer software, the following short-form Notice may be used in lieu thereof:

**Restricted Rights Notice—Short Form**

Use, reproduction, or disclosure is subject to restrictions set forth in the Long Form Notice of DOE Contract No. \_\_\_\_ with (name of Contractor).

(End of Notice)

(3) If the software is embedded, or if it is commercially impractical to mark it with human readable text, then the symbol R and the clause date (mo/yr) in brackets or a box, a [R-mo/yr], may be used. This will be read to mean restricted computer software, subject to the rights of the Government as described in the Long Form Notice, in effect as of the date indicated next to the symbol. The symbol shall not be used to mark human readable material. In the event this Contract contains any variation to the rights in the Long Form Notice, then the contract number must also be cited.

(4) If restricted computer software is delivered with the copyright notice of 17 U.S.C. 401, the software will be presumed to be published copyrighted computer software licensed to the Government without disclosure prohibitions and with unlimited rights, unless the Contractor includes the following statement with such copyright notice "Unpublished-rights reserved under the Copyright Laws of the United States."

(i) Relationship to patents. Nothing contained in this clause creates or is intended to imply a license to the Government in any patent or is intended to be construed as affecting the scope of any licenses or other rights otherwise granted to the Government under any patent.

(End of Clause)

Alternate I (Month and Year TBE). As prescribed in 48 CFR 970.2704-3(b), where access to Category C-24 restricted data is contemplated in the performance of a contract the contracting officer shall insert the phrase "and except Restricted Data in category C-24, 10 CFR part 725, in which DOE has reserved the right to receive reasonable compensation for the use of its inventions and discoveries, including related data and technology" after "laser isotope separation" and before the comma in paragraph (b)(2)(ii) of the clause at 48 CFR 970.5227-2, Rights in Data—Technology Transfer, as appropriate.

(End of Clause)

**970.5227-3 Technology Transfer Mission.**

As prescribed in 48 CFR 970.2770-4(a), insert the following clause:

Technology Transfer Mission (Month and Year TBE)

This clause has as its purpose implementation of the National Competitiveness Technology Transfer Act of 1989 (Sections 3131, 3132, 3133, and 3157 of Pub. L. 101-189 and as amended by Pub. L. 103-160, Sections 3134 and 3160). The Contractor shall conduct technology transfer activities with a purpose of providing benefit from Federal research to U.S. industrial competitiveness.

(a) Authority. (1) In order to ensure the full use of the results of research and development efforts of, and the capabilities of, the Laboratory, technology transfer, including Cooperative Research and Development Agreements (CRADAs), is established as a mission of the Laboratory consistent with the policy, principles and purposes of Sections 11(a)(1) and 12(g) of the Stevenson-Wylder Technology Innovation Act of 1980, as amended (15 U.S.C. 3710a); Section 3132(b) of Pub. L. 101-189, Sections 3134 and 3160 of Pub. Law 103-160, and of Chapter 38 of the Patent Laws (35 U.S.C. 200 *et seq.*); Section 152 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2182); Section 9 of the Federal Nonnuclear Energy Research and Development Act of 1974 (42 U.S.C. 5908); and Executive Order 12591 of April 10, 1987.

(2) In pursuing the technology transfer mission, the Contractor is authorized to conduct activities including but not limited to: identifying and protecting Intellectual Property made, created or acquired at or by the Laboratory; negotiating licensing agreements and assignments for Intellectual Property made, created or acquired at or by the Laboratory that the Contractor controls or owns; bailments; negotiating all aspects of and entering into CRADAs; providing technical consulting and personnel exchanges; conducting science education activities and reimbursable Work for Others (WFO); providing information exchanges; and making available laboratory or weapon production user facilities. It is fully expected that the Contractor shall use all of the mechanisms available to it to accomplish this technology transfer mission, including, but not limited to, CRADAs, user facilities, WFO, science education activities, consulting, personnel, assignments, and licensing in accordance with this clause.

(b) Definitions (1) *Contractor's Laboratory Director* means the individual who has supervision over all or substantially all of the Contractor's operations at the Laboratory.

(2) *Intellectual Property* means patents, trademarks, copyrights, mask works, protected CRADA information, and other forms of comparable property rights protected by Federal Law and other foreign counterparts.

(3) *Cooperative Research and Development Agreement (CRADA)* means any agreement entered into between the Contractor as operator of the Laboratory, and one or more parties including at least one non-Federal party under which the Government, through

its laboratory, provides personnel, services, facilities, equipment, intellectual property, or other resources with or without reimbursement (but not funds to non-Federal parties) and the non-Federal parties provide funds, personnel, services, facilities, equipment, intellectual property, or other resources toward the conduct of specified research or development efforts which are consistent with the missions of the Laboratory; except that such term does not include a procurement contract, grant, or cooperative agreement as those terms are used in sections 6303, 6304, and 6305 of Title 31 of the United States Code.

(4) *Joint Work Statement (JWS)* means a proposal for a CRADA prepared by the Contractor, signed by the Contractor's Laboratory Director or designee which describes the following:

- (i) Purpose;
- (ii) Scope of Work which delineates the rights and responsibilities of the Government, the Contractor and Third Parties, one of which must be a non-Federal party;
- (iii) Schedule for the work; and
- (iv) Cost and resource contributions of the parties associated with the work and the schedule.

(5) *Assignment* means any agreement by which the Contractor transfers ownership of Laboratory Intellectual Property, subject to the Government's retained rights.

(6) *Laboratory Biological Materials* means biological materials capable of replication or reproduction, such as plasmids, deoxyribonucleic acid molecules, ribonucleic acid molecules, living organisms of any sort and their progeny, including viruses, prokaryote and eukaryote cell lines, transgenic plants and animals, and any derivatives or modifications thereof or products produced through their use or associated biological products, made under this contract by Laboratory employees or through the use of Laboratory research facilities.

(7) *Laboratory Tangible Research Product* means tangible material results of research which

- (i) Are provided to permit replication, reproduction, evaluation or confirmation of the research effort, or to evaluate its potential commercial utility;
- (ii) Are not materials generally commercially available; and
- (iii) Were made under this contract by Laboratory employees or through the use of Laboratory research facilities.

(8) *Bailment* means any agreement in which the Contractor permits the commercial or non-commercial transfer of custody, access or use of Laboratory Biological Materials or Laboratory Tangible Research Product for a specified purpose of technology transfer or research and development, including without limitation evaluation, and without transferring ownership to the bailee.

(c) *Allowable Costs.* (1) The Contractor shall establish and carry out its technology transfer efforts through appropriate organizational elements consistent with the requirements for an Office of Research and Technology Applications (ORTA) pursuant to paragraphs (b) and (c) of Section 11 of the

Stevenson-Wydler Technology Innovation Act of 1980, as amended (15 U.S.C. 3710). The costs associated with the conduct of technology transfer through the ORTA including activities associated with obtaining, maintaining, licensing, and assigning Intellectual Property rights, increasing the potential for the transfer of technology, and the widespread notice of technology transfer opportunities, shall be deemed allowable provided that such costs meet the other requirements of the allowable costs provisions of this Contract. In addition to any separately designated funds, these costs in any fiscal year shall not exceed an amount equal to 0.5 percent of the operating funds included in the Federal research and development budget (including Work For Others) of the Laboratory for that fiscal year without written approval of the contracting officer.

(2) The Contractor's participation in litigation to enforce or defend Intellectual Property claims incurred in its technology transfer efforts shall be as provided in the clause entitled "Insurance—Litigation and Claims" of this contract.

(d) Conflicts of Interest—Technology Transfer. The Contractor shall have implementing procedures that seek to avoid employee and organizational conflicts of interest, or the appearance of conflicts of interest, in the conduct of its technology transfer activities. These procedures shall apply to other persons participating in Laboratory research or related technology transfer activities. Such implementing procedures shall be provided to the contracting officer for review and approval within sixty (60) days after execution of this contract. The contracting officer shall have thirty (30) days thereafter to approve or require specific changes to such procedures. Such implementing procedures shall include procedures to:

(1) Inform employees of and require conformance with standards of conduct and integrity in connection with the CRADA activity in accordance with the provisions of paragraph (n)(5) of this clause;

(2) Review and approve employee activities so as to avoid conflicts of interest arising from commercial utilization activities relating to Contractor-developed Intellectual Property;

(3) Conduct work performed using royalties so as to avoid interference with or adverse effects on ongoing DOE projects and programs;

(4) Conduct activities relating to commercial utilization of Contractor-developed Intellectual Property so as to avoid interference with or adverse effects on user facility or WFO activities of the Contractor;

(5) Conduct DOE-funded projects and programs so as to avoid the appearance of conflicts of interest or actual conflicts of interest with non-Government funded work;

(6) Notify the contracting officer with respect to any new work to be performed or proposed to be performed under the Contract for DOE or other Federal agencies where the new work or proposal involves Intellectual Property in which the Contractor has obtained or intends to request or elect title;

(7) Except as provided elsewhere in this Contract, obtain the approval of the

contracting officer for any licensing of or assignment of title to Intellectual Property rights by the Contractor to any business or corporate affiliate of the Contractor;

(8) Obtain the approval of the contracting officer prior to any assignment, exclusive licensing, or option for exclusive licensing, of Intellectual Property to any individual who has been a Laboratory employee within the previous two years or to the company in which the individual is a principal; and

(9) Notify non-Federal sponsors of WFO activities, or non-Federal users of user facilities, of any relevant Intellectual Property interest of the Contractor prior to execution of WFOs or user agreements.

(10) Notify DOE prior to evaluating a proposal by a third party or DOE, when the subject matter of the proposal involves an elected or waived subject invention under this contract or one in which the Contractor intends to elect to retain title under this contract.

(e) Fairness of Opportunity. In conducting its technology transfer activities, the Contractor shall prepare procedures and take all reasonable measures to ensure widespread notice of availability of technologies suited for transfer and opportunities for exclusive licensing and joint research arrangements. The requirement to widely disseminate the availability of technology transfer opportunities does not apply to a specific application originated outside of the Laboratory and by entities other than the Contractor.

(f) U.S. Industrial Competitiveness. (1) In the interest of enhancing U.S. Industrial Competitiveness, the Contractor shall, in its licensing and assignments of Intellectual Property, give preference in such a manner as to enhance the accrual of economic and technological benefits to the U.S. domestic economy. The Contractor shall consider the following factors in all of its licensing and assignment decisions involving Laboratory intellectual property where the Laboratory obtains rights during the course of the Contractor's operation of the Laboratory under this contract:

(i) whether any resulting design and development will be performed in the United States and whether resulting products, embodying parts, including components thereof, will be substantially manufactured in the United States; or

(ii) (A) whether the proposed licensee or assignee has a business unit located in the United States and whether significant economic and technical benefits will flow to the United States as a result of the license or assignment agreement; and

(B) in licensing any entity subject to the control of a foreign company or government, whether such foreign government permits United States agencies, organizations or other persons to enter into cooperative research and development agreements and licensing agreements, and has policies to protect United States Intellectual Property rights.

(2) If the Contractor determines that neither of the conditions in paragraphs (f)(1)(i) or (ii) of this clause are likely to be fulfilled, the Contractor, prior to entering into such an agreement, must obtain the approval of the contracting officer. The contracting officer

shall act on any such requests for approval within thirty (30) days.

(3) The Contractor agrees to be bound by the provisions of 35 U.S.C. 204 (Preference for United States industry).

(g) Indemnity—Product Liability. In entering into written technology transfer agreements, including but not limited to, research and development agreements, licenses, assignments and CRADAs, the Contractor agrees to include in such agreements a requirement that the U.S. Government and the Contractor, except for any negligent acts or omissions of the Contractor, be indemnified for all damages, costs, and expenses, including attorneys' fees, arising from personal injury or property damage occurring as a result of the making, using or selling of a product, process or service by or on behalf of the Participant, its assignees or licensees which was derived from the work performed under the agreement. The Contractor shall identify and obtain the approval of the contracting officer for any proposed exceptions to this requirement such as where State or local law expressly prohibit the Participant from providing indemnification or where the research results will be placed in the public domain.

(h) Disposition of Income. (1) Royalties or other income earned or retained by the Contractor as a result of performance of authorized technology transfer activities herein shall be used by the Contractor for scientific research, development, technology transfer, and education at the Laboratory, consistent with the research and development mission and objectives of the Laboratory and subject to Section 12(b)(5) of the Stevenson-Wydler Technology Innovation Act of 1980, as amended (15 U.S.C. 3710a(b)(5)) and Chapter 38 of the Patent Laws (35 U.S.C. 200 *et seq.*) as amended through the effective date of this contract award or modification. If the net amounts of such royalties and income received from patent licensing after payment of patenting costs, licensing costs, payments to inventors and other expenses incidental to the administration of Subject Inventions during any fiscal year exceed 5 percent of the Laboratory's budget for that fiscal year, 75 percent of such excess amounts shall be paid to the Treasury of the United States, and the remaining amount of such excess shall be used by the Contractor for the purposes as described above in this paragraph. Any inventions arising out of such scientific research and development activities shall be deemed to be Subject Inventions under the Contract.

(2) The Contractor shall include as a part of its annual Laboratory Institutional Plan or other such annual document a plan setting out those uses to which royalties and other income received as a result of performance of authorized technology transfer activities herein will be applied at the Laboratory, and at the end of the year, provide a separate accounting for how the funds were actually used. Under no circumstances shall these royalties and income be used for an illegal augmentation of funds furnished by the U.S. Government.

(3) The Contractor shall establish subject to the approval of the contracting officer a

policy for making awards or sharing of royalties with Contractor employees, other coinventors and coauthors, including Federal employee coinventors when deemed appropriate by the contracting officer.

(i) Transfer to Successor Contractor. In the event of termination or upon the expiration of this Contract, any unexpended balance of income received for use at the Laboratory shall be transferred, at the contracting officer's request, to a successor contractor, or in the absence of a successor contractor, to such other entity as designated by the contracting officer. The Contractor shall transfer title, as one package, to the extent the Contractor retains title, in all patents and patent applications, licenses, accounts containing royalty revenues from such license agreements, including equity positions in third party entities, and other Intellectual Property rights which arose at the Laboratory, to the successor contractor or to the Government as directed by the contracting officer.

(j) Technology Transfer Affecting the National Security.

(1) The Contractor shall notify and obtain the approval of the contracting officer, prior to entering into any technology transfer arrangement, when such technology or any part of such technology is classified or sensitive under Section 148 of the Atomic Energy Act (42 U.S.C. 2168). Such notification shall include sufficient information to enable DOE to determine the extent that commercialization of such technology would enhance or diminish security interests of the United States, or diminish communications within DOE's nuclear weapon production complex. DOE shall use its best efforts to complete its determination within sixty (60) days of the Contractor's notification, and provision of any supporting information, and DOE shall promptly notify the Contractor as to whether the technology is transferable.

(2) The Contractor shall include in all of its technology transfer agreements with third parties, including, but not limited to, CRADAs, licensing agreements and assignments, notice to such third parties that the export of goods and/or Technical Data from the United States may require some form of export control license or other authority from the U.S. Government and that failure to obtain such export control license may result in criminal liability under U.S. laws.

(3) For other than fundamental research as defined in National Security Decision Directive 189, the Contractor is responsible to conduct internal export control reviews and assure that technology is transferred in accordance with applicable law.

(k) Records. The Contractor shall maintain records of its technology transfer activities in a manner and to the extent satisfactory to the DOE and specifically including, but not limited to, the licensing agreements, assignments and the records required to implement the requirements of paragraphs (e), (f), and (h) of this clause and shall provide reports to the contracting officer to enable DOE to maintain the reporting requirements of Section 12(c)(6) of the Stevenson-Wydler Technology Innovation

Act of 1980, as amended (15 U.S.C. 3710a(c)(6)). Such reports shall be made annually in a format to be agreed upon between the Contractor and DOE and in such a format which will serve to adequately inform DOE of the Contractor's technology transfer activities while protecting any data not subject to disclosure under the Rights in Technical Data clause and paragraph (n) of this clause. Such records shall be made available in accordance with the clauses of this Contract pertaining to inspection, audit and examination of records.

(l) Reports to Congress. To facilitate DOE's reporting to Congress, the Contractor is required to submit annually to DOE a technology transfer plan for conducting its technology transfer function for the upcoming year, including plans for securing Intellectual Property rights in Laboratory innovations with commercial promise and plans for managing such innovations so as to benefit the competitiveness of United States industry. This plan shall be provided to the contracting officer on or before October 1st of each year.

(m) Oversight and Appraisal. The Contractor is responsible for developing and implementing effective internal controls for all technology transfer activities consistent with the audit and record requirements of this Contract. Laboratory Contractor performance in implementing the technology transfer mission and the effectiveness of the Contractor's procedures will be evaluated by the contracting officer as part of the annual appraisal process, with input from the cognizant Secretarial Officer or program office.

(n) Technology Transfer Through Cooperative Research and Development Agreements. Upon approval of the contracting officer and as provided in a DOE approved Joint Work Statement (JWS), the Laboratory Director, or designee, may enter into CRADAs on behalf of the DOE subject to the requirements set forth in this paragraph.

(1) Review and Approval of CRADAs. (i) Except as otherwise directed in writing by the contracting officer, each JWS shall be submitted to the contracting officer for approval. The Contractor's Laboratory Director or designee shall provide a program mission impact statement and shall include an impact statement regarding related Intellectual Property rights known by the Contractor to be owned by the Government to assist the contracting officer in the approval determination.

(ii) The Contractor shall also include (specific to the proposed CRADA), a statement of compliance with the Fairness of Opportunity requirements of paragraph (e) of this clause.

(iii) Within ninety (90) days after submission of a JWS, the contracting officer shall approve, disapprove or request modification to the JWS. If a modification is required, the contracting officer shall approve or disapprove any resubmission of the JWS within thirty (30) days of its resubmission, or ninety (90) days from the date of the original submission, whichever is later. The contracting officer shall provide a written explanation to the Contractor's

Laboratory Director or designee of any disapproval or requirement for modification of a JWS.

(iv) Upon approval of a JWS, the Contractor's Laboratory Director or designee may submit a CRADA, based upon the approved JWS, to the contracting officer. The contracting officer, within thirty (30) days of receipt of the CRADA, shall approve or request modification of the CRADA. If the contracting officer requests a modification of the CRADA, an explanation of such request shall be provided to the Laboratory Director or designee.

(v) Except as otherwise directed in writing by the contracting officer, the Contractor shall not enter into, or begin work under, a CRADA until approval of the CRADA has been granted by the contracting officer. The Contractor may submit its proposed CRADA to the contracting officer at the time of submitting its proposed JWS or any time thereafter. However, the contracting officer is not obligated to respond under paragraph (n)(1)(iv) of this clause until within thirty (30) days after approval of the JWS or thirty (30) days after submittal of the CRADA, whichever is later.

(2) Selection of Participants. The Contractor's Laboratory Director or designee in deciding what CRADA to enter into shall:

(i) Give special consideration to small business firms, and consortia involving small business firms;

(ii) Give preference to business units located in the United States which agree that products or processes embodying Intellectual Property will be substantially manufactured or practiced in the United States and, in the case of any industrial organization or other person subject to the control of a foreign company or government, take into consideration whether or not such foreign government permits United States agencies, organizations, or other persons to enter into cooperative research and development agreements and licensing agreements;

(iii) Provide Fairness of Opportunity in accordance with the requirements of paragraph (e) of this clause; and

(iv) Give consideration to the Conflicts of Interest requirements of paragraph (d) of this clause.

(3) Withholding of Data. (i) Data that is first produced as a result of research and development activities conducted under a CRADA and that would be a trade secret or commercial or financial data that would be privileged or confidential, if such data had been obtained from a non-Federal third party, may be protected from disclosure under the Freedom of Information Act as provided in the Stevenson-Wydler Technology Innovation Act of 1980, as amended (15 U.S.C. 3710a(c)(7)) for a period as agreed in the CRADA of up to five (5) years from the time the data is first produced. The DOE shall cooperate with the Contractor in protecting such data.

(ii) Unless otherwise expressly approved by the contracting officer in advance for a specific CRADA, the Contractor agrees, at the request of the contracting officer, to transmit such data to other DOE facilities for use by DOE or its Contractors by or on behalf of the Government. When data protected pursuant

to paragraph (n)(3)(i) of this clause is so transferred, the Contractor shall clearly mark the data with a legend setting out the restrictions against private use and further dissemination, along with the expiration date of such restrictions.

(iii) In addition to its authority to license Intellectual Property, the Contractor may enter into licensing agreements with third parties for data developed by the Contractor under a CRADA subject to other provisions of this Contract. However, the Contractor shall neither use the protection against dissemination nor the licensing of data as an alternative to the submittal of invention disclosures which include data protected pursuant to paragraph (n)(3)(i) of this clause.

(4) Work For Others and User Facility Programs. (i) WFO and User Facility Agreements (UFAs) are not CRADAs and will be available for use by the Contractor in addition to CRADAs for achieving utilization of employee expertise and unique facilities for maximizing technology transfer. The Contractor agrees form prospective CRADA participants, which are intending to substantially pay full cost recovery for the effort under a proposed CRADA, of the availability of alternative forms of agreements, i.e., WFO and UFA, and of the Class Patent Waiver provisions associated therewith.

(ii) Where the Contractor believes that the transfer of technology to the U.S. domestic economy will benefit from, or other equity considerations dictate, an arrangement other than the Class Waiver of patent rights to the sponsor in WFO and UFAs, a request may be made to the contracting officer for an exception to the Class Waivers.

(iii) Rights to inventions made under agreements other than funding agreements with third parties shall be governed by the appropriate provisions incorporated, with DOE approval, in such agreements, and the provisions in such agreements take precedence over any disposition of rights contained in this Contract. Disposition of rights under any such agreement shall be in accordance with any DOE class waiver (including Work for Others and User Class Waivers) or individually negotiated waiver which applies to the agreement.

(5) Conflicts of Interest. (i) Except as provided in paragraph (n)(5)(ii) of this clause, the Contractor shall assure that no employee of the Contractor shall have a substantial role (including an advisory role) in the preparation, negotiation, or approval of a CRADA, if, to such employee's knowledge:

(A) Such employee, or the spouse, child, parent, sibling, or partner of such employee, or an organization (other than the Contractor) in which such employee serves as an officer, director, trustee, partner, or employee—

(1) holds financial interest in any entity, other than the Contractor, that has a substantial interest in the preparation, negotiation, or approval of the CRADA;

(2) receives a gift or gratuity from any entity, other than the Contractor, that has a substantial interest in the preparation, negotiation, or approval of the CRADA; or

(B) A financial interest in any entity, other than the Contractor, that has a substantial interest in the preparation, negotiation, or

approval of the CRADA, is held by any person or organization with whom such employee is negotiating or has any arrangement concerning prospective employment.

(ii) The Contractor shall require that each employee of the Contractor who has a substantial role (including an advisory role) in the preparation, negotiation, or approval of a CRADA certify through the Contractor to the contracting officer that the circumstances described in paragraph (n)(5)(i) of this clause do not apply to that employee.

(iii) The requirements of paragraphs (n)(5)(i) and (n)(5)(ii) of this clause shall not apply in a case where the contracting officer is advised by the Contractor in advance of the participation of an employee described in those paragraphs in the preparation, negotiation or approval of a CRADA of the nature of and extent of any financial interest described in paragraph (n)(5)(i) of this clause, and the contracting officer determines that such financial interest is not so substantial as to be considered likely to affect the integrity of the Contractor employee's participation in the process of preparing, negotiating, or approving the CRADA.

(o) Technology Transfer in Other Cost-Sharing Agreements. In conducting research and development activities in cost-shared agreements not covered by paragraph (n) of this clause, the Contractor, with prior written permission of the contracting officer, may provide for the withholding of data produced thereunder in accordance with the applicable provisions of paragraph (n)(3) of this clause.

(End of clause)

Alternate I (Month and Year TBE). As prescribed in 48 CFR 970.2770-4(b), add the following definition under paragraph (b) and the following new paragraph (p):

(b)(8) Privately funded technology transfer means the prosecuting, maintaining, licensing, and marketing of inventions which are not owned by the Government (and not related to CRADAs) when such activities are conducted entirely without the use of Government funds.

(p) Nothing in paragraphs (c) Allowable Costs, (e) Fairness of Opportunity, (f) U.S. Industrial Competitiveness, (g) Indemnity—Product Liability, (h) Disposition of Income, and (i) Transfer to Successor Contractor of this clause are intended to apply to the contractor's privately funded technology transfer activities if such privately funded activities are addressed elsewhere in the contract.

Alternate II (Month and Year TBE). As prescribed in 48 CFR 970.2770-4(c), the contracting officer shall substitute the phrase "weapon production facility" wherever the word "laboratory" appears in the clause.

#### **970.5228-1 Insurance—Litigation and Claims.**

As prescribed in 48 CFR 970.2803-2, insert the following clause:

Insurance—Litigation and Claims (Month and Year TBE)

(a) The contractor may, with the prior written authorization of the contracting officer, and shall, upon the request of the Government, initiate litigation against third

parties, including proceedings before administrative agencies, in connection with this contract. The contractor shall proceed with such litigation in good faith and as directed from time to time by the contracting officer.

(b) The contractor shall give the contracting officer immediate notice in writing of any legal proceeding, including any proceeding before an administrative agency, filed against the contractor arising out of the performance of this contract. Except as otherwise directed by the contracting officer, in writing, the contractor shall furnish immediately to the contracting officer copies of all pertinent papers received by the contractor with respect to such action. The contractor, with the prior written authorization of the contracting officer, shall proceed with such litigation in good faith and as directed from time to time by the contracting officer.

(c)(1) Except as provided in paragraph (c)(2) of this clause, the contractor shall procure and maintain such bonds and insurance as required by law or approved in writing by the contracting officer.

(2) The contractor may, with the approval of the contracting officer, maintain a self-insurance program; provided that, with respect to workers' compensation, the contractor is qualified pursuant to statutory authority.

(3) All bonds and insurance required by this clause shall be in a form and amount and for those periods as the contracting officer may require or approve and with sureties and insurers approved by the contracting officer.

(d) The contractor agrees to submit for the contracting officer's approval, to the extent and in the manner required by the contracting officer, any other bonds and insurance that are maintained by the contractor in connection with the performance of this contract and for which the contractor seeks reimbursement. If an insurance cost (whether a premium for commercial insurance or related to self-insurance) includes a portion covering costs made unallowable elsewhere in the contract, and the share of the cost for coverage for the unallowable cost is determinable, the portion of the cost that is otherwise an allowable cost under this contract is reimbursable to the extent determined by the contracting officer.

(e) Except as provided in subparagraphs (g) and (h) of this clause, or specifically disallowed elsewhere in this contract, the contractor shall be reimbursed—

(1) For that portion of the reasonable cost of bonds and insurance allocable to this contract required in accordance with contract terms or approved under this clause, and

(2) For liabilities (and reasonable expenses incidental to such liabilities, including litigation costs) to third persons not compensated by insurance or otherwise without regard to and as an exception to the clause of this contract entitled, "Obligation of Funds."

(f) The Government's liability under paragraph (e) of this clause is subject to the availability of appropriated funds. Nothing in this contract shall be construed as implying that the Congress will, at a later date, appropriate funds sufficient to meet deficiencies.

(g) Notwithstanding any other provision of this contract, the contractor shall not be reimbursed for liabilities (and expenses incidental to such liabilities, including litigation costs, counsel fees, judgment and settlements)—

(1) Which are otherwise unallowable by law or the provisions of this contract; or

(2) For which the contractor has failed to insure or to maintain insurance as required by law, this contract, or by the written direction of the contracting officer.

(h) In addition to the cost reimbursement limitations contained in DEAR 970.3102-1-2, and notwithstanding any other provision of this contract, the contractor's liabilities to third persons (and any expenses incidental to such liabilities, including litigation costs, counsel fees, judgments and settlements) shall not be reimbursed if such liabilities were caused by contractor managerial personnel's—

(1) Willful misconduct,

(2) Lack of good faith, or

(3) Failure to exercise prudent business judgment, which means failure to act in the same manner as a prudent person in the conduct of competitive business; or, in the case of a non-profit educational institution, failure to act in the manner that a prudent person would under the circumstances prevailing at the time the decision to incur the cost is made.

(i) The burden of proof shall be upon the contractor to establish that costs covered by paragraph (h) of this clause are allowable and reasonable if, after an initial review of the facts, the contracting officer challenges a specific cost or informs the contractor that there is reason to believe that the cost results from willful misconduct, lack of good faith, or failure to exercise prudent business judgment by contractor managerial personnel.

(j)(1) All litigation costs, including counsel fees, judgments and settlements shall be differentiated and accounted for by the contractor so as to be separately identifiable. If the contracting officer provisionally disallows such costs, then the contractor may not use funds advanced by DOE under the contract to finance the litigation.

(2) Punitive damages are not allowable unless the act or failure to act which gave rise to the liability resulted from compliance with specific terms and conditions of the contract or written instructions from the contracting officer.

(3) The portion of the cost of insurance obtained by the contractor that is allocable to coverage of liabilities referred to in paragraph (g)(1) of this clause is not allowable.

(4) The term "contractor's managerial personnel" is defined in clause paragraph (j) of 48 CFR 970.5245-1.

(k) The contractor may at its own expense and not as an allowable cost procure for its own protection insurance to compensate the contractor for any unallowable or unreimbursable costs incurred in connection with contract performance.

(l) If any suit or action is filed or any claim is made against the contractor, the cost and expense of which may be reimbursable to the contractor under this contract, and the risk of which is then uninsured or is insured for less

than the amount claimed, the contractor shall—

(1) Immediately notify the contracting officer and promptly furnish copies of all pertinent papers received;

(2) Authorize Department representatives to collaborate with: In-house or DOE-approved outside counsel in settling or defending the claim; or counsel for the insurance carrier in settling or defending the claim if the amount of the liability claimed exceeds the amount of coverage, unless precluded by the terms of the insurance contract; and

(3) Authorize Department representatives to settle the claim or to defend or represent the contractor in and/or to take charge of any litigation, if required by the Department, if the liability is not insured or covered by bond. In any action against more than one Department contractor, the Department may require the contractor to be represented by common counsel. Counsel for the contractor may, at the contractor's own expense, be associated with the Department representatives in any such claim or litigation.

(End of Clause)

#### 970.5229-1 State and Local Taxes.

As prescribed in 48 CFR 970.2904-1(b), insert the following clause in management and operating contracts. The requirement for the notice prescribed in paragraph (a) of the clause may be broadened to include all State and local taxes which may be claimed as allowable costs when considered to be appropriate.

State and Local Taxes (Month and Year TBE)

(a) The contractor agrees to notify the contracting officer of any State or local tax, fee, or charge levied or purported to be levied on or collected from the contractor with respect to the contract work, any transaction thereunder, or property in the custody or control of the contractor and constituting an allowable item of cost if due and payable, but which the contractor has reason to believe, or the contracting officer has advised the contractor, is or may be inapplicable or invalid; and the contractor further agrees to refrain from paying any such tax, fee, or charge unless authorized in writing by the contracting officer. Any State or local tax, fee, or charge paid with the approval of the contracting officer or on the basis of advice from the contracting officer that such tax, fee, or charge is applicable and valid, and which would otherwise be an allowable item of cost, shall not be disallowed as an item of cost by reason of any subsequent ruling or determination that such tax, fee, or charge was in fact inapplicable or invalid.

(b) The contractor agrees to take such action as may be required or approved by the contracting officer to cause any State or local tax, fee, or charge which would be an allowable cost to be paid under protest; and to take such action as may be required or approved by the contracting officer to seek recovery of any payments made, including assignment to the Government or its designee of all rights to an abatement or refund

thereof, and granting permission for the Government to join with the contractor in any proceedings for the recovery thereof or to sue for recovery in the name of the contractor. If the contracting officer directs the contractor to institute litigation to enjoin the collection of or to recover payment of any such tax, fee, or charge referred to above, or if a claim or suit is filed against the contractor for a tax, fee, or charge it has refrained from paying in accordance with this article, the procedures and requirements of the clause entitled "Insurance-Litigation and Claims" shall apply and the costs and expenses incurred by the contractor shall be allowable items of costs, as provided in this contract, together with the amount of any judgment rendered against the contractor.

(c) The Government shall hold the contractor harmless from penalties and interest incurred through compliance with this clause. All recoveries or credits in respect of the foregoing taxes, fees, and charges (including interest) shall inure to and be for the sole benefit of the Government. (End of Clause)

#### 970.5231-1 Allowable Costs and Fee (Management and Operating Contracts).

As prescribed in 48 CFR 970.3170(a), insert the following clause:

Allowable Costs and Fee (Management And Operating Contracts) (Month and Year TBE)

(a) Compensation for contractor's services. Payment for the allowable costs as hereinafter defined, and of the fixed-fee, if any, as hereinafter provided, shall constitute full and complete compensation for the performance of the work under this contract.

(b) Fixed-fee. The fixed-fee payable to the contractor for the performance of the work under this contract is \$ \_\_\_\_\_. There shall be no adjustment in the amount of the contractor's fixed-fee by reason of differences between any estimate of cost for performance of the work under this contract and the actual costs for performance of that work.

(c) Allowable costs. The allowable cost of performing the work under this contract shall be the costs and expenses that are actually incurred by the contractor in the performance of the contract work in accordance with its terms, that are necessary or incident thereto, and that are determined to be allowable as set forth in this paragraph. The determination of allowability of cost shall be based on:

(1) Allowability and reasonableness in accordance with 48 CFR 31.201-2(d) and 31.201-3;

(2) Standards promulgated by the Cost Accounting Standards Board, if applicable; otherwise, generally accepted accounting principles and practices appropriate to the particular circumstances; and

(3) Recognition of all exclusions and limitations set forth in this clause or elsewhere in this contract as to types or amounts of items of cost. Allowable costs shall not include the cost of any item described as unallowable in paragraph (e) of this clause except as indicated therein. Failure to mention an item of cost specifically in paragraphs (d) or (e) of this clause shall not imply either that it is allowable or that it is unallowable.

(d) Items of allowable cost. Subject to the other provisions of this clause, the following items of cost of work done under this contract shall be allowable to the extent indicated:

(1) Bonds and insurance, including self-insurance, as provided in the clause entitled, "Insurance-Litigation and Claims."

(2) Communication costs, including telephone services, local and long-distance calls, telegrams, cablegrams, postage, and similar items.

(3) Consulting services (including legal and accounting), and related expenses, as approved by the contracting officer, except as made unallowable by paragraphs (e)(16) and (e)(26).

(4) Reasonable litigation and other legal expenses, including counsel fees, if incurred in accordance with the clause of the contract entitled, "Insurance-Litigation and Claims", and the DOE approved contractor litigation management procedures (including cost guidelines) as such procedures may be revised from time to time, and if not otherwise made unallowable in this contract.

(5) Losses and expenses (including settlements made with the consent of the contracting officer) sustained by the contractor in the performance of this contract and certified in writing by the contracting officer to be reasonable, except the losses and expenses expressly made unallowable under other provisions of this contract.

(6) Materials, supplies, and equipment, including freight transportation, material handling, inspection, storage, salvage, and other usual expenses incident to the procurement, use and disposition thereof, subject to approvals required under other provisions of this contract.

(7) Patents, purchased design, and royalty payments to the extent expressly provided for under other provisions in this contract or as approved by the contracting officer, and preparation of invention disclosures, reports and related documents, and searching the art to the extent necessary to make such invention disclosures in accordance with any "Patent Rights" clause of this contract.

(8) Personnel costs and related expenses incurred in accordance with the personnel appendix which is hereby incorporated by reference and made a part of this contract. It is specifically understood and agreed that said personnel appendix sets forth in detail personnel costs and related expenses to be allowable under this contract and is intended to document those personnel policies, practices and plans which have been found acceptable by the contracting officer. It is further understood and agreed that the contractor will advise DOE of any proposed changes in any matters covered by said policies, practices or plans which relate to this item of cost, and that the personnel appendix may be modified from time to time in writing by mutual agreement of the contractor and DOE without execution of an amendment to this contract for the purpose of effectuating any such changes in, or additions to, said personnel appendix as may be agreed upon by the parties. Such modifications shall be evidenced by execution of written numbered approval letters from the contracting officer or the

contracting officer's representative. Types of personnel costs and related expenses to be incorporated into the personnel appendix, or amendments thereto, are as follows:

(i) Salaries and wages; bonuses and incentive compensation; overtime, shift differential, holiday, and other premium pay for time worked; nonwork time, including vacations, holidays, sick, funeral, military, jury, witness, and voting leave; salaries and wages to employees in their capacity as union stewards and committeemen for time spent in handling grievances, or serving on labor management (contractor) committees, provided, however, that the contracting officer's approval is required in each instance of total compensation to an individual employee at an annual rate of \$— (see 48 CFR 970.3102–3–2) or more, when it is proposed that a total of 50 percent or more of such compensation be reimbursed under DOE cost-type contracts. Total compensation, as used here, includes only the employee's base salary, bonus, and incentive compensation payments;

(ii) Legally required contributions to old-age and survivors' insurance, unemployment compensation plans, and workers compensation plans, (whether or not covered by insurance); voluntary or agree-upon plans providing benefits for retirement, separation, life insurance, hospitalization, medical-surgical and unemployment (whether or not such plans are covered by insurance);

(iii) Travel (except foreign travel, which requires specific approval by the contracting officer on a case-by-case basis); incidental subsistence and other allowances of contractor employees, in connection with performance of work under this contract (including new employees reporting for work and transfer of employees, the transfer of their household goods and effects and the travel and subsistence of their dependents);

(iv) Employee relations, welfare, morale, etc.; programs including incentive or suggestion awards; employee counseling services, health or first-aid clinics; house or employee publications; and wellness/fitness centers;

(v) Personnel training (except special education and training courses and research assignments calling for attendance at educational institutions which require specific approval by the contracting officer on a case-by-case basis); including apprenticeship training programs designed to improve efficiency and productivity of contract operations, to develop needed skills, and to develop scientific and technical personnel in specialized fields required in the contract work;

(vi) Recruitment of personnel (including help-wanted advertisement), including service of employment agencies at rates not in excess of standard commercial rates, employment office, travel of prospective employees at the request of the contractor for employment interviews; and

(vii) Net cost of operating plant-site cafeteria, dining rooms, and canteens attributable to the performance of the contract.

(viii) Compensation of a senior executive, provided that such compensation does not exceed the benchmark compensation amount

determined applicable for the contractor fiscal year by the Administrator, Office of Federal Procurement Policy. Costs of executive compensation shall be determined pursuant to 48 CFR 31.205–6(p).

(9) Repairs, maintenance, inspection, replacement, and disposal of Government-owned property and the restoration or clean-up of site and facilities to the extent approved by the contracting officer and as allowable under paragraph (f) of the clause of this contract entitled, "Property."

(10) Subcontracts and purchase orders, including procurements from contractor-controlled sources, subject to approvals required by other provisions of this contract.

(11) Subscriptions to trade, business, technical, and professional periodicals, as approved by the contracting officer.

(12) Taxes, fees, and charges levied by public agencies which the contractor is required by law to pay, except those which are expressly made unallowable under other provisions of this contract.

(13) Utility services, including electricity, gas, water, and sewerage.

(14) Indemnification of the Pension Benefit Guaranty Corporation, pursuant to the Employee Retirement Income Security Act of 1974, in accordance with 48 CFR 31.205–6(j)(3)(iv).

(15) Establishment and maintenance of bank accounts in connection with the work hereunder, including, but not limited to, service charges, the cost of disbursing cash, necessary guards, cashiers, and paymasters. If payments are made by check, facilities and arrangements for cashing checks may be provided without expense to the employees, subject to the approval of the contracting officer.

(e) Items of unallowable costs. The following items of costs are unallowable under this contract to the extent indicated:

(1) Advertising and public relations costs designed to promote the contractor or its products, including the costs of promotional items and memorabilia such as models, gifts and souvenirs, and the cost of memberships in civic and community organizations; except those advertising and public relations costs

(i) Specifically required by the contract,

(ii) Approved in advance by the contracting officer as clearly in furtherance of work performed under the contract,

(iii) That arise from requirements of the contract and that are exclusively for recruiting personnel, acquiring scarce items for contract performance, disposing of scrap or surplus materials, the transfer of federally owned or originated technology to State and local governments and to the private sector, or acquisition of contract-required supplies and services, or

(iv) Where the primary purpose of the activity is to facilitate contract performance in support of the DOE mission.

(2) Bad debts (including expenses of collection) and provisions for bad debts arising out of other business of the contractor.

(3) Proposal expenses and costs of proposals.

(4) Bonuses and similar compensation under any other name, which (i) are not pursuant to an agreement between the

contractor and employee prior to the rendering of the services or an established plan consistently followed by the contract or (ii) are in excess of those costs which are allowable by the Internal Revenue Code and regulations thereunder, or (iii) provide total compensation to an employee in excess of reasonable compensation for the services rendered.

(5) Central and branch office expenses of the contractor, except as specifically set forth in the contract.

(6) Commissions, bonuses, and fees (under whatever name) in connection with obtaining or negotiating for a Government contract or a modification thereto, except when paid to bona fide employees or bona fide established selling organizations maintained by the contractor for the purpose of obtaining Government business.

(7) Contingency reserves, provisions for.

(8) Contributions and donations, including cash, contractor-owned property and services, regardless of the recipient.

(9) Depreciation in excess of that calculated by application of methods approved for use by the Internal Revenue Code of 1954, as amended, including the straight-line declining balance (using a rate not exceeding twice the rate which would have been used had the depreciation been computed under the straight line method), or sum-of-the-years digits method, on the basis of expected useful life, to the cost of acquisition of the related fixed assets less estimated salvage or residual value at the end of the expected useful life.

(10) Dividend provisions or payments and, in the case of sole proprietors and partners, distributions of profit.

(11) Entertainment, including costs of amusement, diversion, social activities; and directly associated costs such as tickets to shows or sports events, meals, lodging, rentals, transportation, and gratuities; costs of membership in any social, dining or country club or organization.

(12) Fines and penalties, except, with respect to civil fines and penalties only, if the contractor demonstrates to the contracting officer that—

(i) Such a civil fine or penalty was incurred as a result of compliance with specific terms and conditions of the contract or written instructions from the contracting officer; or

(ii) Such a civil fine or penalty was imposed without regard to fault and could not have been avoided by the exercise of due care.

(13) Government-furnished property, except to the extent that cash payment therefor is required pursuant to procedures of DOE applicable to transfers of such property to the contractor from others.

(14) Insurance (including any provisions of a self-insurance reserve) on any person where the contractor under the insurance policy is the beneficiary, directly or indirectly, and insurance against loss of or damage to Government property as defined in Clause \* \* \*

(15) Interest, however represented (except (i) Interest incurred in compliance with the contract clause entitled "State and Local Taxes" or, (ii) imputed interest costs relating to leases classified and accounted for as

capital leases under generally accepted accounting principles (GAAP), provided that the decision to enter into a capital leasing arrangement has been specifically authorized and approved by the DOE in accordance with applicable procedures and such interest costs are recorded in an appropriately specified DOE account established for such purpose), bond discounts and expenses, and costs of financing and refinancing operations.

(16) Legal, accounting, and consulting services and related costs incurred in connection with the preparation and issuance of stock, rights, organization or reorganization, prosecution or defense of antitrust suits, prosecution of claims against the United States, contesting actions of proposed actions of the United States, and prosecution or defense of patent infringement litigation (except where incurred pursuant to the contractor's performance of the Government-funded technology transfer mission and in accordance with the "Insurance—Litigation and Claims" clause).

(17) Losses or expenses: (i) On, or arising from the sale, exchange, or abandonment of capital assets, including investments;

(ii) On other contracts, including the contractor's contributed portion under cost-sharing contracts;

(iii) In connection with price reductions to and discount purchases by employees and others from any source;

(iv) That are compensated for by insurance or otherwise or which would have been compensated for by insurance required by law or by written direction of the contracting officer but which the contractor failed to procure or maintain through its own fault or negligence;

(v) That result from willful misconduct or lack of good faith on the part of any of the contractor's managerial personnel (as that term is defined in the clause of this contract entitled, "Property");

(vi) That represent liabilities to third persons that are not allowable under the clause of this contract entitled, "Insurance—Litigation and Claims"; or

(vii) That represent liabilities to third persons for which the contractor has expressly accepted responsibility under other terms of this contract.

(18) Maintenance, depreciation, and other costs incidental to the contractor's idle or excess facilities (including machinery and equipment), other than reasonable standby facilities.

(19) Membership in trade, business, and professional organizations, except as approved by the contracting officer.

(20) Precontract costs, except as expressly made allowable under other provisions in this contract.

(21) Research and development costs, unless specifically provided for elsewhere in this contract.

(22) Selling cost, except to the extent they are determined to be reasonable and to be allocable to the contract. Allocability of selling costs to the contract will be determined in the light of reasonable benefit to the agency program arising from such activities as technical, consulting, demonstration, and other services performed for such purposes as applying or adapting the contractor's product for agency use.

(23) Storage of records pertaining to this contract after completion of operations under this contract, irrespective of contractual or statutory requirement for the preservation of records.

(24) Taxes, fees, and charges in connection with financing, refinancing, or refunding operations, including listing of securities on exchanges, taxes which are paid contrary to the clause entitled "State and Local Taxes," federal taxes on net income and excess profits, special assessments on land which represent capital improvement and taxes on accumulated funding deficiencies of, or prohibited transactions involving, employee deferred compensation plans pursuant to section 4971 or section 4975 of the Internal Revenue Code of 1954, as amended, respectively.

(25) Travel expenses of the officers, proprietors, executives, administrative heads and other employees of the contractor's central office or branch office organizations concerned with the general management, supervision, and conduct of the contractor's business as a whole, except to the extent that particular travel is in connection with the contract and approved by the contracting officer.

(26) Salary or other compensation (and expenses related thereto) of any individual employed under this contract as a consultant or in another comparable employment capacity who is an employee of another organizational and concurrently performing work on a full-time annual basis for that organization under a cost-type contract with DOE, except to the extent that cash payment therefor is required pursuant to the provisions of this contract or procedure of DOE applicable to the borrowing of such an individual from another cost-type contractor.

(27) Travel by commercial aircraft or travel by other than common carrier that is not necessary for the performance of this contract or the cost of which exceeds the lesser of the lowest available commercial discount airfare, Government contract airfare, or customary standard (coach or equivalent) commercial airfare. Airfare costs in excess of the lowest such airfare are unallowable, except when such accommodations: Require circuitous routing; require travel during unreasonable hours; excessively prolong travel; result in increased cost that would offset transportation savings; would offer accommodations not reasonably adequate for the physical or medical needs of the traveler; or are not reasonably available to meet necessary mission requirements. Individual contractor determinations of nonavailability of commercial discount airfare or Government contract airfare will not be contested by DOE when the contractor can reasonably demonstrate such nonavailability or, on an overall basis, that established policies and procedures result in the routine use of the lowest available airfare. However, in order for air travel costs in excess of customary standard airfare to be allowable, the contractor must justify and document the applicable condition(s) set forth above.

(28) Special construction industry "funds" financed by employer contributions for such purposes as methods and materials research, public and industry relations, market

development, and disaster relief, except as specifically provided elsewhere in this contract.

(29) Late premium payment charges related to employee deferred compensation plan insurance.

(30) Facilities capital cost of money. (CAS 414 and CAS 417).

(31) Contractor costs incurred to influence either directly or indirectly—

(i) Legislative action on any matter pending before Congress, a State legislature, or a legislative body of a political subdivision of a State; or

(ii) Federal, State, or executive body of a political subdivision of a State action on regulatory and contract matters as described in the "Political Activity Cost Prohibition" clause of this contract.

(32) Commercial automobile rental expenses unless approved by the contracting officer.

(33) Costs incurred in connection with any criminal, civil or administrative proceeding commenced by the Federal Government or a State, local or foreign government, as provided in the clause titled "Cost prohibitions related to legal and other proceedings" incorporated elsewhere in this contract.

(34) Costs of alcoholic beverages.

(35) Contractor employee travel costs incurred for lodging, meals and incidental expenses which exceed on a daily basis the applicable maximum per diem rates in effect for Federal civilian employees at the time of travel. When the applicable maximum per diem rate is inadequate due to special or unusual situations, the contractor may pay employees for actual expenses in excess of such per diem rate limitation. To be allowable, however, such payments must be properly authorized by an officer or appropriate official of the contractor and shall not exceed the higher amounts that may be authorized for Federal civilian employees in a similar situation.

Alternate I (Month and Year TBE). As prescribed in 48 CFR 970.3170(a)(1), paragraph (b) of the basic clause may be appropriately modified to address situations where the fee is for a period of time or different fees are allowed for various phases of the work.

Alternate II (Month and Year TBE). As prescribed in 48 CFR 970.3170(a)(2), the lead sentence in subparagraph (d)(8) of the basic clause may be modified, in appropriate circumstances, to read as follows:

"Personnel costs and related expenses incurred in accordance with established policies, programs, and schedules, and any changes thereto during the contract term, applicable to the contractor's private operations and consistently followed throughout its organization, as approved by the contracting officer, such as"

Alternate III (Month and Year TBE). As prescribed in 48 CFR 970.3170(a)(3), if the contractor will perform construction, add the following to paragraph (d) of the basic clause:

(16) Camp operations, to the extent approved by the contracting officer.

(17) Maintenance, inspection, repair, replacement, and transportation of construction plant and equipment to the

extent not covered by rentals or insurance and as provided in rental agreements approved by the contracting officer.

(18) Rental for (i) construction plant and equipment rented by the contractor from others at rates and under written agreements approved by the contracting officer, and (ii) construction plant and equipment owned and furnished by the contractor under this contract.

Alternate IV (Month and Year TBE). As prescribed in 48 CFR 970.3170(a)(4), if no contractor-owned equipment is being utilized in the performance of the contract, paragraph (e)(18) of the basic clause may be omitted and the remaining subparagraphs renumbered accordingly.

Alternate V (Month and Year TBE). As prescribed in 48 CFR 970.3170(a)(5), in contracts with for-profit contractors, add the following to paragraph (e):

(36) Notwithstanding any other provision of this contract, the costs of bonds and insurance are unallowable to the extent they are incurred to protect and indemnify the contractor and/or subcontractor against otherwise unallowable costs, unless such insurance or bond is required by law, the express terms of this contract, or is authorized in writing by the contracting officer. The cost of commercial insurance to protect the contractor against the costs of correcting its own defects in materials or workmanship is an unallowable cost.

(37) Costs of gifts; however, gifts do not include awards for performance or awards made in recognition of employee achievements pursuant to an established contractor plan or policy.

(38) The costs of recreation, registration fees of employees participating in competitive fitness promotions, team activities, and sporting events except for the costs of employees' participation in company sponsored intramural sports teams or employee organizations designed to improve company loyalty, team work, or physical fitness.

(End of Clause)

#### **970.5231-2 Political activity cost prohibition.**

As prescribed in 48 CFR 970.3170(b), insert the following clause:

Political Activity Cost Prohibition (Month and Year TBE)

(a) Pursuant to the allowable cost provisions established elsewhere under the contract, costs associated with the following activities are not reimbursable under the contract:

(1) Attempts to influence the outcome of any Federal, State, or local election, referendum, initiative, or similar procedure, through in-kind or cash contributions, endorsements, publicity, or similar activities;

(2) Establishing, administering, contributing to, or paying the expenses of a political party, campaign, political action committee, or other organization established for the purpose of influencing the outcomes of elections;

(3) Any attempt to influence (i) the introduction of Federal or State legislation, or (ii) the enactment or modification of any

pending Federal or State legislation through communication with any member or employee of the Congress or State legislature (including efforts to influence state or local officials to engage in similar lobbying activity), or with any government official or employee in connection with a decision to sign or veto enrolled legislation;

(4) Any attempt to influence (i) the introduction of Federal or State legislation, or (ii) the enactment or modification of any pending Federal or State legislation by preparing, distributing or using publicity or propaganda, or by urging members of the general public or any segment thereof to contribute to or participate in any mass demonstration, march, rally, fund raising drive, lobbying campaign or letter writing or telephone campaign; or

(5) Legislative liaison activities, including attendance at legislative sessions or committee hearings, gathering information regarding legislation, and analyzing the effect of legislation, when such activities are carried on in support of or in knowing preparation for an effort to engage in unallowable activities.

(6) Contractor costs incurred to influence (directly or indirectly) Federal, State, or local executive branch action on regulatory and contract matters.

(b) Costs of the following activities are excepted from the coverage of paragraph (a) of this clause; provided that the resultant contract costs are reasonable and otherwise comply with the allowable cost provisions of the contract:

(1) Providing Members of Congress, their staff members or staff of cognizant legislative committees, in response to a request (written or oral, prior or contemporaneous) from Members of Congress, their staff members or staff of cognizant legislative committees, or as otherwise directed by the contracting officer, information or expert advice of a factual technical, or scientific nature, with respect to topics directly related to the performance of the contract proposed legislation. In providing this information or expert advice, the contractor shall indicate to the recipient that it is not presenting the views of DOE. Reasonable costs for transportation, lodging or meals incurred by contractor employees for the purpose of providing such information or expert advice shall also be reimbursable, provided the request for such information or expert advice is a prior written request signed by a Member of Congress, and provided such costs also comply with the allowable cost provisions of the contract.

(2) Providing State legislatures or subdivisions thereof, their staff members, or staff of cognizant legislative committees, in response to a prior written request from a State legislator, or as otherwise directed by the contracting officer, information or expert advice of factual, technical, or scientific nature, with respect to topics directly related to the performance of the contract or proposed legislation. In providing this information or expert advice, the contractor shall indicate to the recipient that it is not presenting the views of DOE. Reasonable costs for transportation, lodging, or meals incurred by contractor employees shall be

reimbursable, provided such costs also comply with the allowable costs provision of the contract.

(3) Any lobbying made unallowable under subparagraph (a)(3) above to influence State legislation in order to directly reduce contract cost, or to avoid material impairment of the contractor's authority to perform the contract if authorized by the contracting officer.

(4) Any activity specifically authorized by statute to be undertaken with funds from the contract.

(c) Unallowable lobbying costs incurred, if any, shall not be charged to DOE, paid for with DOE funds or recorded as allowable cost in DOE's system of accounts.

(d) The contractor's annual certification, submitted as part of its annual claim (*i.e.*, Voucher Accounting for Net Expenditures Accrued required under the clause titled "Payments and Advances") or cost incurred statement, that the costs claimed are allowable under the contract, shall also serve as the contractor's certification that the requirements and standards of this clause have been complied with.

(e) The contractor shall maintain adequate records to demonstrate that the annual certifications of claimed costs as being allowable comply with the requirements of this clause.

(f) Time logs, calendars, or similar records shall not be created for purposes of complying with this clause during any particular calendar month when: (1) An employee engages in legislative liaison activities (as delineated in paragraphs (a) and (b) of this clause) 25 percent or less of the employee's compensated hours of employment during that calendar month, and (2) within the preceding five-year period, the contractor has not materially misstated allowable or unallowable costs of any nature, including legislative liaison costs. When conditions (f)(1) and (2) of this clause are met, the contractor is not required to establish records to support the allowability of claimed costs in addition to records already required or maintained. Also, when conditions (f) (1) and (2) of this clause are met, the absence of time logs, calendars, or similar records will not serve as a basis for disallowing costs by contesting estimates of legislative liaison activity time spent by employees during any calendar month.

(g) During contract performance, the contractor should resolve, in advance, any significant questions or disagreements between the contractor and DOE concerning compliance with this clause.

(h) In providing information or expert advice under paragraph (b)(1) and (b)(2) of this clause, the contractor shall advise the contracting officer in advance or as soon as practicable.

(End of Clause)

#### **970.5231-3 Cost Prohibitions Related to Legal and Other Proceedings.**

As prescribed in 48 CFR 970.3170(c), insert the following clause:

#### *Cost Prohibitions Related to Legal and Other Proceedings (Month and Year TBE)*

(a) *Definitions.* *Conviction*, as used in this section, means a judgment or conviction of

a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, including a conviction due to a plea of *nolo contendere*.

*Costs* include, but are not limited to, administrative and clerical expenses; the cost of legal services, whether performed by in-house or private counsel; the costs of the services of accountants, consultants, or others retained by the contractor to assist it; all elements of compensation, related costs, and expenses of employees, officers and directors; and any similar costs incurred before, during, and after commencement of a proceeding which bears a direct relationship to the proceeding.

*Fraud*, as used herein, means: (i) Acts of fraud or corruption or attempts to defraud the Government or to corrupt its agents,

(ii) Acts which constitute a cause for debarment or suspension under 48 CFR 9.406-2(a) and 48 CFR 9.407-2(a), and

(iii) Acts which violate the False Claims Act, 31 U.S.C. 3729-3731, or the Anti-kickback Act, 41 U.S.C. 51 and 54.

*Penalty* does not include restitution, reimbursement, or compensatory damages.

*Proceeding* includes an investigation.

(b) Except as otherwise described in this section, costs incurred in connection with any proceeding brought by a third party in the name of the United States under the False Claims Act, 31 U.S.C. 3730, or costs incurred in connection with any criminal, civil or administrative proceeding by the Federal Government, or a State, local or foreign government, are not allowable if the proceeding relates to a violation of, or failure to comply with a Federal, State, local or foreign statute or regulation by the contractor, and results in any of the following dispositions:

- (1) In a criminal proceeding, conviction.
- (2) In a civil or administrative proceeding involving an allegation of fraud or similar misconduct, a determination of contractor liability.
- (3) In the case of any civil or administrative proceeding, the imposition of a monetary penalty.
- (4) A final decision by an appropriate Federal official to debar or suspend the contractor, to rescind or void a contract, or to terminate a contract for default by reason of a violation of or failure to comply with a law or regulation.
- (5) A disposition by consent or compromise, if the action could have resulted in any of the dispositions described in paragraphs (b) (1), (2), (3) or (4) of this section.
- (6) Not covered by paragraphs (b)(1) through (5) of this section, but where the underlying alleged contractor misconduct was the same as that which led to a different proceeding whose costs are unallowable by reason of paragraphs (b)(1) through (5) of this section.

(c)(1) If a proceeding referred to in paragraph (b) of this clause is commenced by the Federal Government and is resolved by consent or compromise pursuant to an agreement entered into by the contractor and the Federal Government, then the costs incurred by the contractor in connection with such proceeding that are otherwise

unallowable under paragraph (b) of this clause may be allowed to the extent specifically provided in such agreement.

(2) In the event of a settlement of any proceeding brought by a third party under the False Claims Act in which the United States did not intervene, reasonable costs incurred by the contractor in connection with such a proceeding that are not otherwise unallowable by regulation or by separate agreement with the United States, may be allowed if the contracting officer, in consultation with legal counsel, determines that there was very little likelihood that the third party would have been successful on the merits.

(d) If a proceeding referred to in paragraph (b) of this clause is commenced by a State, local or foreign government, the contracting officer may allow the costs incurred in such proceeding, provided the Senior Procurement Executive determines that the costs were incurred as a result of compliance with a specific term or condition of the contract, or specific written direction of the contracting officer.

(e) Costs incurred in connection with a proceeding described in paragraph (b) of this section, but which are not made unallowable by that paragraph, may be allowed by the contracting officer only to the extent that:

(1) The total costs incurred are reasonable in relation to the activities required to deal with the proceeding and the underlying cause of action;

(2) Payment of the costs incurred, as allowable and allocable contract costs, is not prohibited by any other provision(s) of this contract;

(3) The costs are not otherwise recovered from the Federal Government or a third party, either directly as a result of the proceeding or otherwise; and

(4) The amount of costs allowed does not exceed 80 percent of the total costs incurred and otherwise allowable under the contract. Such amount that may be allowed (up to the 80 percent limit) shall not exceed the percentage determined by the contracting officer to be appropriate, considering the complexity of procurement litigation, generally accepted principles governing the award of legal fees in civil actions involving the United States as a party, and such other factors as may be appropriate. The amount of reimbursement allowed for legal costs in connection with any proceeding described in subparagraph (c)(2) shall be the amount determined to be reasonable by the contracting officer but shall not exceed 80 percent of otherwise allowable costs incurred. Agreements reached under paragraph (c) of this subsection shall be subject to this limitation. If, however, an agreement explicitly states the amount of otherwise allowable incurred legal fees and limits the allowable recovery to 80 percent or less of the stated legal fees, no additional limitation need be applied.

(f) Contractor costs incurred in connection with the defense of suits brought by employees or ex-employees of the contractor under section 2 of the Major Fraud Act of 1988, including the cost of all relief necessary to make such employee whole, where the contractor was found liable or settled, are unallowable.

(g) Costs which may be unallowable under this clause, including directly associated costs, shall be differentiated and accounted for by the contractor so as to be separately identifiable. During the pendency of any proceeding covered by paragraphs (b) and (f) of this section, the contracting officer shall generally withhold payment and not authorize the use of funds advanced under the contract for the payment of such costs. However, the contracting officer may, in appropriate circumstances, provide for conditional payment upon provision of adequate security, or other adequate assurance, and agreements by the contractor to repay all unallowable costs, plus interest, if the costs are subsequently determined to be unallowable.

#### **970.5231-4 Preexisting Conditions.**

As prescribed in 48 CFR 970.3170(d), insert the following clause:

Preexisting Conditions (Month and Year TBE)

(a) The Department of Energy agrees to reimburse the contractor, and the contractor shall not be held responsible, for any liability (including without limitation, a claim involving strict or absolute liability and any civil fine or penalty), expense, or remediation cost, but limited to those of a civil nature, which may be incurred by, imposed on, or asserted against the contractor arising out of any condition, act, or failure to act which occurred before the contractor assumed responsibility on [Insert date contract began]. To the extent the acts or omissions of the contractor cause or add to any liability, expense or remediation cost resulting from conditions in existence prior to [Insert date contract began], the contractor shall be responsible in accordance with the terms and conditions of this contract.

(b) The obligations of the Department of Energy under this clause are subject to the availability of appropriated funds.  
(End of Clause)

Alternate I (Month and Year TBE). As prescribed in 48 CFR 970.3170(d)(1), in contracts with incumbent management and operating contractors, substitute the following for paragraph (a) of the basic clause:

(a) Any liability, obligation, loss, damage, claim (including without limitation, a claim involving strict or absolute liability), action, suit, civil fine or penalty, cost, expense or disbursement, which may be incurred or imposed, or asserted by any party and arising out of any condition, act or failure to act which occurred before [Insert date this clause was included in contract], in conjunction with the management and operation of [Insert name of facility], shall be deemed incurred under Contract No. [Insert number of prior contract].

Alternate II (Month and Year TBE). As prescribed in 48 CFR 970.3170(d)(2), add the following paragraph (c) to the basic clause in contracts with management and operating contractors not previously working at that particular site or facility:

(c) The contractor has the duty to inspect the facilities and sites and timely identify to the contracting officer those conditions

which it believes could give rise to a liability, obligation, loss, damage, penalty, fine, claim, action, suit, cost, expense, or disbursement or areas of actual or potential noncompliance with the terms and conditions of this contract or applicable law or regulation. The contractor has the responsibility to take corrective action, as directed by the contracting officer and as required elsewhere in this contract.

(End of Clause)

#### **970.5232-1 Reduction or suspension of advance, partial, or progress payments upon finding of substantial evidence of fraud.**

As prescribed in 48 CFR 970.3200-1-1, insert the following clause:

Reduction or Suspension of Advance, Partial, or Progress Payments (Month and Year TBE)

(a) The contracting officer may reduce or suspend further advance, partial, or progress payments to the contractor upon a written determination by the Senior Procurement Executive that substantial evidence exists that the contractor's request for advance, partial, or progress payment is based on fraud.

(b) The contractor shall be afforded a reasonable opportunity to respond in writing.  
(End of Clause)

#### **970.5232-2 Payments and Advances.**

As prescribed in 48 CFR 970.3204-3, insert the following clause:

Payments And Advances (Month and Year TBE)

(a) Installments of fixed-fee. Ninety percent (90%) of the fixed-fee shall become due and payable in periodic installments in amounts based on the proportion of the work then completed, as determined by the contracting officer, and the balance upon completion and acceptance of all work under this contract. Fixed-fee payments shall be made by direct payment or withdrawn from funds advanced or available under this contract, as determined by the contracting officer. The contracting officer may offset against any such fee payment, the amounts owed to the Government by the contractor, including any amounts owed for disallowed costs under this contract. No fixed-fee payment may be withdrawn against the letter-of-credit without prior written approval of the contracting officer.

(b) Payments on Account of Allowable Costs. The contracting officer and the contractor shall agree as to the extent to which payment for allowable costs or payments for other items specifically approved in writing by the contracting officer (for example, negotiated fixed amounts) shall be made from advances of Government funds. When pension contributions are paid by the contractor to the retirement fund less frequently than quarterly, accrued costs therefor shall be excluded from costs for payment purposes until such costs are paid. If pension contribution are paid on a quarterly or more frequent basis, accrual therefor may be included in costs for

payment purposes, provided that they are paid to the fund within 30 days after the close of the period covered. If payments are not made to the fund within such 30-day period, pension contribution costs shall be excluded from cost for payment purposes until payment has been made.

(c) Special bank account— use. All advances of Government funds shall be withdrawn pursuant to a letter of credit in favor of the bank or, in the option of the Government, shall be made by check payable to the contractor, and shall be deposited only in the Special Bank Account referred to in the Agreement for Special Bank Account, which is attached hereto and incorporated into this contract as an appendix. The contractor shall likewise deposit in the Special Bank Account any other revenues received by the contractor in connection with the work under this contract. No part of the funds in the Special Bank Account shall be (1) mingled with any funds of the contractor or (2) used for a purpose other than that of making payments for costs allowable under this contract or payments for other items specifically approved in writing by the contracting officer. If the contracting officer shall at any time determine that the balance on such bank account exceeds the contractor's current needs, the contractor shall promptly make such disposition of the excess as the contracting officer may direct.

(d) Title to funds advanced. Title to the unexpended balance of any funds advanced and of any bank account established pursuant to this clause shall remain in the Government and be superior to any claim or lien of the bank of deposit or others. It is understood that an advance to the contractor hereunder is not a loan to the contractor, and will not require the payment of interest by the contractor, and that the contractor acquires no right, title or interest in or to such advance other than the right to make expenditures therefrom, as provided in this clause.

(e) Financial settlement. The Government shall promptly pay to the contractor the unpaid balance of allowable costs (or other items specifically approved in writing by the contracting officer) and fixed fee upon termination of the work, expiration of the term of the contract, or completion of the work and its acceptance by the Government after (1) compliance by the contractor with DOE's patent clearance requirements, and (2) the furnishing by the contractor of:

- (i) An assignment of the contractor's rights to any refunds, rebates, allowances, accounts receivable, or other credits applicable to allowable costs under the contract;
- (ii) A closing financial statement;
- (iii) The accounting for Government-owned property required by the clause entitled "Property;" and
- (iv) A release discharging the Government, its officers, agents, and employees from all liabilities, obligations, and claims arising out of or under this contract subject only to the following exceptions:

(A) Specified claims in stated amounts or in estimated amounts where the amounts are not susceptible to exact statement by the contractor;

(B) Claims, together with reasonable expenses incidental thereto, based upon

liabilities of the contractor to third parties arising out of the performance of this contract; provided that such claims are not known to the contractor on the date of the execution of the release; and provided further that the contractor gives notice of such claims in writing to the contracting officer promptly, but not more than one (1) year after the contractor's right of action first accrues. In addition, the contractor should provide prompt notice to the contracting officer of all potential claims under this clause, whether in litigation or not (see also 48 CFR 970.5228-1, Insurance—Litigation and Claims); and

(C) Claims for reimbursement of costs (other than expenses of the contractor by reason of any indemnification of the Government against patent liability), including reasonable expenses incidental thereto, incurred by the contractor under the provisions of this contract relating to patents.

In arriving at the amount due the contractor under this clause, there shall be deducted, any claim which the Government may have against the contractor in connection with this contract, and deductions due under the terms of this contract, and not otherwise recovered by or credited to the Government. The unliquidated balance of the Special Bank Account may be applied to the amount due and any balance shall be returned to the Government forthwith.

(f) Claims. Claims for credit against funds advanced for payment shall be accompanied by such supporting documents and justification as the contracting officer shall prescribe.

(g) Discounts. The contractor shall take and afford the Government the advantage of all known and available cash and trade discounts, rebates, allowances, credits, salvage, and commissions unless the contracting officer finds that action is not in the best interest of the Government.

(h) Revenues. All revenues other than the contractor's fixed fee or fees, if any, accruing to the contractor in connection with the work under this contract shall be Government property and shall be deposited in the Special Bank Account to be available for payment of allowable cost under this contract.

(i) Direct payment of charges. The Government reserves the right, upon ten days written notice from the contracting officer to the contractor, to pay directly to the persons concerned, all amounts due which otherwise would be allowable under this contract. Any payment so made shall discharge the Government of all liability to the contractor therefor.

Alternate I (Month and Year TBE). As prescribed in 48 CFR 970.3204-3(a), if a separate fixed-fee is provided for a separate item of work, paragraph (a) of the basic clause should be modified to permit payment of the entire fixed-fee upon completion of that item.

Alternate II (Month and Year TBE). As prescribed in 48 CFR 970.3204-3(b), when total available fee provisions are used, replace paragraph (a) of the basic clause with the following paragraph (a):

(a) Payment of Base Fee and Award Fee. The base fee amount, if any, is payable in

equal monthly installments. Total available fee amount earned is payable following the FDO's issuing a Determination of Total Available Fee Amount Earned in accordance with the clause of this contract entitled "Total Available Fee: Base Fee Amount and Performance Fee Amount." Base fee amount and total available fee amount earned payments shall be made by direct payment or withdrawn from funds advanced or available under this contract, as determined by the contracting officer. The contracting officer may offset against any such fee payment the amounts owed to the Government by the contractor, including any amounts owed for disallowed costs under this contract. No base fee amount or total available fee amount earned payment may be withdrawn against the payments cleared financing arrangement with the prior written approval of the contracting officer.

Alternate III (Month and Year TBE). As prescribed in 48 CFR 970.3204-3(c), the following paragraph (j) shall be included in management and operating contracts with integrated contractors:

(j) Review and approval of costs incurred. The contractor shall prepare and submit annually as of September 30, a voucher for the total of net expenditures accrued (i.e., net costs incurred) for the period covered by the voucher, and DOE, after audit and appropriate adjustment, will approve such voucher. This approval by DOE will constitute an acknowledgment by DOE that the net costs incurred are allowable under the contract and that they have been recorded in the accounts maintained by the contractor in accordance with DOE accounting policies, but will not relieve the contractor of responsibility for DOE's assets in its care, for appropriate subsequent adjustments, or for errors later becoming known to DOE.

#### **970.5232-3 Accounts, Records, and Inspection.**

As prescribed in 48 CFR 970.3270(a), insert the following clause:

Accounts, Records, and Inspection (Month and Year TBE)

(a) Accounts. The contractor shall maintain a separate and distinct set of accounts, records, documents, and other evidence showing and supporting all allowable costs incurred, revenues or other applicable credits, negotiated fixed amounts, fixed-fee accruals, and the receipt, use, and disposition of all Government property coming into the possession of the contractor under this contract. The system of accounts employed by the contractor shall be satisfactory to DOE and in accordance with generally accepted accounting principles consistently applied.

(b) Inspection and audit of accounts and records. All books of account and records relating to this contract shall be subject to inspection and audit by DOE at all reasonable times, before and during the period of retention provided for in (d) below, and the contractor shall afford DOE proper facilities for such inspection and audit.

(c) Audit of subcontractors' records. The contractor also agrees, with respect to any subcontracts (including fixed-price or unit-

price subcontracts or purchase orders) where, under the terms of the subcontract, costs incurred are a factor in determining the amount payable to the subcontractor of any tier, to either conduct an audit of the subcontractor's costs or arrange for such an audit to be performed by the cognizant government audit agency through the contracting officer.

(d) Disposition of records. Except as agreed upon by the Government and the contractor, all financial and cost reports, books of account and supporting documents, and other data evidencing costs allowable, revenues, and other applicable credits under this contract, shall be the property of the Government, and shall be delivered to the Government or otherwise disposed of by the contractor either as the contracting officer may from time to time direct during the progress of the work or, in any event, as the contracting officer shall direct upon completion or termination of this contract and final audit of accounts hereunder. Except as provided in this contract, all other records in the possession of the contractor relating to this contract shall be preserved by the contractor for a period of three years after final payment under this contract or otherwise disposed of in such manner as may be agreed upon by the Government and the contractor.

(e) Reports. The contractor shall furnish such progress reports and schedules, financial and cost reports, and other reports concerning the work under this contract as the contracting officer may from time to time require.

(f) Inspections. The DOE shall have the right to inspect the work and activities of the contractor under this contract at such time in such manner as it shall deem appropriate.

(g) Subcontracts. The contractor further agrees to require the inclusion of provisions similar to those in paragraphs (a) through (g) and paragraph (i) of this clause in all subcontracts (including fixed-price or unit-price subcontracts or purchase orders) of any tier entered into hereunder where, under the terms of the subcontract, costs incurred are a factor in determining the amount payable to the subcontractor.

(h) Comptroller General. (1) The Comptroller General of the United States, or an authorized representative, shall have access to and the right to examine any of the contractor's directly pertinent records involving transactions related to this contract or a subcontract hereunder.

(2) This paragraph may not be construed to require the contractor or subcontractor to create or maintain any record that the contractor or subcontractor does not maintain in the ordinary course of business or pursuant to a provision of law.

(3) Nothing in this contract shall be deemed to preclude an audit by the General Accounting Office of any transaction under this contract.

(End of Clause)

Alternate I (Month and Year TBE). As prescribed in 48 CFR 970.3270(a)(1), if the contract includes the clause at 48 CFR 52.215-22, Price Reduction for Defective Cost or Pricing Data, the basic clause shall be modified as follows:

(a) Paragraph (a) of the basic clause shall be modified by adding the words "or anticipated to be incurred" after the words "allowable costs incurred."

(b) Paragraph (g) of the basic clause shall be modified by adding the following:

The contractor further agrees to include an "Audit" clause, the substance of which is the "Audit" clause set forth at 48 CFR 52.215-2, in each subcontract which does not include provisions similar to those in paragraph (a) through paragraph (g) and paragraph (h) of this clause, but which contains a "defective cost or pricing data" clause.

Alternate II (Month and Year TBE). As prescribed in 48 CFR 970.3270(a)(2), in cost-reimbursement contracts involving an estimated cost exceeding \$5 million and expected to run for more than 2 years, and any other cost-reimbursement contract determined by the Head of the Contracting Activity in which the contractor has an established internal audit organization, add the following paragraph (i) to the basic clause:

(i) Internal audit. The contractor agrees to conduct an internal audit and examination satisfactory to DOE of the records, operations, expenses, and the transactions with respect to costs claimed to be allowable under this contract annually and at such other times as may be mutually agreed upon. The results of such audit, including the working papers, shall be submitted or made available to the contracting officer. The contractor shall include this paragraph (i) in all cost-reimbursement subcontracts with an estimated cost exceeding \$5 million and expected to run for more than 2 years, and any other cost-reimbursement subcontract determined by the Head of the Contracting Activity.

#### **970.5232-4 Obligation of funds.**

As prescribed in 48 CFR 970.3270(b), insert the following clause:

Obligation of Funds (Month and Year TBE)

(a) Obligation of funds. The amount presently obligated by the Government with respect to this contract is \_\_\_\_ dollars (\$\_\_\_\_). Such amount may be increased unilaterally by DOE by written notice to the contractor and may be increased or decreased by written agreement of the parties (whether or not by formal modification of this contract). Estimated collections from others for work and services to be performed under this contract are not included in the amount presently obligated. Such collections, to the extent actually received by the contractor, shall be processed and accounted for in accordance with applicable requirements imposed by the contracting officer pursuant to the Laws, regulations, and DOE directives clause of this contract. Nothing in this paragraph (a) is to be construed as authorizing the contractor to exceed limitations stated in financial plans established by DOE and furnished to the contractor from time to time under this contract.

(b) Limitation on payment by the Government. Except as otherwise provided in this contract and except for costs which may

be incurred by the contractor pursuant to the termination clause of the contract, or costs of claims allowable under the contract occurring after completion or termination and not released by the contractor at the time of financial settlement of the contract in accordance with the clause entitled "Payments and Advances," payment by the Government under this contract on account of allowable costs shall not, in the aggregate, exceed the amount obligated with respect to this contract, less the contractor's fee. Unless expressly negated in this contract, payment on account of those costs excepted in the preceding sentence which are in excess of the amount obligated with respect to this contract shall be subject to the availability of:

(1) Collections accruing to the contractor in connection with the work under this contract and processed and accounted for in accordance with applicable requirements imposed by the contracting officer pursuant to the Laws, regulations, and DOE directives clause of this contract, and

(2) Other funds which DOE may legally use for such purpose, provided DOE will use its best efforts to obtain the appropriation of funds for this purpose if not otherwise available.

(c) Notices—Contractor excused from further performance. The contractor shall notify DOE in writing whenever the unexpended balance of available funds (including collections available under paragraph (a) of this clause, plus the contractor's best estimate of collections to be received and available during the \_\_\_\_ day period hereinafter specified, is in the contractor's best judgment sufficient to continue contract operations at the programmed rate for only \_\_\_\_ days and to cover the contractor's unpaid fee, and outstanding encumbrances and liabilities on account of costs allowable under the contract at the end of such period. Whenever the unexpended balance of available funds (including collections available under paragraph (a) of this clause, less the amount of the contractor's fee then earned but not paid, is in the contractor's best judgment sufficient only to liquidate outstanding encumbrances and liabilities on account of costs allowable under this contract, the contractor shall immediately notify DOE and shall make no further encumbrances or expenditures (except to liquidate existing encumbrances and liabilities), and, unless the parties otherwise agree, the contractor shall be excused from further performance (except such performance as may become necessary in connection with termination by the Government) and the performance of all work hereunder will be deemed to have been terminated for the convenience of the Government in accordance with the provisions of the termination clause of the contract.

(d) Financial plans; cost and encumbrance limitations. In addition to the limitations provided for elsewhere in this contract, DOE may, through financial plans, such as Approved Funding Programs, or other directives issued to the contractor, establish controls on the costs to be incurred and encumbrances to be made in the performance of the contract work. Such plans and

directives may be amended or supplemented from time to time by DOE. The contractor hereby agrees.

(1) To comply with the specific limitations (ceilings) on costs and encumbrances set forth in such plans and directives,

(2) To comply with other requirements of such plans and directives, and

(3) To notify DOE promptly, in writing, whenever it has reason to believe that any limitation on costs and encumbrances will be exceeded or substantially underrun.

(e) Government's right to terminate not affected. The giving of any notice under this clause shall not be construed to waive or impair any right of the Government to terminate the contract under the provisions of the termination clause of the contract.

(End of Clause)

Alternate I (Month and Year TBE). As prescribed in 48 CFR 970.3270(b), paragraph (d) of the clause may be omitted in contracts which, expressly or otherwise, provide a contractual basis for equivalent controls in a separate clause.

#### **970.5235-1 Federally Funded Research and Development Center Sponsoring Agreement.**

As prescribed in 48 CFR 970.3501-4, the contracting officer shall insert the following clause:

Federally Funded Research and Development Center Sponsoring Agreement (Month and Year TBE)

(a) Pursuant to 48 CFR 35.017-1, this contract constitutes the sponsoring agreement between the Department of Energy and the contractor, which establishes the relationship for the operation of a Department of Energy sponsored Federally Funded Research and Development Center (FFRDC).

(b) In the operation of this FFRDC, the contractor may be provided access beyond that which is common to the normal contractual relationship, to Government and supplier data, including sensitive and proprietary data, and to Government employees and facilities needed to discharge its responsibilities efficiently and effectively. Because of this special relationship, it is essential that the FFRDC be operated in the public interest with objectivity and independence, be free from organizational conflicts of interest, and have full disclosure of its affairs to the Department of Energy.

(c) Unless otherwise provided by the contract, the contractor may accept work from a nonsponsor (as defined in 48 CFR 35.017) in accordance with the requirements and limitations of DOE Order 481.1, Work for Others (Non-Department of Energy Funded Work) (see current version).

(d) As an FFRDC, the contractor shall not use its privileged information or access to government facilities to compete with the private sector. Specific guidance on restricted activities is contained in DOE Order 481.1.

(End of Clause)

#### **970.5236-1 Government Facility Subcontract Approval.**

As prescribed in 48 CFR 970.3605-2, insert the following clause:

Government Facility Subcontract Approval (Month and Year TBE)

Upon request of the contracting officer and acceptance thereof by the contractor, the contractor shall procure, by subcontract, the construction of new facilities or the alteration or repair of Government-owned facilities at the plant. Any subcontract entered into under this paragraph shall be subject to the written approval of the contracting officer and shall contain the provisions relative to labor and wages required by law to be included in contracts for the construction, alteration, and/or repair, including painting and decorating, of a public building or public work.

(End of Clause)

**970.5237-1 Waiver of Limitations on Severance Payments to Foreign Nationals.**

As prescribed in 48 CFR 970.3701-1-2, the contracting officer shall insert the following solicitation provision:

Waiver of Limitations on Severance Payments to Foreign Nationals (Month and Year TBE)

Pursuant to 48 CFR 970.3701-1, Severance Payments to Foreign Nationals, the cost allowability limitations in 48 CFR 970.3102-3-2(i)(iv) and (v) are waived for this contract.

(End of Clause)

Alternate I (Month and Year TBE). As prescribed in 48 CFR 970.3701-1-2(b), substitute the following paragraph for the foregoing solicitation provision when the waiver of limitations to severance payments for foreign nationals has not been predetermined by the Department.

Pursuant to 48 CFR 970.3701-1, Severance Payments to Foreign Nationals, the Department will consider waiving the cost allowability limitations in 48 CFR 970.3102-3-2(i)(iv) and (v) for this contract.

**970.5237-2 Facilities management.**

As prescribed in 48 CFR 970.3770-2, insert the following clause:

Facilities Management (Month and Year TBE)

Copies of DOE Directives referenced herein are available from the contracting officer.

(a) Site development planning. The Government shall provide to the contractor site development guidance for the facilities and lands for which the contractor is responsible under the terms and conditions of this contract. Based upon this guidance, the contractor shall prepare, and maintain through annual updates, a Long-Range Site Development Plan (Plan) to reflect those actions necessary to keep the development of these facilities current with the needs of the Government and allow the contractor to successfully accomplish the work required under this contract. In developing this Plan, the contractor shall follow the procedural guidance set forth in the applicable DOE Directives in the Life Cycle Facility Operations Series listed elsewhere in this contract. The contractor shall use the Plan to manage and control the development of facilities and lands. All plans and revisions shall be approved by the Government.

(b) General design criteria. The general design criteria which shall be utilized by the contractor in managing the site for which it is responsible under this contract are those specified in the applicable DOE Directives in the 6430, Design Criteria, series listed elsewhere in this contract. The contractor shall comply with these mandatory, minimally acceptable requirements for all facility designs with regard to any building acquisition, new facility, facility addition or alteration or facility lease undertaken as part of the site development activities of paragraph (a) above. This includes on-site constructed buildings, pre-engineered buildings, plan-fabricated modular buildings, and temporary facilities. For existing facilities, original design criteria apply to the structure in general; however, additions or modifications shall comply with this directive and the associated latest editions of the references therein. An exception may be granted for off-site office space being leased by the contractor on a temporary basis.

(c) Energy management. The contractor shall manage the facilities for which it is responsible under the terms and conditions of this contract in an energy efficient manner in accordance with the applicable DOE Directives in the Life Cycle Facility Operations Series listed elsewhere in this contract. The contractor shall develop a 10-year energy management plan for each site with annual reviews and revisions. The contractor shall submit an annual report on progress toward achieving the goals of the 10-year plan for each individual site, and an energy conservation analysis report for each new building or building addition project. Any acquisition of utility services by the contractor shall be conducted in accordance with 48 CFR 970.41.

(d) Subcontract Requirements. To the extent the contractor subcontracts performance of any of the responsibilities discussed in this clause, the subcontract shall contain the requirements of this clause relative to the subcontracted responsibilities.

(End of Clause)

**970.5243-1 Changes.**

As prescribed in 48 CFR 970.4302-1, the contracting officer shall insert the following clause in all management and operating contracts:

Changes (Month and Year TBE)

(a) Changes and adjustment of fee. The contracting officer may at any time and without notice to the sureties, if any, issue written directions within the general scope of this contract requiring additional work or directing the omission of, or variation in, work covered by this contract. If any such direction results in a material change in the amount or character of the work described in the "Statement of Work," an equitable adjustment of the fee, if any, shall be made in accordance with the agreement of the parties and the contract shall be modified in writing accordingly. Any claim by the contractor for an adjustment under this clause must be asserted in writing within 30 days from the date of receipt by the contractor of the notification of change; provided, however, that the contracting

officer, if it is determined that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this contract. A failure to agree on an equitable adjustment under this clause shall be deemed to be a dispute within the meaning of the clause entitled "Disputes."

(b) Work to continue. Nothing contained in this clause shall excuse the contractor from proceeding with the prosecution of the work in accordance with the requirements of any direction hereunder.

(End of Clause)

**970.5244-1 Contractor Purchasing System.**

As prescribed in 48 CFR 970.4402-5, insert the following clause:

Contractor Purchasing System (Month and Year TBE)

(a) General. The contractor shall develop, implement, and maintain formal policies, practices, and procedures to be used in the award of subcontracts consistent with this clause and 48 CFR 970.44. The contractor's purchasing system and methods shall be fully documented, consistently applied, and acceptable to DOE in accordance with 48 CFR 970.4401-1. The contractor shall maintain file documentation which is appropriate to the value of the purchase and is adequate to establish the propriety of the transaction and the price paid. The contractor's purchasing performance will be evaluated against such performance criteria and measures as may be set forth elsewhere in this contract. DOE reserves the right at any time to require that the contractor submit for approval any or all purchases under this contract. The contractor shall not purchase any item or service the purchase of which is expressly prohibited by the written direction of DOE and shall use such special and directed sources as may be expressly required by the DOE contracting officer. DOE will conduct periodic appraisals of the contractor's management of all facets of the purchasing function, including the contractor's compliance with its approved system and methods. Such appraisals will be performed through the conduct of Contractor Purchasing System Reviews in accordance with 48 CFR subpart 44.3, or, when approved by the contracting officer, through the contractor's participation in the conduct of the Balanced Scorecard performance measurement and performance management system. The contractor's approved purchasing system and methods shall include the requirements set forth in paragraphs (b) through (x) of this clause.

(b) Acquisition of utility services. Utility services shall be acquired in accordance with the requirements of 48 CFR 970.41.

(c) Acquisition of Real Property. Real property shall be acquired in accordance with 48 CFR Subpart 917.74.

(d) Advance Notice of Proposed Subcontract Awards. Advance notice shall be provided in accordance with 48 CFR 970.4401-3.

(e) Audit of Subcontractors. (1) The contractor shall provide for:

(i) periodic post-award audit of cost-reimbursement subcontractors at all tiers, and

(ii) audits, where necessary, to provide a valid basis for pre-award or cost or price analysis.

(2) Responsibility for determining the costs allowable under each cost-reimbursement subcontract remains with the contractor or next higher-tier subcontractor. The contractor shall provide, in appropriate cases, for the timely involvement of the contractor and the DOE contracting officer in resolution of subcontract cost allowability.

(3) Where audits of subcontractors at any tier are required, arrangements may be made to have the cognizant Federal agency perform the audit of the subcontract. These arrangements shall be made administratively between DOE and the other agency involved and shall provide for the cognizant agency to audit in an appropriate manner in light of the magnitude and nature of the subcontract. In no case, however, shall these arrangements preclude determination by the DOE contracting officer of the allowability or unallowability of subcontractor costs claimed for reimbursement by the contractor.

(4) Allowable costs for cost reimbursable subcontracts are to be determined in accordance with the cost principles of 48 CFR Part 31, appropriate for the type of organization to which the subcontract is to be awarded, as supplemented by 48 CFR Part 931. Allowable costs in the purchase or transfer from contractor-affiliated sources shall be determined in accordance with 48 CFR 970.4402-3 and 48 CFR 970.3102-3-21(b).

(f) Bonds and Insurance. (1) The contractor shall require performance bonds in penal amounts as set forth in 48 CFR 28.102-2(a) for all fixed priced and unit-priced construction subcontracts in excess of \$100,000. The contractor shall consider the use of performance bonds in fixed price nonconstruction subcontracts, where appropriate.

(2) For fixed-price, unit-priced and cost reimbursement construction subcontracts in excess of \$100,000 a payment bond shall be obtained on Standard Form 25A modified to name the contractor as well as the United States of America as obligees. The penal amounts shall be determined in accordance with 48 CFR 28.102-2(b).

(3) For fixed-price, unit-priced and cost-reimbursement construction subcontracts, greater than \$25,000, but not greater than \$100,000, the contractor shall select two or more of the payment protections at 48 CFR 28.102-1(b), giving particular consideration to the inclusion of an irrevocable letter of credit as one of the selected alternatives.

(4) A subcontractor may have more than one acceptable surety in both construction and other subcontracts, provided that in no case will the liability of any one surety exceed the maximum penal sum for which it is qualified for any one obligation. For subcontracts other than construction, a co-surety (two or more sureties together) may reinsure amounts in excess of their individual capacity, with each surety having the required underwriting capacity that appears on the list of acceptable corporate sureties.

(g) Buy American. The contractor shall comply with the provisions of the Buy American Act as reflected in 48 CFR 52.225-3 and 48 CFR 52.225-5. The contractor shall forward determinations of nonavailability of individual items to the DOE contracting officer for approval. Items in excess of \$100,000 require the prior concurrence of the Head of Contracting Activity. If, however, the contractor has an approved purchasing system, the Head of the Contracting Activity may authorize the contractor to make determinations of nonavailability for individual items valued at \$100,000 or less.

(h) Construction and Architect-Engineer Subcontracts. (1) Independent Estimates. A detailed, independent estimate of costs shall be prepared for all construction work to be subcontracted.

(2) Specifications. Specifications for construction shall be prepared in accordance with the DOE publication entitled "General Design Criteria Manual."

(3) Prevention of Conflict of Interest. (i) The contractor shall not award a subcontract for construction to the architect-engineer firm or an affiliate that prepared the design. This prohibition does not preclude the award of a "turnkey" subcontract so long as the subcontractor assumes all liability for defects in design and construction and consequential damages.

(ii) The contractor shall not award both a cost-reimbursement subcontract and a fixed-price subcontract for construction or architect-engineer services or any combination thereof to the same firm where those subcontracts will be performed at the same site.

(iii) The contractor shall not employ the construction subcontractor or an affiliate to inspect the firm's work. The contractor shall assure that the working relationships of the construction subcontractor and the subcontractor inspecting its work and the authority of the inspector are clearly defined.

(i) Contractor-Affiliated Sources. Equipment, materials, supplies, or services from a contractor-affiliated source shall be purchased or transferred in accordance with 48 CFR 970.4402-3.

(j) Contractor-Subcontractor Relationship. The obligations of the contractor under paragraph (a) of this clause, including the development of the purchasing system and methods, and purchases made pursuant thereto, shall not relieve the contractor of any obligation under this contract (including, among other things, the obligation to properly supervise, administer, and coordinate the work of subcontractors). Subcontracts shall be in the name of the contractor, and shall not bind or purport to bind the Government.

(k) Government Property. Identification, inspection, maintenance, protection, and disposition of Government property shall conform with the policies and principles of 48 CFR part 45, 48 CFR part 945, the Federal Property Management Regulations 41 CFR chapter 101, the DOE Property Management Regulations 41 CFR chapter 109, and their contracts.

(l) Indemnification. Except for Price-Anderson Nuclear Hazards Indemnity, no subcontractor may be indemnified except

with the prior approval of the Senior Procurement Executive.

(m) Leasing of Motor Vehicles. Contractors shall comply with 48 CFR 8.11 and 48 CFR 908.11.

(n) Make-or-Buy Plans. Acquisition of property and services shall be obtained on a least-cost basis, consistent with the requirements of the "Make-or-Buy Plan" clause of this contract and the contractor's approved make-or-buy plan.

(o) Management, Acquisition and Use of Information Resources. Requirements for automatic data processing resources and telecommunications facilities, services, and equipment, shall be reviewed and approved in accordance with applicable DOE Orders and regulations regarding information resources.

(p) Priorities, Allocations and Allotments. Priorities, allocations and allotments shall be extended to appropriate subcontracts in accordance with the clause or clauses of this contract dealing with priorities and allocations.

(q) Purchase of Special Items. Purchase of the following items shall be in accordance with the following provisions of 48 CFR 908.71 and the Federal Property Management Regulations, 41 CFR chapter 101:

- (1) Motor vehicles—48 CFR 908.7101
- (2) Aircraft—48 CFR 908.7102
- (3) Security Cabinets—48 CFR 908.7106
- (4) Alcohol—48 CFR 908.7107
- (5) Helium—48 CFR 908.7108
- (6) Fuels and packaged petroleum products—48 CFR 908.7109
- (7) Coal—48 CFR 908.7110
- (8) Arms and Ammunition—48 CFR 908.7111
- (9) Heavy Water—48 CFR 908.7121(a)
- (10) Precious Metals—48 CFR 908.7121(b)
- (11) Lithium—48 CFR 908.7121(c)
- (12) Products and services of the blind and severely handicapped—41 CFR 101-26.701
- (13) Products made in Federal penal and correctional institutions—41 CFR 101-26.702

(r) Purchase vs. Lease Determinations. Contractors shall determine whether required equipment and property should be purchased or leased, and establish appropriate thresholds for application of lease vs. purchase determinations. Such determinations shall be made:

- (1) At time of original acquisition;
- (2) When lease renewals are being considered; and
- (3) At other times as circumstances warrant.

(s) Quality Assurance. Contractors shall provide no less protection for the Government in its subcontracts than is provided in the prime contract.

(t) Setoff of Assigned Subcontractor Proceeds. Where a subcontractor has been permitted to assign payments to a financial institution, the assignment shall treat any right of setoff in accordance with 48 CFR 932.803.

(u) Strategic and Critical Materials. The contractor may use strategic and critical materials in the National Defense Stockpile.

(v) Termination. When subcontracts are terminated as a result of the termination of all or a portion of this contract, the contractor

shall settle with subcontractors in conformity with the policies and principles relating to settlement of prime contracts in 48 CFR Subparts 49.1, 49.2 and 49.3. When subcontracts are terminated for reasons other than termination of this contract, the contractor shall settle such subcontracts in general conformity with the policies and principles in 48 CFR Subparts 49.1, 49.2, 49.3 and 49.4. Each such termination shall be documented and consistent with the terms of this contract. Terminations which require approval by the Government shall be supported by accounting data and other information as may be directed by the contracting officer.

(w) Unclassified Controlled Nuclear Information. Subcontracts involving unclassified uncontrolled nuclear information shall be treated in accordance with 10 CFR part 1017.

(x) Subcontract Flooddown Requirements. In addition to terms and conditions that are included in the prime contract which direct application of such terms and conditions in appropriate subcontracts, the contractor shall include the following clauses in subcontracts, as applicable:

- (1) Davis-Bacon clauses prescribed in 48 CFR 22.407.
  - (2) Foreign Travel clause prescribed in 48 CFR 952.247-70.
  - (3) Counterintelligence clause prescribed in 48 CFR 970.0404-4(a).
  - (4) Service Contract Act clauses prescribed in 48 CFR 22.1006.
  - (5) State and local taxes clause prescribed in 48 CFR 970.2904-1.
  - (6) Cost or pricing data clauses prescribed in 48 CFR 970.1504-3-1(b).
- (End of Clause)

#### **970.5245-1 Property.**

As prescribed in 48 CFR 970.4501-1(a), insert the following clause:

Property (Month and Year TBE)

(a) Furnishing of Government property. The Government reserves the right to furnish any property or services required for the performance of the work under this contract.

(b) Title to property. Except as otherwise provided by the contracting officer, title to all materials, equipment, supplies, and tangible personal property of every kind and description purchased by the contractor, for the cost of which the contractor is entitled to be reimbursed as a direct item of cost under this contract, shall pass directly from the vendor to the Government. The Government reserves the right to inspect, and to accept or reject, any item of such property. The contractor shall make such disposition of rejected items as the contracting officer shall direct. Title to other property, the cost of which is reimbursable to the contractor under this contract, shall pass to and vest in the Government upon (1) issuance for use of such property in the performance of this contract, or (2) commencement of processing or use of such property in the performance of this contract, or (3) reimbursement of the cost thereof by the Government, whichever first occurs. Property furnished by the Government and property purchased or furnished by the contractor, title to which

vests in the Government, under this paragraph are hereinafter referred to as Government property. Title to Government property shall not be affected by the incorporation of the property into or the attachment of it to any property not owned by the Government, nor shall such Government property or any part thereof, be or become a fixture or lose its identity as personalty by reason of affixation to any realty.

(c) Identification. To the extent directed by the contracting officer, the contractor shall identify Government property coming into the contractor's possession or custody, by marking and segregating in such a way, satisfactory to the contracting officer, as shall indicate its ownership by the Government.

(d) Disposition. The contractor shall make such disposition of Government property which has come into the possession or custody of the contractor under this contract as the contracting officer may direct during the progress of the work or upon completion or termination of this contract. The contractor may, upon such terms and conditions as the contracting officer may approve, sell, or exchange such property, or acquire such property at a price agreed upon by the contracting officer and the contractor as the fair value thereof. The amount received by the contractor as the result of any disposition, or the agreed fair value of any such property acquired by the contractor, shall be applied in reduction of costs allowable under this contract or shall be otherwise credited to account to the Government, as the contracting officer may direct. Upon completion of the work or the termination of this contract, the contractor shall render an accounting, as prescribed by the contracting officer, of all government property which had come into the possession or custody of the contractor under this contract.

(e) Protection of government property—management of high-risk property and classified materials.

(1) The contractor shall take all reasonable precautions, and such other actions as may be directed by the contracting officer, or in the absence of such direction, in accordance with sound business practice, to safeguard and protect government property in the contractor's possession or custody.

(2) In addition, the contractor shall ensure that adequate safeguards are in place, and adhered to, for the handling, control and disposition of high-risk property and classified materials throughout the life cycle of the property and materials consistent with the policies, practices and procedures for property management contained in the Federal Property Management regulations (41 CFR chapter 101), the Department of Energy Property Management regulations (41 CFR chapter 109), and other applicable regulations.

(3) High-risk property is property, the loss, destruction, damage to, or the unintended or premature transfer of which could pose risks to the public, the environment, or the national security interests of the United States. High-risk property includes proliferation sensitive, nuclear related dual use, export controlled, chemically or

radioactively contaminated, hazardous, and specially designed and prepared property, including property on the militarily critical technologies list.

(f) Risk of loss of Government property.

(1)(i) The contractor shall not be liable for the loss or destruction of, or damage to, Government property unless such loss, destruction, or damage was caused by any of the following:

(A) Willful misconduct or lack of good faith on the part of the contractor's managerial personnel;

(B) Failure of the contractor's managerial personnel to take all reasonable steps to comply with any appropriate written direction of the contracting officer to safeguard such property under paragraph (e) of this clause; or

(C) Failure of contractor managerial personnel to establish, administer, or properly maintain an approved property management system in accordance with paragraph (i)(1) of this clause.

(ii) If, after an initial review of the facts, the contracting officer informs the contractor that there is reason to believe that the loss, destruction of, or damage to the government property results from conduct falling within one of the categories set forth above, the burden of proof shall be upon the contractor to show that the contractor should not be required to compensate the government for the loss, destruction, or damage.

(2) In the event that the contractor is determined liable for the loss, destruction or damage to Government property in accordance with (f)(1) of this clause, the contractor's compensation to the Government shall be determined as follows:

(i) For damaged property, the compensation shall be the cost of repairing such damaged property, plus any costs incurred for temporary replacement of the damaged property. However, the value of repair costs shall not exceed the fair market value of the damaged property. If a fair market value of the property does not exist, the contracting officer shall determine the value of such property, consistent with all relevant facts and circumstances.

(ii) For destroyed or lost property, the compensation shall be the fair market value of such property at the time of such loss or destruction, plus any costs incurred for temporary replacement and costs associated with the disposition of destroyed property. If a fair market value of the property does not exist, the contracting officer shall determine the value of such property, consistent with all relevant facts and circumstances.

(3) The portion of the cost of insurance obtained by the contractor that is allocable to coverage of risks of loss referred to in paragraph (f)(1) of this clause is not allowable.

(g) Steps to be taken in event of loss. In the event of any damage, destruction, or loss to Government property in the possession or custody of the contractor with a value above the threshold set out in the contractor's approved property management system, the contractor:

(1) Shall immediately inform the contracting officer of the occasion and extent thereof,

(2) Shall take all reasonable steps to protect the property remaining, and

(3) Shall repair or replace the damaged, destroyed, or lost property in accordance with the written direction of the contracting officer. The contractor shall take no action prejudicial to the right of the Government to recover therefore, and shall furnish to the Government, on request, all reasonable assistance in obtaining recovery.

(h) Government property for Government use only. Government property shall be used only for the performance of this contract.

(i) Property Management. (1) Property Management System. (i) The contractor shall establish, administer, and properly maintain an approved property management system of accounting for and control, utilization, maintenance, repair, protection, preservation, and disposition of Government property in its possession under the contract. The contractor's property management system shall be submitted to the contracting officer for approval and shall be maintained and administered in accordance with sound business practice, applicable Federal Property Management regulations and Department of Energy Property Management regulations, and such directives or instructions which the contracting officer may from time to time prescribe.

(ii) In order for a property management system to be approved, it must provide for:

(A) Comprehensive coverage of property from the requirement identification, through its life cycle, to final disposition;

(B) Employee personal responsibility and accountability for Government-owned property;

(C) Full integration with the contractor's other administrative and financial systems; and

(D) A method for continuously improving property management practices through the identification of best practices established by "best in class" performers.

(iii) Approval of the contractor's property management system shall be contingent upon the completion of the baseline inventory as provided in subparagraph (i)(2) of this clause.

(2) Property Inventory. (i) Unless otherwise directed by the contracting officer, the contractor shall within six months after execution of the contract provide a baseline inventory covering all items of Government property.

(ii) If the contractor is succeeding another contractor in the performance of this contract, the contractor shall conduct a joint reconciliation of the property inventory with the predecessor contractor. The contractor agrees to participate in a joint reconciliation of the property inventory at the completion of this contract. This information will be used to provide a baseline for the succeeding contract as well as information for closeout of the predecessor contract.

(j) The term "contractor's managerial personnel" as used in this clause means the contractor's directors, officers and any of its managers, superintendents, or other equivalent representatives who have supervision or direction of:

(1) All or substantially all of the contractor's business; or

(2) All or substantially all of the contractor's operations at any one facility or separate location to which this contract is being performed; or

(3) A separate and complete major industrial operation in connection with the performance of this contract; or

(4) A separate and complete major construction, alteration, or repair operation in connection with performance of this contract; or

(5) A separate and discrete major task or operation in connection with the performance of this contract.

(k) The contractor shall include this clause in all cost reimbursable subcontracts.

(End of Clause)

Alternate I (Month and Year TBE). As prescribed in 48 CFR 970.4501-1(b), when the award is to a nonprofit contractor, replace paragraph (j) of the basic clause with the following paragraph (j):

(j) The term "contractor's managerial personnel" as used in this clause means the contractor's directors, officers and any of its managers, superintendents, or other equivalent representatives who have supervision or direction of all or substantially all of:

(1) The contractor's business; or

(2) The contractor's operations at any one facility or separate location at which this contract is being performed; or

(3) The contractor's Government property system and/or a Major System Acquisition or Major Project as defined in DOE Order 4700.1 (Version in effect on effective date of contract).

[FR Doc. 00-4880 Filed 3-10-00; 8:45 am]

BILLING CODE 6450-01-U