DEPARTMENT OF ENERGY

48 CFR Parts 917, 950, 952, and 970

[1991–AB–28]

Acquisition Regulation; Department of Energy Management and Operating Contracts

AGENCY: Department of Energy.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Department of Energy (DOE) proposes to amend the Department of Energy Acquisition Regulation (DEAR) to implement certain key recommendations of its Department-wide contract reform initiative. Changes are proposed in the following areas: performance-based management contracting; fines, penalties, third-party liability, and property liability; requirements for contractor make or buy plans; payment of fee; procedures for determining the application of laws, regulations, and Department directives to contractors; environment; ownership of records; and overtime management.

DATES: Written comments should be forwarded no later than August 23, 1996. A public hearing will be held on August 1, 1996, beginning at 9:30 a.m. local time at the address listed below. Requests to speak at the hearing should be received by 4:30 p.m. local time on July 18, 1996. Later requests will be accommodated to the extent practicable.

ADDRESSES: All comments, as well as requests to speak at the public hearing, are to be submitted to Connie P. Fournier, Office of Policy (HR–51), Department of Energy, 1000 Independence Avenue, SW, Washington, D.C. 20585, (202) 586–8245; (202) 586–0545 (facsimile); connie.fournier@hq.doe.gov (Internet).

The public hearing will be held at the U.S. Department of Energy, Main Auditorium, Forrestal Building, 1000 Independence Avenue, SW, Washington, DC 20585.

The administrative record regarding this rulemaking that is on file for public inspection, including a copy of the transcript of the public hearing and any additional public comments received, is located in the Department's Freedom of Information Reading Room, Room 1E–190, 1000 Independence Avenue, SW, Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT: Connie P. Fournier, Office of Policy (HR–51), Department of Energy, 1000 Independence Avenue, SW, Washington, D.C. 20585, (202) 586–8245.

SUPPLEMENTARY INFORMATION:

I. Background

In February 1994, the Department of Energy issued the report of its Contract Reform Team, *Making Contracting Work Better and Cost Less*, which recommended a number of changes to improve the Department's acquisition system, principally in areas affecting management and operating contracts. The Department has since developed and tested various policies, practices, and procedures to implement the report's recommendations. Today's proposed rule would include those new policies and changes to existing policies in the Department's acquisition regulation needed to strengthen the management of management and operating contracts.

DOE today also publishes a notice of interim final rulemaking that discusses changes to the Department's policies regarding competition and extension of its management and operating contracts. A third rulemaking that discusses the Department's fee policies for profit making and nonprofit management and operating contractors will be promulgated as a separate proposal. Together, these three rulemakings constitute the Department's regulatory implementation of certain key contract reform initiatives in its acquisition regulation.

II. Section-by-Section Analysis

The proposed rule would amend the following sections of the DEAR, as discussed below. For convenience, this section-by-section analysis is grouped by the major items covered. Proposed text changes are listed at the end of each major item discussed.

Item I—Performance-based Management Contracting

The Contract Reform Report recommended Performance Based Management Contracts, a new form of management and operating contract, which use performance-based contracting concepts to better define measurable standards of performance under which the Department evaluated and appropriately rewarded contractors. That recommendation was based, in part, on the policies established by the Office of Federal Procurement Policy (OFPP) Policy Letter 91–2, entitled ''Service Contracting.'' That Policy Letter, issued in April 1991, establishes performance-based contracting as a strategy for acquiring services, with the objectives of improving quality and ensuring that the Government only pays for services actually received. These objectives are met through contracting methodologies that use performance-based, results-oriented statements of work in conjunction with measurable performance indicators to assess quality, evaluation and selection factors that employ quality related factors, performance incentives, and greater use of fixed pricing arrangements. Although the OFPP Policy Letter applies to service contracts under Part 37 of the Federal Acquisition Regulation, the concepts and methodologies of performance-based service contracting have application in the Department's contracts for the management and operation of its sites and facilities. Accordingly, the Department considered the policies established under the OFPP Policy Letter in developing policies for its performance-based management and operating contracts and adopted its key features and methodologies. The Department intends to review its proposed coverage with the upcoming proposed coverage in FAR Part 37 implementing the OFPP Policy Letter to ensure consistency with Government-wide policies. The key to the Department's efforts is the development of specific, objective criteria for performance as well as identification of specific measures to determine if the contractor met the expectations established in the contract. Accordingly, today's proposed rule would define performance-based management contracts and would require that specific criteria for performance and measures of that performance be included in the contract.

The following changes are proposed:

1. *917.600*, Scope of subpart. This section would be revised to recognize the applicability of the requirements of the subpart to performance-based management contracts.

2. *917.601*, Definitions. This section would be added to define the term ''performance-based management contract'' as a form of management and operating contract to be used by the Department of Energy for the management and operation of its weapons production and laboratory facilities, where the contract includes objective performance standards and incentives. This term, first identified in

the Contract Reform Report, would be recognized as the embodiment of the Department's commitment and policy to employ performance-based contracting methodologies in contracting for the management and operation of its sites and facilities.

3. *970.10,* Specifications, standards and other statement of work descriptions. Section 970.1001 is proposed to be revised as a new section on Performance-based statements of work, criteria, and measures, and section 970.1002 is proposed to be retitled, Additional considerations.

Item II—Fines, Penalties, Third-party Liability, and Property Liability

The Contract Reform Report indicated that the Department's contracting policy must focus on payment for results and not simply payment for incurred costs. An early attempt, in January 1990, to be more outcome-oriented and encourage the contractor to more efficiently manage risk resulted in the ''accountability rule.'' This revision to the Department's cost reimbursement policies, published as a final rule (56 FR 28099) on June 19, 1991, made profit making management and operating contractors liable for certain costs, known as ''avoidable costs,'' which resulted from the negligence of the contractor's or subcontractor's employees.

Based on practical experience with this policy, the Department is proposing to maintain the concept of transferring certain risk to the contractor in order to incentivize good business management but to change the approach to minimize the costs associated with the administration of the accountability rule. Therefore, this notice of proposed rulemaking would revise the current reimbursement rules in the DEAR regarding avoidable costs by eliminating the provisions of the accountability rule contained in DEAR Part 970 and introducing a new policy on cost reimbursement and liability. With regard to property, the Department also proposes to have the contractor compensate the Government for Government property losses and damage under certain circumstances.

A. Comments on Sample Contract Provisions for Profit-Making Contractors Related to Liability Provisions

The Department announced in the *Commerce Business Daily* on February 13, 1995, the availability of draft sample contract provisions which contained, among other things, contract clauses relating to the reimbursement of costs for fines, penalties, third party liabilities, and damage to, or loss of, government property. These contract clauses have also been subjected to numerous, less formal reviews by stakeholders and other interested parties both within and outside of the Department in the months preceding and following the announcement of the availability of the draft sample contract. The contract clauses proposed today governing the Department's treatment of costs for fines, penalties, third party liabilities, and damage to, or loss of, government property reflect the Department's consideration of comments, concerns, and observations raised by stakeholders during these developmental efforts.

B. Burden of Proof Shifted for Fines and Penalties, Third-Party Liability, and Damage to or Loss of Government Property

A key change in today's notice of proposed rulemaking would be the adoption of a rebuttable presumption of unallowability standard for fines and penalties, third-party liability, and damage to or loss of government property. This standard, which would affect a number of contract clauses governing the Department's management and operating contracts, would shift the burden of proof for establishing the reasonableness and allowability of these costs from the Government to the contractor. An underlying premise in promulgating this change in policy is the belief that the contractor has in its possession the information necessary to determine how and why these costs are incurred and, therefore, is better able to establish the facts and other information needed to support a decision of allowability. Accordingly, under this proposed rule, the contractor would have to make an affirmative showing to the contracting officer that such costs should be allowable.

The Department believes that the proposals set forth in this proposed rule concerning the presumption of allowability and burden of proof for fines and penalties, third-party liability, and damage to or loss of government property are appropriate to the Department's management and operating contracts. In addition, the Department believes that the changes are supported by current policies, legal precedent, and legislative reform efforts in this area. For example, under a previous rulemaking published by the Federal Acquisition Regulation Council, Federal Acquisition Regulation 31.201–3 was amended to change the Government allowability standard and shift the burden of proof from the Government to the contractor once the contracting officer challenged the allowability of a cost (see 52 FR 19800, May 27, 1987). Further, Section 2151(f)(2) of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103–355), entitled, Allowable Contract Costs, provides that the Federal Acquisition Regulation shall require a contracting officer not to resolve any questioned costs until adequate documentation has been obtained from the contractor with respect to the questioned costs.

C. Prudent Business Judgment

This proposed rule contains amendments to DEAR 970.3101–3, General basis for reimbursement of costs, and the general allowability paragraph (paragraph (c)) of DEAR 970.5204–13 and 970.5204–14. Under these amendments, the Department would rely on FAR 31.201–3, Determining Reasonableness, as the basis for determining cost reasonableness. Under FAR 31.201–3, a cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business. This standard would be used in conjunction with other factors stated in the affected provisions and contract clauses to determine cost allowability and reimbursement.

This guidance would also be applied in determining whether the contractor has met its burden to demonstrate that its managerial personnel did not fail to exercise prudent business judgment under the facts and circumstances leading to the incurrence of the cost.

In applying this new standard, the contracting officer would consider the totality of the circumstances and the exercise of skill and judgment by the contractor's management in his/her review and determination on a particular cost's reasonableness. Included in the contracting officer's review of each set of circumstances would be an analysis of the contractor's management practices with respect to lower level employees, including whether management has failed to act on repeated misconduct by lower level employees or has failed to institute on a systematic basis sufficient controls or mechanisms to prevent deficient behavior or performance.

D. Fines and Penalties.

The current DEAR policy on fines and penalties, DEAR 970.3102–21, contains amendments from the accountability rule and provides different treatment for profit making contractors and nonprofit contractors. This proposed rule would amend this policy and the allowable cost provisions to make fines and

penalties unallowable unless the contractor demonstrates to the contracting officer that they were incurred as a result of compliance with specific terms and conditions of the contract or written instructions from the contracting officer.

The proposed rule additionally provides that the contracting officer would have authority to reimburse the contractor where the fine or penalty was imposed without regard to whether the contractor was at fault or exercised due care, and the fine or penalty could not have been avoided by the exercise of due care by the contractor or its employees. The Department recognizes concerns on the part of contractors regarding potential liabilities arising from activities occurring on a Department of Energy-owned site before the contractor assumed responsibility for that site and, for this reason, the Department is proposing a new clause, DEAR 970.5204–XX—Preexisting Conditions.

E. Litigation and Losses From Third-Party Liabilities.

This proposed rule would amend certain contract clauses to provide that third-party liabilities would not be allowable unless the contractor demonstrates that they did not result from (1) willful misconduct or lack of good faith by the contractor's managerial personnel, or (2) failure to exercise prudent business judgment by the contractor's managerial personnel. Under the proposed rule, the new clause, Insurance—Litigation and Claims, would provide guidance on the reimbursement of insurance covering third-party claims, litigation involving third-party claims, treatment of punitive damages under a third-party claim, and the burden of proof carried by the contractor in seeking reimbursement of its costs. The proposed revision to the Litigation and Claims clause would also revise the Department's guidance on non-third-party litigation, such as litigation by other governmental entities. The new clause would, in no way, impact or affect the Department's obligation to provide nuclear hazards indemnity pursuant to the Price-Anderson Act (42 U.S.C. Section 2210(d)).

On the issue of reimbursement of contractor insurance costs, the Department proposes that contracting officers should be given authority to pro-rate the cost of premiums incurred by contractors to exclude the unallowable portion but still cover the portion of the premium allowable under the contract's terms.

Finally, the Department proposes to revise the allowable cost provisions in DEAR 970.5204–13 and 970.5204–14 to clearly provide that litigation expenses would only be allowable if incurred in accordance with Department-approved contractor litigation management procedures, including cost guidelines.

F. Qui Tam Actions.

A new paragraph (h) would be added to DEAR 970.5204–61, Cost Prohibitions Related to Legal and Other Proceedings, to address the treatment of costs incurred in proceedings involving a *qui tam* action under the False Claims Act, 31 U.S.C. 3730, alleging fraud against the Government, which are not otherwise covered by the existing provisions of that clause.

G. Environmentally-Related Third-Party Liabilities Incurred by Contractors Performing Response Action Work.

The Department has reviewed a number of issues, including the types of environmental cleanup problems confronted by the Department and its contractors, the potential third-party liabilities at the Department's sites, and the availability of reasonably priced commercial pollution liability insurance for sites potentially contaminated with radioactive waste. A determination has been made that the same provision proposed in this notice of proposed rulemaking for general third-party liabilities should be proposed for environmentally-related third-party liabilities incurred by contractors performing response action work.

H. Damage to or Loss of Government Property.

A similar standard of liability is proposed in DEAR 970.5204–21 for damage to or loss of government property as for third-party liabilities. The proposed rule provides that costs resulting from damage to government property would not be allowable unless the contractor demonstrates to the contracting officer that they did not result from: (1) willful misconduct or lack of good faith on the part of the contractor's managerial personnel; or (2) failure of the contractor to comply with any appropriate written direction of the contracting officer to safeguard such property; or (3) failure of the contractor to establish, maintain or administer an approved property management system. Further, the contractor may be responsible for and required to compensate the Government for loss, destruction, or damage to Government property.

I. Effect of Proposed Rule on Nonprofit Contractors.

Until now, the Department's accountability provisions have not applied to nonprofit contractors. This proposed rule would apply the same rules to nonprofit as profit-making contractors. Through this approach, the Department is expressing its desire that all its contractors, regardless of business status, must bear responsibility for employing good business practices and must mitigate risks associated with potential liabilities. In proposing this change, some minor distinctions, such as for the definition of managerial personnel in the Insurance—Litigation and Claims clause, would be recognized for nonprofit contractors. This definition is necessarily different since nonprofit contractors usually have a different organizational structure and different work responsibilities than profit-making contractors. The Department particularly seeks comment on this part of the proposal.

J. Effect of Proposed Rule on Accountability Rule.

This proposed rule would revise the provisions of the accountability rule relating to cost reimbursement policies and clauses contained in DEAR Part 970.

The following changes are proposed:

1. *950.7101,* General contract authority indemnity. Paragraph (c)(2) would be removed.

2. *970.28,* would be amended to add a new section 970.2830, Contract clause, which would prescribe the use of the clause at 970.5204–31, Insurance—Litigation and Claims.

3. *970.3101–3,* General basis for reimbursement of costs. Subparagraph (a)(1) would be amended to add a reference to FAR 31.201–3.

4. *970.3102–21,* Fines and penalties. This subsection would be revised.

5. *970.3102–22,* Avoidable Costs for Profit Making Contractors. This subsection would be removed.

6. *970.3103,* Contract Clauses. Paragraph (d) would be added.

7. *970.5204–13.* Subparagraph (c)(1) would be amended to refer to FAR 31.201–3.

8. *970.5204–13(d)(4).* This paragraph would be amended to add references to Department of Energy-approved contractor litigation management procedures and cost guidelines to be included in an Appendix to the contract.

9. *970.5204–13(d)(9).* This paragraph would be amended to add ''and as allowable under subparagraph (f) of the clause of this contract entitled, Property.''

10. *970.5204–13(e)(12).* This paragraph concerning fines and penalties for profit making and nonprofit contractors would be revised.

11. *970.5204–13(e)(17).* This paragraph would be reorganized and revised.

12. *970.5204–13(e)(36).* This paragraph would be revised to remove most of the discussion; the statement that the cost of insurance for an unallowable cost is an unallowable cost would be retained.

13. *970.5204–14.* Subparagraph (c)(1) would be amended to add a reference to FAR 31.201–3.

14. *970.5204–14(d)(4).* This paragraph would be amended to add references to Department of Energy-approved contractor litigation management procedures and cost guidelines to be included in an Appendix to the contract.

15. *970.5204–14(d)(10).* This paragraph would be amended to add ''and as allowable under subparagraph (f) of the clause of this contract entitled Property.''

16. *970.5204–14(e)(10).* This paragraph concerning fines and penalties for profit making and nonprofit contractors would be revised.

17. *970.5204–14(e)(15).* This paragraph would be reorganized and revised.

18. *970.5204–14(e)(34).* This paragraph would be revised to remove most of the discussion; only the statement that the cost of insurance for an unallowable cost is an unallowable cost would be retained.

19. *970.5204–18,* Definition of nonprofit and profit making management and operating contractors and subcontractors. This subsection would be removed and reserved.

20. *970.5204–21,* Property. Paragraphs (e), (f), (g), (i) and (j) would be revised; the definition of contractor's managerial personnel which previously appeared at the end of paragraph (f) would appear as paragraph (j).

21. *970.5204–31,* Litigation and claims. This subsection would be removed and a new subsection, Insurance—Litigation and Claims, would be added in its place.

22. *970.5204–32,* Required bond and insurance-exclusive of Government property. This subsection would be removed and reserved.

23. *970.5204–55,* Ceiling on certain liabilities for profit making contractors. This subsection would be removed and reserved.

24. *970.5204–56,* Determining avoidable costs. This subsection would be removed and reserved.

25. *970.5204–61,* Cost prohibitions related to legal and other proceedings. This subsection would be amended to add a new paragraph (h).

26. *970.5204–XX,* Preexisting Conditions. This subsection would be added.

Item III—Make-or-buy Decisions

The Department of Energy expects its management and operating contractors to operate the Department's laboratories, weapons production plants, and other facilities in a cost-effective and efficient manner. In addition to maximizing the productivity of existing operations, contractors are expected to critically analyze all of the functions performed at a facility to identify the most efficient and cost effective manner in which these functions may be performed, with an emphasis on subcontracting. Accordingly, the Department proposes that contracts for the management and operation of the Department's facilities require the contractor to prepare and administer a master make-or-buy plan consistent with the Department's expectations.

Because subcontracting decisions by a management and operating contractor can result in the displacement of workers in, or a restructuring of, the current work force, the Department would expect its contractors to assess subcontracting opportunities and implement subcontracting decisions in a manner which (1) promotes open communications early in and throughout the planning process between and among the parties affected by such subcontracting decisions and (2) mitigates the social and economic impacts of subcontracting decisions, consistent with the Department's commitments and responsibilities under Section 3161 of the National Defense Authorization Act for Fiscal Year 1993 (42 U.S.C. 7274h). The policy proposed today addresses the application, submission, review, and acceptance of make-or-buy plans under management and operating contracts, including considerations relating to subcontracting activities which result in the displacement of the existing contractor work force.

The following changes are proposed:

1. *970.1507,* Make-or-Buy Plans. A new section would be added to Subpart 970.15, Contracting by Negotiation, consisting of Subsection 970.1507–2, Requirements, and Subsection 970.1507–3, Contract Clause. Subsection 970.1507–1, Policy, would provide the basic policy of the Department that its management and operating contractors operate the facility or site on a least-cost basis. Subsection 970.1507–2, Requirements, would provide broad guidance on key elements of the make-or-buy plan submission, approval and evaluation process. Subsection 970.1507–3, Contract Clauses, would provide the contracting officer with guidance on the application of the clauses to be included in contracts.

2. *970.5204–XX,* Make-or-Buy Plan. A new subsection would be added to provide a contract clause to be used in management and operating contracts governing the submission and approval of contractor make-or-buy plans, and changes to the approved make-or-buy plan.

3. *970.5204–XX,* Displaced Employee Hiring Preference. A new subsection would be added to provide a contract clause to be used in management and operating contracts describing hiring preferences for certain employees affected by the downsizing of a Department of Energy defense nuclear facility.

Item IV—Payment of Fee

With regard to the Government's payment of fixed-fee, base fee, and award fee under a management and operating contract, the clause at DEAR 970.5204–16, Payments and Advances, would be revised to give the contracting officer the option to either pay fee through draw downs against the special financial institution account or by direct payment. Prior written approval of the contracting officer for fee payment to be withdrawn against the letter-of-credit is also proposed. This would allow the Department the latitude to make fee payments in the most cost effective manner; i.e., draw downs, but retain the option to pay fee by direct payment if circumstance so warrant. Additionally, language would be added allowing the contracting officer to offset against any such fee payment the amounts owed to the Government by the contractor, including any amounts owed for disallowed costs under the contract.

The following change is proposed:

970.5204–16, Payments and advances. This subsection would be revised to permit the contracting officer to either pay fee through draw downs against special financial institution accounts or by direct payment. In addition, contracting officer approval is proposed for fee payment to be withdrawn against a letter of credit.

Item V—Laws, Regulations, and DOE Directives

The Department is proposing a revised DEAR clause entitled, Laws, Regulations, and DOE Directives, as part of its contract reform efforts. The proposed clause would standardize the

manner in which applicable requirements are included in its management and operating contracts.

Paragraph (a) would provide that the contractor is obligated to comply with applicable Federal, State, and local laws and regulations, unless relief has been granted in writing by the appropriate regulatory agency. In addition, this paragraph would provide that a List of Applicable Laws and Regulations identifying all applicable Federal, state, and local laws and regulations may be appended to the contract, but the contractor would not be excused from compliance with applicable laws and regulations in the event the Department omitted a law or regulation from the List. Paragraph (b) would provide for the inclusion of a List of Applicable Directives containing a listing of DOE directives, or parts thereof, applicable to a particular contract on the effective date of the contract, and as discussed below, would explain the mechanism to be used by the Department to revise the List. This List might include Department orders and other written requirements such as Department of Energy Notices.

Development of both lists would be aided by efforts to tailor Department requirements on environment, safety, and health to the unique circumstances at particular facilities. The Office of Defense Programs and Office of Environmental Management have established the Standards/Requirements Program to identify adequate environmental, safety, and health protection standards and requirements for selected facilities and activities and to assess the status of implementation of those standards/requirements. The environment, safety, and health requirements for Department sites, facilities, and activities would be documented in Standards/Requirements Identification Documents (SRIDs).

Building on experience with the SRIDs process, the Department Standards Committee has developed a generic process, called the Necessary and Sufficient Process, to identify an appropriate set of standards for a particular facility or activity that would ensure adequate protection of workers, the public, and the environment.

If the Standards/Requirements identification process or the Necessary and Sufficient Process has been concluded before a contract is executed, the resulting SRID or Necessary and Sufficient set of standards should be used as the basis for developing the lists of environment, safety, and health requirements.

Paragraph (b) would provide that when the contracting officer decides to revise the List of Applicable Directives in any way, the contractor is given the opportunity to assess and advise the contracting officer of the potential impact of such revision. Revisions to the List of Applicable Directives would be made in accordance with the Changes clause of the contract.

If the SRID or Necessary and Sufficient set of standards is developed and approved after execution of the contract, it would be incorporated into the contract pursuant to proposed paragraph (c), and would substitute for environment, safety, and health requirements identified on the pre-existing List of Applicable Directives, as appropriate, for the work activities subject to the approved SRID or Necessary and Sufficient set of standards.

As background for those wishing to comment on this proposed clause, information on the SRID development process and the Necessary and Sufficient process is available in the Department's Freedom of Information Act Reading Room, where public information for this notice of proposed rulemaking is available.

Information and background on the SRID development process may be found in the Department of Energy Implementation Plan in response to the Defense Nuclear Facilities Safety Board Recommendation 90–2 (Revision 5; November 1994), and in Standards/Requirements Identification Document Development and Approval Instruction (September 1994). The Necessary and Sufficient Closure Process is described in Department of Energy Closure Process for Necessary and Sufficient Set of Standards (M450.3–1, January 25, 1996).

The following changes are proposed:

1. *970.04,* Administrative Matters. A new section 970.0470, Department of Energy Directives, would be added, describing the Department of Energy directives system.

2. *970.5204–XX,* Laws, Regulations, and DOE Directives. A new subsection would be added to provide a clause to identify directives and related requirements applicable to a specific contract.

Item VI—Environment

DEAR 970.5204–2 and the clause therein would be retitled to add ''Environment'' to their titles, reflecting the broadening of the clause to add this subject related to safety and health. The revised clause would call for compliance with applicable laws and regulations and, in conjunction with the clause on Departmental directives discussed elsewhere in this proposed rule, identify more specifically the Department of Energy directives with which a contractor is to comply than does the existing clause at DEAR 970.5204–2. The clause would change from 30 days to 60 days the period by which an Environment, Safety, and Health (ES&H) Management Plan is to be submitted, provide for the Plan to be periodically updated, and make changes to the Plan subject to the Government-approved change control process applicable to the contract. Successful application of the clause would require that: 1) Department of Energy Operations Office Managers establish contractor expectations for ES&H performance prior to the program execution year; 2) contractors develop an ES&H Management Plan that describes the management and program activities that would be conducted to meet those expectations and that the contractor would commit to undertake; 3) Department of Energy Operations Office Manager approve the Plan; and 4) ES&H performance measures flow from the Plan, target major risk management issues, and tie explicitly to incentives and fees. The ''stop work'' provisions of the clause would be revised to enhance their clarity. Guidance for the flowdown of environment, safety, and health requirements in subcontracts to be performed on-site would be provided. Also, paragraph (d) would be added requiring the submission and approval of an Authorization Agreement for certain facilities and/or site operations as determined by the contracting officer. Authorization Agreements might be used to establish, document, and control the safety requirements and other parameters for specified operations. Paragraph (d) would also require that: 1) contracting officers may at any time notify the contractor that specified operations may require an Authorization Agreement; 2) specified operations may proceed only subject to the requirements of a Department of Energy-approved Authorization Agreement; and 3) updates and changes to an Authorization Agreement shall be subject to Department of Energy approval. Authorization Agreements would be subject to the same ''stop work'' and fee and awards payment criteria established for the ES&H Management Plan. This paragraph is intended to be responsive to the Defense Nuclear Facilities Safety Board (DNFSB) Recommendation 95–2 regarding integrated safety management. Additional changes to contract language may be required as a result of the Department's implementation plan for DNFSB Recommendation 95–2.

Alternate clause paragraph (b) would provide for the use of an alternate version of the clause in contracts that do not incorporate clauses referenced in the basic Environment, Safety and Health clause.

Several clauses dealing with environment, safety, or health would be consolidated for the sake of simplification and overall consistency. Three clauses proposed, DEAR 970.5204–2, Environment, Safety, and Health; DEAR 970.5204–XX, Ownership of Records; and DEAR 970.5204–XX, Laws, Regulations, and DOE Directives, would incorporate requirements from four existing clauses the Department proposes to remove from its regulation: DEAR 970.5204–2, Safety and Health; DEAR 970.5204–26, Nuclear Facility Safety; DEAR 970.5204–41, Preservation of Individual Occupational Radiation Exposure Records; and DEAR 970.5204–62, Environmental Protection. For instance, the provisions in the Safety and Health clause would be consolidated in DEAR 970.5204–2, Environment, Safety, and Health. The Department proposes to remove the Nuclear Facility Safety clause, since most of the provisions of the Nuclear Facility Safety clause are, or will be, incorporated in other Departmental rulemakings (see 10 CFR Parts 830, 834, and 835). These other Departmental rulemakings will also be available for public comment as they are developed. Removal of the Nuclear Facility Safety clause would be contingent upon the final promulgation of Part 830. The Department proposes to remove the clause entitled, Preservation of Individual Occupational Radiation Exposure Records, and place the substance of the clause in DEAR 970.5204–XX, Ownership of Records. It is also noted that the removed clause's requirements would be encompassed within 10 CFR Part 835. The Department proposes to remove DEAR 970.5204–62, Environmental Protection, because the list of applicable laws, regulations, and directives cited therein would be included in the contract pursuant to proposed paragraph (a) of DEAR 970.5204–XX, Laws, Regulations, and DOE Directives. The language, ''assist the DOE in complying'' contained in paragraph (b) of 970.5204–62, would be added to DEAR 970.5204–2, Environment, safety, and health.

The following changes are proposed:

1. *952.223–71,* Safety and health. This subsection would be clarified so that it is consistent with 970.5204–2, Safety and Health, for non-management and operating contracts.

2. *970.2303–2,* Clauses. Paragraphs (c), (d), and (e), prescribing clauses at 970.5204–26, 970.5204–41, and 970.5204–62, respectively, would be removed, since these clauses would also be removed.

3. *970.5204–2,* Safety and health. Environmental requirements would be added to those for safety and health in this clause.

4. *970.5204–26,* Nuclear facility safety. This clause would be removed.

5. *970.5204–41.* Preservation of individual occupational radiation exposure records. This clause would be removed.

6. *970.5204–62,* Environmental protection. This clause would be removed.

Item VII—Ownership of Records

The Ownership of Records clause proposed today sets forth the government's ownership of, and control over, those records the creation or acquisition of which by the contractor was paid for by the government. This clause would preserve the government's access and copying rights to such records during the contract term and ensure continuity at sites by giving the Department the records upon termination or completion of the contract. Additionally, consistent with the Department's implementing requirements (59 FR 63882, December 12, 1994) for the Freedom of Information Act (FOIA), the ownership provision in paragraph (a) of the clause would grant public access to contractor-generated or acquired records, subject only to the two specified exceptions in the FOIA rule (privileged and commercially valuable information) and to the statutory exemptions in the Freedom of Information Act.

Generally, all records generated or acquired by the contractor in connection with work performed under management and operating contracts have been considered the property of the Government. Conversely, the Department recognizes that under this principle, a contractor may request that the Department restrict its rights with respect to documents for which the contractor would not seek reimbursement from the Department under the contract. Nonetheless, over time, contractors have requested that certain, limited categories of records be the property of the contractors. The Department proposes that some of these categories may be appropriate for contractor ownership, subject to the Department's rights of audit, inspection, and copying.

The proposed clause, therefore, would ensure that the Department's right to obtain and determine the disposition of contractor-owned documents be maintained. For instance, the Department must have access to contractor medical and personnel records when the Department has determined that such access is necessary to enable the Department to carry out its public health and safety responsibilities under existing law. The Department has made such determinations in the area of health-related research, including epidemiological research performed by the Department or other public health agencies, and in connection with the Department's evaluation of a contractor's performance of environment, safety, and health requirements. In the past, government access to records on individuals has been restricted to protect the privacy interests of the individuals, based on state law. The clause recognizes, however, that federal law preempts state law in this area, and that in any event, the government's use of such records would be consistent with applicable federal laws, including the Privacy Act.

The categories of records proposed in this clause as eligible for contractor ownership, in paragraph (b), are intended to be restricted to only those contained in the clause. Paragraph (c) of the clause would delineate the Department's rights to obtain the documents; the Department anticipates that certain of these documents would be routinely provided to the Department under the contract.

The following changes are proposed:

1. *970.0407,* Alternate retention schedules. This section would be redesignated 970.0407–1.

2. *970.0407–2,* Ownership of records. This subsection would be added to explain the circumstances in which contractor ownership of certain records may be identified in a management and operating contract.

3. *970.5204–XX,* Ownership of records. A clause would be added to identify government-owned records; contractor-owned records; the government's rights to inspection, copying, use, and audit of records; and records retention requirements under the contract.

Item VIII—Management and Operating Contract Overtime Practices

The Contract Reform Report identified weaknesses in the Department's management of contractor overtime costs. While acknowledging that overtime can save money compared to not doing the job at all or hiring new permanent workers, it can also be abused. In order to better manage these resources and to ensure that management and operating contractors

balance the efficient use of human resources and the need to adequately compensate its work force with effective cost control of overtime, the Department is proposing an approach for assuring overtime costs are reasonable. Individual contractor overtime practices exceeding specified criteria would trigger a requirement for the contractor to develop an overtime control plan, with the contractor establishing specific controls for the use and evaluation of overtime. The Department proposes to require the plan, on an annual basis, if one of the following criteria are met: (1) the contractor exceeds the Department's management and operating contract median overtime usage plus 2%; or (2) the contractor's overtime usage as a percentage of payroll exceeds the DOE contractor median and the contractor's policy permits payment of overtime premiums for exempt employees earning equal to or greater than $45,000 per annum; or (3) the contractor's overtime usage as a percentage of payroll exceeds the DOE contractor median and the contractor permits overtime payments on any basis other than hours worked in excess of 40 hours per week. In 1994, the median overtime experienced by the Department's management and operating contractors was 3.09% of base payroll expenditures; in 1993, it was 3.16%.

The following changes are proposed:

1. *970.2275.* A new section, Overtime management, would be added.

2. *970.2275–1.* A new subsection would be added to describe the criteria under which a management and operating contract may incur overtime without further management controls. Management and operating contractors that exceed these overtime criteria would be required to develop and comply with a plan to report and control overtime.

3. *970.2275–2.* A new subsection would be added to give the prescription for use of an overtime management clause.

4. *970.5204–XX.* A new clause on overtime management would be added.

III. Procedural Requirements

A. Review Under Executive Order 12866

This 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 regulations meet the relevant standards of Executive Order 12988.

C. Review Under the Regulatory Flexibility Act

This proposed rule was reviewed under the Regulatory Flexibility Act of 1980, 5 U.S.C. 601, *et seq.,* which requires preparation of a regulatory flexibility analysis for any rule that is likely to have a significant economic impact on a substantial number of small entities. This proposed rule is intended to provide policies for the Department of Energy's management and operating contractors, who are all large businesses. There are three clauses proposed which identify flowdown requirements to subcontractors, some of whom may be small businesses. (1) The clause at 970.5204–2, Environment, Safety, and Health, would provide for the flowdown of ''appropriate requirements'' to subcontractors performing work on-site at a Department-owned or -leased facility. (2) The clause at 970.5204–XX, Laws, Regulations, and DOE Directives, would provide for subcontract compliance with ''necessary provisions'' as determined by the prime contractor. (3) The clause at 970.5204–XX, Ownership of Records, would specify requirements for certain subcontractors meeting specific thresholds. The first two clauses do not impose a significant economic impact since nearly all of the prime and subcontracts have been cost reimbursement contracts. The third clause has considered the needs of small business in establishing thresholds above which requirements must be met. The Department anticipates that most small businesses will not meet these threshold requirements for compliance. Based on this review, the Department certifies that this proposed rule 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 collection or recordkeeping requirements are imposed by this proposed rule. Accordingly, no Office of Management and Budget clearance is required under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501, *et seq.*).

E. Review Under Executive Order 12612

Executive Order 12612, entitled ''Federalism,'' 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 Federal Government and the States, or in the distribution of power and responsibilities among various levels of government. If there are sufficient substantial direct effects, then the Executive Order requires preparation of a federalism assessment to be used in all decisions involved in promulgating and implementing a policy action. The Department has determined that this proposed rule will not have a substantial direct effect on the institutional interests or traditional functions of States.

F. Review Under the National Environmental Policy Act

Pursuant to the Council on Environmental Quality Regulations (40 CFR 1500–1508), the Department has established guidelines for its compliance with the provisions of the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321, *et seq.*). Pursuant to Appendix A of Subpart D of 10 CFR 1021, National Environmental

Policy Act Implementing Procedures (Categorical Exclusion A6), the Department has determined that this proposed rule is categorically excluded from the need to prepare an environmental impact statement or environmental assessment.

IV. Opportunities for Public Comment

A. Written Comments

Interested persons are invited to participate by submitting data, views, or arguments with respect to the DEAR amendments set forth in this proposed rule. Three copies of written comments should be submitted to the address indicated in the **ADDRESSES** section. Comments on the major items identified in this proposed rule should be identified on separate pages, with the name of the item at the top of each page. In addition, it is requested that you provide a copy of your comments on a WordPerfect 6.1 or ASCII diskette. Comments may be sent to the Internet address in the **ADDRESSES** section of this proposed rule instead of the written copies and diskette, provided they are transmitted in a WordPerfect 6.1 compatible format and include the name, title, organization, postal address, and Internet address with the text of the comments. All comments received will be available for public inspection in the Department of Energy Reading 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 on or before the date specified in the beginning of this proposed rule and all other relevant information will be considered by the Department before taking final action. Comments received after that date will be considered to the extent that time allows. Any person submitting information which that person believes to be confidential and which may be exempt from public disclosure should submit one complete copy, as well as an additional copy from which the information claimed to be confidential has been deleted. The Department reserves the right to determine the confidential status of the information or data and to treat it according to its determination. The Department's generally applicable procedures for handling information which has been submitted in a document and may be exempt from public disclosure are set forth in 10 CFR 1004.11.

B. Public Hearing

1. Request to Speak Procedures

A public hearing on the proposed rule will be held at 9:30 a.m. on August 1, 1996, in the Main Auditorium of the Forrestal Building, 1000 Independence Avenue, SW, Washington, DC 20585. Oral presentations on both this proposed rule and the proposed rule on fees for management and operating contractors published elsewhere in this Federal Register will be heard at that time.

Any person who has an interest in the proposed rule or who is a representative of a group or class of persons who has an interest in the proposed rule may request an opportunity to make an oral presentation. A request to speak at the public hearing should be addressed to the address indicated at the beginning of this proposed rule. The person making the request should briefly describe his or her interest in the proceedings and, if appropriate, state why the person is a proper representative of a group. The person should also provide a telephone number where he or she may be reached during the day. Two copies of the speaker's statement should be brought to the hearing. In the event any person wishing to testify cannot meet this requirement, alternative arrangement can be made in advance.

2. Conduct of the Hearing

DOE reserves the right to select persons to be heard at the hearing, to schedule their respective presentations, and to establish procedures governing the conduct of the hearing. To ensure that all persons wishing to make a presentation can be heard, each speaker will be limited to 10 minutes to present comments on this proposed rule. Speakers who wish to provide further information for the record should submit such information in writing.

A Department of Energy official will preside at the hearing. This will not be a judicial or evidentiary hearing. It will be conducted in accordance with 5 U.S.C. 553 and section 501 of the Department of Energy Organization Act, 42 U.S.C. 7191.

Questions may be asked only by those conducting the hearing. Any further procedural rules needed for the proper conduct of the hearing will be announced by the presiding officer. DOE reserves the right to change the location, date, and procedures for this hearing. If DOE must cancel the public hearing, DOE will make every effort to publish an advance notice of such cancellation in the Federal Register. Actual notice of cancellation will also be given to all persons scheduled to speak. The hearing date may be canceled in the even no member of the public requests the opportunity to make an oral presentation.

A transcript of the hearing will be made by DOE and made available as part of the administrative record for this rulemaking. It will be on file for inspection at the DOE Freedom of Information Reading Room, Forrestal Building, 1000 Independence Avenue, SW, Washington, DC 20585, between the hours of 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Any person may purchase a copy of the transcript from the hearing reporter.

List of Subjects in 48 CFR Parts 917, 950, 952, 970

Government procurement.

Issued in Washington, D.C., on June 7, 1996.

Richard H. Hopf,

Deputy Assistant Secretary for Procurement and Assistance Management.

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

PART 917—SPECIAL CONTRACTING METHODS

1. The authority citation for Part 917 continues to read as follows:

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

2. Section 917.600 is amended by adding the following sentences at the end of the paragraph:

917.600 Scope of subpart.

* * * 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 (DEAR) 917.601. References in this subpart to ''management and operating contracts'' shall be understood to include performance-based management contracts.

3. Subpart 917.6, Management and Operating Contracts, is amended to add new section 917.601, Definitions, to read as follows:

917.601 Definitions.

Performance-based management contract means a management and operating contract that employs, to the maximum extent practicable, performance-based contracting concepts and methodologies through the application of results-oriented statements of work; clear, objective performance standards and measurement tools; and incentives to

encourage superior contractor performance.

PART 950—EXTRAORDINARY CONTRACTUAL ACTIONS

4. The authority citation for Part 950 continues to read as follows:

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

950.7101 [Amended]

5. Section 950.7101 is amended by removing paragraph (c)(2) and redesignating paragraph (c)(1) as (c).

PART 952—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

6. The authority citation for Part 952 is revised to read as follows:

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

7. Section 952.223–71 is amended by revising the section heading and adding the following sentence at the end of the paragraph to read as follows:

952.223–71 Environment, safety and health.

* * * Replace clause paragraph (b) with the following:

(b) The contractor shall comply with applicable Federal, State, and local environmental, safety, and health laws and regulations, and with DOE directives identified in writing by the contracting officer. The contractor shall cooperate with Federal and non-Federal agencies having jurisdiction over environmental, safety, and health matters under this contract.

PART 970—DOE MANAGEMENT AND OPERATING CONTRACTS

8. 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).

970.0407 [Removed]

9. Section 970.0407, Records retention requirements, is removed.

10. New subsection 970.0407–1, Alternate retention schedules, is added to read as follows:

970.0407–1 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 requirements of DOE Order 1324.5 rather than those set forth at subpart 4.4 of the Federal Acquisition Regulation.

11. New section 970.0407–2, Ownership of records, is added to read as follows:

970.0407–2 Ownership of records.

Contracting officers may agree to contractor ownership of the categories of records designated in the instruction in paragraph (b) of 48 CFR (DEAR) 970.5204–XX, Ownership of Records, so long as such agreements do not limit the Government's right to inspect, copy, and audit these records. Right of inspection, copying, and audit must be maintained in order to protect the public interest and meet the Department's statutory reporting requirements.

12. New section 970.0470–3, Contract clause, is added to read as follows:

970.0470–3 Contract clause.

The contracting officer shall insert the clause at 48 CFR (DEAR) 970.5204–XX, Ownership of records, in management and operating contracts where the contractor wishes to retain ownership of certain records. Contracts containing the clause at 48 CFR (DEAR) 970.5204–XX, Ownership of Records, shall also include the clauses at 48 CFR (DEAR) 970.5203–2, Inspection of records by the Comptroller General, and 48 CFR (DEAR) 970.5204–9, Accounts, records and inspection.

13. New section 970.0470, Department of Energy Directives, consisting of subsections 970.0470–1 and 970.0470–2, is added to read as follows:

970.0470 Department of Energy Directives.
970.0470–1 General.
970.0470–2 Contract clause.

970.0470–1 General.

(a) The Department of Energy Directives system is the 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 applicable to a contract, developing the list, and providing the list to the contracting officer for inclusion in the contract.

(b) If the contract relates to facilities or activities that have been the subject of a completed review using the Standards/Requirements Identification process or the Necessary and Sufficient process, the environment, safety, and health portion of the list should be developed using the approved Standards/Requirements Identification Document or Necessary and Sufficient set of standards. If the Standards/Requirements Identification process or the Necessary and Sufficient process is completed with regard to facilities or activities covered by the contract after the contract is executed, the approved Standards/Requirements Identification Document or Necessary and Sufficient set of standards should be used in developing the environment, safety, and health portion of the list, as appropriate.

970.0470–2 Contract clause.

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

14. Section 970.1001 is revised to read as follows:

970.1001 Performance-based statements of work, criteria, and measures.

(a) It is the policy of the Department of Energy to use, to the maximum extent practicable, performance-based contracting in its management and operating contracts. The use of performance-based statements of work, where feasible, is the preferred method for establishing work requirements. Statements of work, work authorizations, and other documents describing contractor work activity should describe performance requirements and expectations in terms of outcome, results, or final work products, as opposed to methods, processes, design, or broad statements or categories of work activity.

(b) Performance criteria, measures, and incentives shall be structured to correspond to the performance requirements established in the statement of work, work authorization, or other such document.

970.1002 [Amended]

15. The section heading for section 970.1002 is revised to read, ''Additional considerations.''

16. Subpart 970.15 is amended by adding new section 970.1507, Make-or-Buy Plans, consisting of 970.1507–1, 970.1507–2, and 970.1507–3, to read as follows:

970.1507 Make-or-buy Plans
970.1507–1 Policy.
970.1507–2 Requirements.
970.1507–3 Contract clauses.

970.1507–1 Policy.

(a) Contracting officers shall require management and operating contractors to develop and implement make-or-buy plans that establish a preference for providing property 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) 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 actively support 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, contractors will openly discuss their plans, activities, cost-benefit analyses, and decisions with the many stakeholders affected by such decisions, including representatives of the community and local businesses.

(3) Consistent with Section 3161 of the National Defense Authorization Act for Fiscal Year 1993 (42 U.S.C. 7274h), the contractor shall mitigate the social and economic impacts of subcontracting decisions, including work force displacement or restructuring, to the extent practicable. Mitigation shall include the requirement for hiring preferences in a subcontract (see 48 CFR (DEAR) 970.5204–XX, Displaced Employee Hiring Preference). Potential work force displacement may require the Department of Energy to prepare a work force restructuring plan. The contractor shall implement the plan, which may require the following initiatives for eligible workers consistent with the objectives of Section 3161: retraining, early retirement or other options to avoid lay-offs; retraining for new missions; outplacement assistance, including tuition reimbursement; relocation assistance; and 60 days individual layoff notice.

970.1507–2 Requirements.

(a) *Development of program-specific make-or-buy criteria.* DOE programmatic sponsors of the work conducted at the facility or site shall develop program specific make-or-buy criteria. 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 obviate a decision based on a purely economic (i.e., least-cost) 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. Program specific make-or-buy criteria shall be provided to the contractor for use in developing a master make-or-buy plan for the facility, site, or specific program, as appropriate.

(b) *Make-or-buy plan property and services.* Property 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, generally should 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 master plan.

(c) *Submission of make-or-buy plans.* The contracting officer shall require the contractor to submit an initial plan and all plan updates for DOE approval. For newly awarded contracts, the contracting officer shall require the contractor to submit to the contracting officer the master make-or-buy plan for approval not later than 180 days after contract award. Where existing contracts are to be renewed with the incumbent contractor, the contracting officer shall require the contractor to submit a master make-or-buy plan during the negotiation of the contract extension. The contracting officer shall modify existing contracts that have a remaining term of at least two (2) years to include a requirement for a contractor make-or-buy plan. Evaluation and approval of such a plan should occur as part of the annual work plan/budget negotiations. Once approved, make-or-buy plans shall remain effective for the term of the contract (up to a period of five years), unless circumstances warrant a change. The contracting officer shall require the contractor to update the plan whenever changed circumstances occur or significant new work not identified or contemplated at the time of approval of the initial plan is initiated.

(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 with particular attention to the effect of a ''buy'' decision on the contractor's ability to maintain core competencies needed to operate the site or facility;

(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) Consistent with the contractor's approved subcontracting plan, whether small, small disadvantaged, or other minority owned businesses will be afforded maximum practicable opportunity to compete for work that is subcontracted;

(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 updates. Once approved, make-or-buy plans 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.

970.1507–3 Contract clauses.

(a) The contracting officer shall insert the clause at 48 CFR (DEAR) 970.5204–XX, Make-or-Buy Plan, in management and operating contracts.

(b) The contracting officer shall insert the clause at 48 CFR (DEAR) 970.5204–XX, Displaced Employee Hiring Preference, in management and operating contracts.

17. New section 970.2275, consisting of subsections 970.2275–1 and 970.2275–2, is added to read as follows:

970.2275 Overtime management.

970.2275–1 General.

(a) Contracting officers shall require an overtime control plan from contractors whose overtime premium funds meet any one of the following criteria:

(1) They exceed the DOE management and operating contract median overtime expenditures for the preceding calendar year plus 2%;

(2) They exceed the DOE management and operating contractor median overtime expenditures for the preceding calendar year and the contractor's policy permits payment of overtime premiums for exempt employees earning equal to or greater than $45,000 per annum; or,

(3) They exceed the DOE management and operating contractor median overtime expenditures for the preceding calendar year and the contractor permits overtime payments on any basis other than hours worked in excess of 40 hours per week.

(b) The overtime control plan shall be on an annual basis and approved by DOE. It shall include submission of a semi-annual report on overtime usage to the contracting officer and implementation of an effective management evaluation program to assure that overtime usage is in accordance with the approved overtime control plan.

970.2275–2 Contract clause.

The contracting officer shall insert the clause at 48 CFR (DEAR) 970.5204–XX, Overtime Management, in management and operating contracts and contracts with advance understandings on cost.

970.2302–2 [Amended]

18. Subsection 970.2303–2 is amended by removing paragraphs (c), (d), and (e).

19. New section 970.2830 is added to read as follows:

970.2830 Contract clause.

The contracting officer shall insert the clause at 48 CFR (DEAR) 970.5204–31, Insurance—Litigation and Claims, in management and operating contracts. Individual deviations to 48 CFR (DEAR) 970.5204–31(h)(1)(i) may be used in contracts with nonprofit organizations when combined with a reduction in fee and approved by the Procurement Executive.

20. Section 970.3101–3 is amended by revising paragraph (a)(1) to read as follows:

970.3101–3 General basis for reimbursement of costs.

(a) * * *

(1) Reasonableness in accordance with FAR 31.201–3;

* * * * *

21. Section 970.3102–21, Fines and penalties, is revised to read as follows:

970.3102–21 Fines and penalties.

It is Department of Energy policy not to reimburse management and operating contractors for fines and penalties except as provided in 48 CFR (DEAR) 970.5204–13(e)(12), Allowable Costs and Fixed Fee (Management and Operating Contracts), 48 CFR (DEAR) 970.5204–14(e)(10), Allowable Costs and Fixed Fee (Support Contracts), and 48 CFR (DEAR) 970.5204–XX, Preexisting Conditions.

970.3102–22 [Removed]

22. Section 970.3102–22 is removed.

23. Subsection 970.3103, Contract Clauses, is amended to add new paragraph (d) to read as follows:

970.3103 Contract clauses.

* * * * *

(d) The clause at 970.5204–XX, Preexisting Conditions, shall be included in management and operating contracts. Alternate I of the clause shall be used in management and operating contracts with incumbent contractors.

24. Subsection 970.5204–2, Safety and health (Government-owned or leased) is revised to read as follows:

970.5204–2 Environment, safety, and health.

As prescribed in 48 CFR (DEAR) 970.2303–2(a), insert the following clause.

Environment, Safety, and Health (Month and Year TBE)

(a) The contractor shall perform the work under this contract in a manner that ensures adequate protection for workers, the public, and the environment and shall develop and manage a comprehensive program in support of these objectives, consistent with its Environment, Safety, and Health Management Plan and any applicable Authorization Agreement. The contractor shall exercise a degree of care commensurate with the risk of harm involved, particularly with respect to the operation of nuclear facilities, where applicable.

(b) The contractor shall comply with, and assist the Department of Energy in complying with (where identified by the Department), (i) all applicable Federal and non-Federal environment, safety, and health laws, regulations, and (ii) applicable directives identified in the clause of this contract on Departmental directives. The contractor shall cooperate with Federal and non-Federal agencies having jurisdiction over environmental, safety, and health matters under this contract.

(c) *Management plan*. The contractor, within 60 days after the effective date of this contract or the modification incorporating this clause, shall submit to the contracting officer for review and approval an Environment, Safety, and Health Management Plan. This management plan shall contain the management program to be implemented by the contractor to protect the environment, workers, and the public. Guidance on preparation of the Management Plan will be provided by DOE as it may be periodically revised. The contractor shall annually submit an updated management plan to the DOE for review and approval reflecting budget decisions and contractor performance commitments for implementation in the budget execution year. Revisions to the management plan shall be subject to the change control process(es) established for the facility(ies) and activity(ies) managed by the contractor.

(d) *Authorization agreement(s).* This contract establishes the agreed-upon safety requirements and other operating safety parameters for operations covered by the contract, except with respect to operations for which the contracting officer has notified the contractor that a separate Authorization Agreement is necessary. Authorization Agreements may be used to establish, document, and control the safety requirements and other parameters for specified operations that ensure adequate protection of the workers, the public, and the environment. The contracting officer may at any time notify the contractor that specified operations may proceed only subject to the requirements of a DOE-approved Authorization Agreement. Upon such notification, the contractor shall prepare and submit for DOE approval an Authorization Agreement within the time frame specified in the notice. Updates and changes to any approved Authorization Agreement shall be subject to DOE approval.

(e) The contractor shall promptly correct any noncompliance with applicable environmental or safety and health requirements, the Management Plan, and any applicable Authorization Agreements. If the contractor fails to take corrective action or if, at any time, the contractor's acts or failure to act cause 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 under this clause (including a stop work order issued by the contractor to a subcontractor in accordance with paragraph (f) of this clause) shall be without prejudice to any other legal or contractual rights of the Government. Thereafter, 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.

(f) The contractor shall provide in its purchasing system, required under the clause of this contract entitled, Contractor Purchasing System, for policies, practices, and procedures for the flowdown of appropriate requirements of this clause to

subcontractors performing 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 (e) of this clause.

25. Section 970.5204–13, Allowable costs and fixed-fee (management and operating contracts), is amended by revising the prescription, clause paragraphs (c), (d)(4), (d)(9), (e)(12), (e)(17), the note preceding (e)(36), and (e)(36) to read as follows:

970.5204–13 Allowable costs and fixed-fee (management and operating contracts).

As prescribed in 48 CFR (DEAR) 970.3103(a), insert the following clause.

Allowable Costs and Fixed-Fee (Management and Operating Contracts) (Month and Year TBE)

* * * * *

(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 are determined to be allowable as set forth in this paragraph. The determination of allowability of cost shall be based on:

(1) Reasonableness in accordance with FAR 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) * * *

(4) Reasonable litigation 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.

* * * * *

(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.

* * * * *

(e) * * *

(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.

* * * * *

(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 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.

* * * * *

Note: In contracts with profit making contractors, add the following paragraph 36:

(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.

Section 970.5204–14, Allowable costs and fixed-fee (support contracts), is amended by revising clause paragraphs (c), (d)(4), (d)(10), (e)(10), (e)(15), the note preceding (e)(34), and (e)(34) to read as follows:

970.5204–14 Allowable costs and fixed-fee (support contracts).

As prescribed in 48 CFR (DEAR) 970.3103(a), insert the following clause.

Allowable Costs and Fixed-Fee (Support Contracts) (Month and Year TBE)

* * * * *

(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 are determined to be allowable as set forth in this paragraph. The determination of allowability of cost hereunder shall be based on:

(1) Reasonableness in accordance with FAR 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) * * *

(4) Reasonable litigation expenses, including counsel fees, if incurred in accordance with the clause of the contract entitled, Insurance—Litigation and Claims, in accordance with 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.

* * * * *

(10) Repairs, maintenance, inspection, replacement, and disposal of government-owned property to the extent directed or approved by the contracting officer and as allowable under paragraph (f) of the clause of this contract entitled, Property.

* * * * *

(e) * * *

(10) 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.

* * * * *

(15) 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 other from any source;

(iv) That are compensated for by insurance or otherwise or which would have been compensated 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.

* * * * *

Note: In contracts with profit making contractors, add the following paragraph 34:

(34) 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.

27. Subsection 970.5204–16 is amended by adding the following to the end of clause paragraph (a) and revising alternate clause paragraph (a) following Note 2 to read as follows:

970.5204–16 Payments and advances.

As prescribed in 48 CFR (DEAR) 970.3270, insert the following clause.

Payments and Advances (Month and Year TBE)

(a) * * * 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.

* * * * *

(a) *Payment of Base Fee and Award Fee Pool Amounts Earned.* The base fee shall become due and payable in equal monthly installments. Award fee pool amounts earned shall become due and payable following the issuance by the FDO of a Determination of Award Fee Pool Amount Earned, in accordance with the clause of this contract entitled, Award Fee: base fee and award fee. Base and award fee pool 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 or award fee pool amount earned payment may be withdrawn against the letter-of-credit without prior written approval of the contracting officer.

* * * * *

970.5204–18 [Removed and Reserved]

28.Section 970.5204–18 is removed and reserved.

29.Section 970.5204–21, Property, is amended by revising clause paragraphs (e), (f), (g), (i) and (j) to read as follows:

970.5204–21 Property.

As prescribed in 970.7104–43, insert the following clause.

Property (Month and Year TBE)

* * * * *

(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) 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 part 101) and the Department of Energy Property Management Regulations (41 CFR part 109).

(3) High-risk property is property, the loss, 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) The contractor shall be responsible and compensate the Government for the loss or destruction of, or damage to, Government property unless the contractor demonstrates to the contracting officer that such loss, destruction, or damage was not caused by any of the following:

(i) Willful misconduct or lack of good faith on the part of the contractor's managerial personnel;

(ii) Failure of the contractor to comply with any appropriate written direction of the contracting officer to safeguard such property under paragraph (e) of this clause; or

(iii) Failure of the contractor to establish, administer or properly maintain an approved property management system in accordance with paragraph (i) of this clause.

(2) As described in paragraph (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 cost of insurance obtained by the contractor to cover the risk 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, 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.

* * * * *

(i) *Property Management.*

(1) *Property Management System.*

(i) The contractor shall maintain and administer an approved property management system of accounting for and control, utilization, maintenance, repair, protection, and preservation of Government property in its possession under the contract. The contractor's property management system shall be approved by the contracting officer and 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 reliable 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 property furnished by the Government.

(ii) In the event that the contractor is succeeding another contractor(s) in the

performance of this contract, the contractor shall conduct a joint reconciliation of the property inventory with the predecessor contractor. The contractor further 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.

Note: Substitute the following paragraph (j) for nonprofit contractors:

(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 at which this contract is being performed; or

(3) The Laboratory officials responsible for 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).

970.5204–26 [Removed and Reserved]

30. Subsection 970.5204–26, Nuclear facility safety, is removed and reserved.

31. Subsection 970.5204–31 is revised to read as follows:

970.5204–31 Insurance—litigation and claims.

As prescribed in 48 CFR (DEAR) 970.2830(a), 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.

(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 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 (48 CFR (DEAR) 970.5204–15).

(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) Notwithstanding any other provision of this contract, the contractor's liabilities to third persons, including employees, (and any expenses incidental to such liabilities, including litigation costs) are not allowable unless the contractor demonstrates to the contracting officer that such liabilities were not caused by the willful misconduct or lack of good faith of the contractor's managerial personnel, or failure to exercise prudent business judgment by the contractor's managerial personnel.

(i)(1) Costs which may be unallowable under subparagraph (g)(1) or (h) of this clause shall be differentiated and accounted for by the contractor so as to be separately identifiable. The contracting officer shall generally withhold payment and not authorize the use of funds advanced under the contract for 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 agreement by the contractor to repay all unallowable costs, plus interest, if the costs are subsequently determined to be unallowable.

(2) Punitive damages are not allowable unless the contractor demonstrates to the contracting officer that 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 cost of insurance specifically procured by the contractor to cover the third-party liabilities referenced 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 (DEAR) 970.5204–21.

(j) 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.

(k) 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 when 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, when 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.

(l) The provisions of 48 CFR (DEAR) 970.71 are not applicable to costs incurred under and in accordance with this clause and subparagraph (d)(4) of the clause at 48 CFR (DEAR) 970.5204–13 entitled, Allowable costs and fixed fee.

970.5204–32 [Removed and Reserved]

32. Subsection 970.5204–32, Required bond and insurance—exclusive of government property, is removed and reserved.

970.5204–41 [Removed and Reserved]

33. Subsection 970.5204–41, Preservation of individual occupational radiation exposure records, is removed and reserved.

970.5204–55 and 970.5204–56 [Removed and Reserved]

34. Subsections 970.5204–55 and 970.5204–56 are removed and reserved.

35. Subsection 970–5204–61 is amended by revising the presciptation and adding clause paragraph (h):

970.5204–61 Cost prohibitions related to legal and other proceedings.

As prescribed in 48 CFR (DEAR) 970.3103(c), insert the following clause.

Cost Prohibitions Related to Legal and Other Proceedings (Month and Year TBE)

* * * * *

(h) For proceedings against the contractor in which the contractor is alleged to have violated the False Claims Act, 31 U.S.C. 3730, and to the extent paragraph (b) of this clause is not otherwise applicable:

(1) Any costs of judgments against the contractor, and the associated litigation costs, and, except as authorized by the contracting officer, costs of settlements made by the contractor, and the associated litigation costs, are unallowable; and

(2) For those cases in which the Department of Justice does not intervene, contractor requests for provisional reimbursement of proceeding costs should be denied unless the General Counsel concurs in a determination that the case is so frivolous or devoid of merit that it would be in the interest of the government to provisionally allow such costs.

970.5204–62 [Removed and Reserved]

36. Subsection 970.5204–62, Environmental protection, is removed and reserved.

37. Subpart 970.52, Contract Clauses for Management and Operating Contracts, is amended to add 970.5204–XX, Preexisting Conditions; 970.5204–XX, Make-or-Buy Plan; 970.5204–XX, Displaced Employee Hiring Preference; 970.5204–XX, Laws, Regulations, and DOE Directives; 970.5204–XX, Ownership of Records; and 970.5204–XX, Overtime Management, to read as follows:

970.52 Contract Clauses for Management and Operating Contracts.
970.5204–XX Preexisting conditions.
970.5204–XX Make-or-buy plan.
970.5204–XX Displaced employee hiring preference.
970.5204–XX Laws, regulations, DOE directives.
970.5204–XX Ownership of records.
970.5204–XX Overtime management.

970.5204–XX Preexisting conditions.

As prescribed in 48 CFR (DEAR) 970.3103(d), insert the following clause.

Preexisting Conditions (Month and Year TBE)

(a) The Department 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 [Specify 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 [Specify date contract began], the contractor shall be responsible in accordance with the terms and conditions of this contract.

(b) 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, and the contractor has the responsibility to take corrective action, as directed by the contracting officer as required elsewhere in this contract.

(c) The obligations of the Government under this provision are subject only to the availability of appropriated funds.

Alternate I. As prescribed in 48 CFR (DEAR) 970.3103(d), substitute the following paragraph (a):

(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 of contract including this clause], in conjunction with the management and operation of [Insert name of facility], shall be deemed incurred under Contract No. [Insert number of prior contract].

970.5204–XX Make-or-buy plan.

As prescribed in 48 CFR (DEAR) 970.1507–3(a), insert the following clause:

Make-Or-Buy Plan (Month and Year TBE)

(a) *Definitions.*

Buy item means a work activity or property or services 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 or property or services to be produced or performed by the contractor using its personnel and other resources at the Department of Energy facility or site.

Master 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 property and services on a least cost basis, subject to specific Department of Energy 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 will actively support 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, contractors will openly discuss their plans, activities, cost-benefit analyses, and decisions with the many stakeholders affected by such decisions, including representatives of the community and local businesses.

(3) Consistent with Section 3161 of the National Defense Authorization Act for Fiscal Year 1993, the contractor shall mitigate the social and economic impacts of subcontracting decisions, including work force displacement or restructuring, to the extent practicable. Mitigation shall include:

(i) The requirement for hiring preferences and retraining in a subcontract,

(ii) The provision of relocation and/or reemployment assistance, and

(iii) Consideration of early retirement opportunities.

(c) *Submission and approval.* The contractor shall submit a make-or-buy plan for approval in accordance with the schedule and other instructions provided by the contracting officer.The following documentation shall be prepared and submitted:

(1) A description of the 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 when:

(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(s) is impracticable at the time of initial development of the plan;

(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 master make or buy plan is approved, the contractor shall perform in accordance with the plan.

(e) *Changes to the master make-or-buy plan.* The master 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 original make-or-buy decisions change subsequent to the initial approval, 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. All changes shall be submitted in accordance with 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.

970.5204–XX Displaced employee hiring preference.

As prescribed in 48 CFR (DEAR) 970.1507–3(b), insert the following clause.

Displaced Employee Hiring Preference (Month and Year TBE)

(a) *Definition.*

Eligible employee means a current or former employee of the [insert name of facility] whose position of employment has been, or will be, affected by the downsizing, contracting out decision, or subcontracting decision of a Department of Energy defense nuclear facility and who has also met the eligibility criteria contained in the Department of Energy's Interim Planning Guidance for Contractor Work Force Restructuring.

(b) The contractor agrees that it will provide a preference in hiring to an eligible employee to the extent practicable for work performed under this contract when that employee is qualified to perform the work.

(c) The requirements of this clause shall be included in all subcontracts awarded in accordance with this contract at any tier which exceed $500,000 in value, unless a statute, such as 41 U.S.C. Section 403 on commercial items, intends to preclude inclusion of such a requirement.

970.5204–XX Laws, regulations, and DOE directives.

As prescribed in 48 CFR (DEAR) 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, unless relief has been granted in writing by the appropriate regulatory agency. A List of Applicable Laws and Regulations may be appended to this contract for information purposes. Omission of any applicable law or regulation from the List 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 appended to this contract. The contracting officer may, from time to time and at any time, revise this List by unilateral modification to the contract to add, modify, or delete specific requirements. Prior to revising this List, the contracting officer shall notify the contractor in writing of the Department's intent to revise this List 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, including an alternative set of requirements incorporated by reference in accordance with paragraph (d) of this clause. 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 this List, and so advise the contractor not later than 30 days prior to the effective date of the revision of the list. 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 the list pursuant to the clause entitled, Changes, of this contract.

(c) Environmental, safety, and health requirements applicable to this contract may be determined by an alternate process developed by the Department of Energy (i.e., the Standards/Requirements Identification process or the Necessary and Sufficient Process). When such alternate process is used, the resulting set of requirements shall be incorporated into the List of Applicable Directives with full force and effect. These requirements shall supersede, in whole or in part, the environmental, safety, and health requirements previously made applicable to the contract by the List of Applicable Directives.

(d) The contractor shall be responsible for compliance with the requirements made applicable to this contract, regardless of the performer of the work. Consequently, the contractor shall be responsible for flowing down the necessary provisions to subcontracts at any tier to which the contractor determines such requirements apply.

970.5204–XX Ownership of records.

As prescribed in 48 CFR (DEAR) 970.0407–3, insert the following clause.

Ownership of Records (Month and Year TBE)

(a) *Government's 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's own 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 here any of the following listed records.

(1) Employment-related records (such as workers' compensation files; employee relations records, records on salary and employee benefits; drug testing records, labor negotiation records; and personnel and medical/health-related records and similar files).

(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) Non-accounting records relating to any procurement action by the contractor; and

(4) 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) In the event of completion or termination of this contract, copies of any of the contractor's own records identified in paragraph (b) of this clause shall be delivered to DOE or its designees. Title to such records shall vest in DOE upon delivery.

(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 designee at all reasonable times, and the contractor shall afford the Government or its designee 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.

(e) *Applicability.* The provisions of paragraph (b) and (c) 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 1324.5, Records Management Program and DOE Records Schedules (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.

(g) *Flowdown.* 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 contract 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 (DEAR) 970.5204–2, Environment, safety, and health, or similar clause.

970.5204–XX Overtime management.

As prescribed in 48 CFR (DEAR) 970.2275–2, insert the following clause:

Overtime Management (Month and Year TBE)

(a) The contractor shall submit and comply with an annual overtime control plan approved by the contracting officer if any of the following criteria are met:

(1) The contractor's overtime expenditures as a percent of payroll exceed the DOE contractor median overtime expenditures for the preceding calendar year plus 2 percent;

(2) The contractor's overtime expenditures as a percent of payroll exceed the DOE contractor median overtime expenditures for the preceding calendar year and the contractor's policy permits payment of overtime premium for exempt employees earning greater than or equal to $45,000 per annum; or

(3) The contractor's overtime as a percent of payroll exceed the DOE contractor median overtime expenditures for the preceding calendar year and the contractor provides for overtime premium pay on any other basis than for hours worked in excess of 40 per week.

(b) The annual overtime control 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.

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