

DEPARTMENT OF ENERGY**48 CFR Parts 915 and 970**

RIN 1991-AB32

Acquisition Regulation; Department of Energy Management and Operating Contracts and Other Designated Contracts**AGENCY:** Department of Energy.**ACTION:** Notice of proposed rulemaking.

SUMMARY: The Department proposes to amend the Department of Energy Acquisition Regulation (DEAR) to revise its fee policies and related procedures for management and operating contracts and other designated contracts. The proposed rule focuses on the use of fees to ensure that they: are reasonable and commensurate with performance, business and cost risks; create and implement tailored incentives for performance based management contracts; are structured to attract best business partners; and afford flexibility to provide incentives to contractors to perform better at less cost.

DATES: Comments must be received by 4:30 p.m. local time on or before June 9, 1998. A workshop will be held on May 19, 1998, beginning at 9:30 a.m. local time at the address listed below. Requests to speak at the workshop or comments you would like specifically addressed should be received by 4:30 p.m. local time on May 11, 1998. Later requests will be accommodated to the extent practicable.

ADDRESSES: All comments (three copies), as well as requests to speak at the workshop or issues you would like addressed, should be submitted to: Stephen Michelsen, Office of Contract and Resource Management (HR-53), Department of Energy, 1000 Independence Avenue, SW, Washington, D.C. 20585, (202) 586-1368, (202) 586-9356 (facsimile), stephen.michelsen@hq.doe.gov (Internet).

The workshop will be held at Department of Energy, 1000 Independence Avenue, SW, Room 8E089, Washington, DC.

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

FOR FURTHER INFORMATION CONTACT: Stephen Michelsen, Office of Contract and Resource Management (HR-53),

Department of Energy, 1000 Independence Avenue, SW, Washington, D.C. 20585, (202) 586-1368; (202) 586-9356 (facsimile); stephen.michelsen@hq.doe.gov (Internet).

SUPPLEMENTARY INFORMATION:**I. Background and Analysis****II. Public Comments****III. Procedural Requirements**

- A. Review Under Executive Order 12866
- B. Review Under Executive Order 12988
- C. Review Under the Regulatory Flexibility Act
- D. Review Under the Paperwork Reduction Act
- E. Review Under Executive Order 12612
- F. Review Under the National Environmental Policy Act
- IV. Opportunities for Public Workshop

I. Background and Analysis

The proposed rule would amend DEAR Subpart 970.1509 to revise fee policies and related procedures for management and operating contracts and other designated contracts. Among other things, the proposed rule complements the Department's June 27, 1997 (62 FR 34842) rulemaking which implemented a number of recommendations to improve its management and operating contracts. One of these recommendations involved the adoption of performance-based contracting concepts. Since the initiation of its contract reform initiatives, the Department has tested a number of approaches to conform its use of fee to such concepts. An additional element of contract reform was the adoption of cost allowability and liability provisions which placed greater financial risk on both for profit and nonprofit contractors. This proposed rule also reflects these changes. The amendments to DEAR proposed by this action are intended to ensure that fees are: reasonable and commensurate with contract type and associated performance and financial risks; structured to attract the best organizations; and effectively used in conjunction with performance-based management contract concepts as implemented by final rule dated June 27, 1997 (62 FR 34842).

Proposed revisions to Subpart 970.1509 would: update fee schedules based on the Bureau of Labor Statistics Producer Price Index for Industrial Commodities to reflect the effects of inflation since 1991 (Sections 915.971-5 and 970.1509-5); add a new fee schedule for environmental management work effort (Section 970.1509-5); redefine and increase facility categories consistent with changes in work at major facilities

(Section 970.1509-8); eliminate management allowance for educational institutions and place limitations on both fixed fee and total available fee, including special limits on fee available to nonprofit organizations (Section 970.1509-2); recognize and provide guidance on the availability of various contract types (Section 970.1509-3); provide a preference for those contract types that appropriately maximize the incentives for superior performance (Section 970.1509-3); define criteria for the use of multiple fee approaches (Section 970.1509-3); correlate incentive-fee type arrangements to Federal Acquisition Regulation guidance (Section 970.1509-3); require that fee amounts tied to specific accomplishments or work activities reflect the value of that work to the Department (Section 970.1509-4); provide a preference for contract types under which all fee will be based on performance (Section 970.1509-3); require the maximum practical use of outcome oriented performance expectations consistent with performance based management contract concepts (Section 970.1509-3); eliminate references to fees for management and operating contracts for support services; provide specialized policies for nonprofit federally funded research and development centers, including those run by educational institutions (Section 970.1509-2); restructure considerations and techniques for determining fixed fees and total available fee (Sections 970.1509-4 and 970.1509-8); delete a specified contractor performance grading scale, Fee Conversion Table, and replace it with a requirement for a site specific method of rating the contractor's performance of the contract requirements and determining fee earned (Section 970.1509-8); provide a new clause to establish a threshold for the payment of any fee to ensure, among other things, that performance in the critical area of environment, safety and health is not compromised by any other performance objective (Section 970.5204-XX); and prescribe a new contract clause to address cost reduction proposal programs based on guidance in DEAR 970.1509 (Section 970.5204-YY).

II. Public Comments

Interested persons are invited to participate by submitting data, views, or arguments with respect to the DEAR amendments set forth in this notice. Three copies of written comments should be submitted to the address indicated in the ADDRESSES section of this notice. Comments on the major items identified in the "PUBLIC

WORKSHOP" section should be identified on separate pages, with the name of the item at the top of each page, e.g., comments regarding the Department's fee policy as it applies to the use of multiple contract types. 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 notice 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's Freedom of Information Public 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 notice 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.

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) and 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. DOE 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, Pub. L. 96-354, 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. Based on the history of the Department and the requirements contained in its management and operating contracts, the impact of the proposed rule will be limited to large businesses not subject to the Regulatory Flexibility Act, as small businesses generally do not have the resources required to manage and operate the complex activities at the Department's largest sites. 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 record keeping 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 Workshop

For significant proposals to revise procurement regulations, DOE has a practice of providing an opportunity for affected contractors, potential offerors, and other interested persons to be heard. In this rulemaking, a public workshop will be conducted on the proposed regulatory amendments rather than a standard public hearing. There are issues involved in this rulemaking that are both significant and complex. DOE believes that the resolution of these issues, as well as the overall quality of the final rule, will be enhanced by an interactive exchange of ideas conducted in a more informal conference style setting. The agenda for the workshop will include, at a minimum, the following topics:

1. The use of multiple contract types within the structure of a cost-plus-

award-fee contract. The Department believes that management and operating contracts may be more efficiently and effectively performed if there is latitude to utilize multiple contract types within the structure of a cost-plus-award-fee contract. Therefore, the revised policy allows for management and operating contracts, or portions of these contracts to be awarded on a cost-plus-incentive-fee (CPIF), fixed-price incentive (FPI), or firm-fixed-price (FFP) basis or combination thereof. Comments are specifically solicited regarding:

- a. the appropriateness of requiring that the preconditions set forth in FAR 16.1 be met, as appropriate, for the contract type employed;
- b. the appropriateness of employing several contract types, (assuming the contractor has the ability to segregate and track costs by task); and
- c. the impact on fee of using several contract types.

2. *The approach which places all fee at performance risk.* The Department believes that with the introduction of performance based incentives into its award fee management and operating contracts, that all fee should be tied to performance risk. Comments are specifically solicited regarding: the risk posed to contractors by not having any base (fixed) fee amount; and the type and magnitude of potential costs which would be incurred by the contractor if no fee were earned.

3. *The policy, as it applies to contracts with nonprofit organizations including educational institutions.* The Department, while generally preferring to minimize the amount of fee available for the operation of its laboratories, believes that fee considerations should include the nature and extent of financial or other liability or risk assumed under the contract and the utility of fee as a performance incentive. Any fee exceeding that associated with liability risk should be tied to the organizations's performance. Comments are specifically solicited regarding:

- a. the appropriateness of fee in contracts with nonprofit organizations or educational institutions;
- b. limiting the fixed fee or base fee to an amount that reflects the cost risk associated with the liability assumed by the organization;
- c. the ability of an organization to identify and support the potential cost risk associated with its assumption of liability; and
- d. the appropriateness of tying fee to performance.

4. *An alternative to the proposed policy as described in item 3 above.* The alternative under consideration would establish a fee policy for the operators

of the Department's FFRDCs which would not distinguish between the types of business organizations operating them. Consideration is being given to limiting the fee to a minimum amount which recognizes that organizations may incur costs and risks in doing business with the government which are not reimbursed. Comments are specifically solicited regarding:

- a. establishing a section of the policy which applies solely to the Department's FFRDCs in contrast to all of its other operations;
- b. the principle of setting a maximum allowable fee that is the same for any entity which would operate a FFRDC;
- c. minimizing the fee to an amount which recognizes that organizations may incur costs and risks in doing business with the government which are not reimbursed; and
- d. the implications of an organization's tax status on the foregoing.

5. *The amount of fee necessary to attract the most capable contractors.* The Department, with this revised fee policy, is attempting to provide meaningful incentives for contractors to perform better at less cost. In addition, the Department is hoping to enlarge the pool of contractors who are available to help DOE accomplish its important and challenging missions. For these reasons, the Department has created a fee policy which is intended to offer contractors reasonable levels of total available fee relative to the work to be performed and the contractor resources brought to the work. Comments are specifically solicited on the Department's approach to the determination of fee objectives and amounts specifically with regard to the following elements:

- a. the use of fee schedules;
- b. the use of significant factors and facility/task category factors; and
- c. the calculation of total available fee.

6. *The application of the Conditional Payment of Fee or Incentives clause.* As a general rule, performance requirements that do not lend themselves to a specific incentive fee, should be included in the award fee. However, there are certain performance requirements that are so fundamental to the accomplishment of the overall mission objectives that meeting expected levels of performance should be a prerequisite to earning fee. In such cases, it may be appropriate to condition the payment of any earned fee on the contractor's satisfactory performance of these requirements. The proposed clause allows any otherwise earned fee to be adjusted downward based on a lack of or failure to comply with an environmental, safety, and health plan,

or the occurrence of a catastrophic event, or poor technical performance or poor cost performance. Comments are specifically solicited including those specifically regarding:

- a. the need for such a clause in a performance based contract;
- b. the relationship between primarily objective performance incentives and a clause which allows the subjective adjustment to fee earned based on the occurrence of specified events; and
- c. alternatives by which the Department can ensure acceptable performance of work effort under its management and operating contracts not specifically tied to an incentive.

DOE is interested in receiving at the workshop comments and views of interested persons concerning: (1) The above-listed topics; (2) the proposed approach contained in this proposed rulemaking; and (3) possible alternatives to the approach contained in this proposed rulemaking. DOE is also interested in receiving views concerning other topics relevant to the proposed regulatory amendments that workshop participants believe should be discussed.

Members of the public interested in participating actively in the workshop are invited to submit requests to speak to the **FOR FURTHER INFORMATION CONTACT** identified at the beginning of this notice. Those who make such a request are invited to suggest topics for inclusion in the workshop agenda. DOE requests that participants who wish to make brief oral presentations provide a written version or summary of their views for inclusion in the rulemaking record. As time permits, there will be an opportunity to engage in a general discussion of the topics raised during the workshop.

The meeting will be conducted conference-style by a DOE official. A record will be made of the proceedings of the workshop. A copy of the minutes will be placed in the record available for public inspection in the DOE Freedom of Information Public Reading Room at the address indicated in the **ADDRESSES** section. Since this proceeding is not a formal negotiated rulemaking, DOE officials will not seek a consensus of workshop participants on how to resolve issues in principle or on the specific wording of changes to the proposed regulatory text. Otherwise, DOE welcomes public participation in its policy making process and hopes that the workshop will be well attended.

List of Subjects in 48 CFR Parts 915 and 970

Government procurement.

Issued in Washington, D.C., on April 3, 1998.

Richard H. Hopf,

Deputy Assistant Secretary for Procurement and Assistance Management.

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

PART 915—CONTRACTING BY NEGOTIATION

1. The authority citation for Part 915 continues to read as follows:

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

2. Section 915.971-5 is amended by revising paragraphs (d), (f), and (h) to read as follows:

915.971-5 Fee schedules.

* * * * *

(d) The following schedule sets forth the base for construction contracts:

CONSTRUCTION CONTRACTS SCHEDULE

Fee base (dollars)	Fee (dollars)	Fee (percent)	Increase (percent)
Up to \$1 Million .....	.....	.....	5.47
1,000,000	54,700	5.47	3.88
3,000,000	132,374	4.41	3.28
5,000,000	198,014	3.96	2.87
10,000,000	341,328	3.41	2.60
15,000,000	471,514	3.14	2.20
25,000,000	691,408	2.77	1.95
40,000,000	984,600	2.46	1.73
60,000,000	1,330,304	2.22	1.56
80,000,000	1,643,188	2.05	1.41
100,000,000	1,924,346	1.92	1.26
150,000,000	2,552,302	1.70	1.09
200,000,000	3,094,926	1.55	0.80
300,000,000	3,897,922	1.30	0.68
400,000,000	4,581,672	1.15	0.57
500,000,000	5,148,364	1.03	.....
Over \$500 Million	5,148,364	.....	0.57

* * * * *

(f) The following schedule sets forth the base for construction management contracts:

CONSTRUCTION MANAGEMENT CONTRACTS SCHEDULE

Fee base (dollars)	Fee (dollars)	Fee (percent)	Increase (percent)
Up to \$1 Million .....	.....	.....	5.47
1,000,000	54,700	5.47	3.88
3,000,000	132,374	4.41	3.28
5,000,000	198,014	3.96	2.87
10,000,000	341,328	3.41	2.60
15,000,000	471,514	3.14	2.20
25,000,000	691,408	2.77	1.95
40,000,000	984,600	2.46	1.73
60,000,000	1,330,304	2.22	1.56
80,000,000	1,643,188	2.05	1.41
100,000,000	1,924,346	1.92	1.26
150,000,000	2,552,302	1.70	1.09
200,000,000	3,094,926	1.55	0.80
300,000,000	3,897,922	1.30	0.68
400,000,000	4,581,672	1.15	0.57
500,000,000	5,148,364	1.03	.....
Over \$500 Million	5,148,364	.....	0.57

* * * * *

(h) The schedule of fees for consideration of special equipment

purchases and for consideration of the subcontract program under a

construction management contract is as follows:

SPECIAL EQUIPMENT PURCHASES/SUBCONTRACT WORK SCHEDULE

Fee base (dollars)	Fee (dollars)	Fee (percent)	Increase (percent)
Up to \$1 Million .....	.....	.....	1.64
1,000,000	16,410	1.64	1.09

SPECIAL EQUIPMENT PURCHASES/SUBCONTRACT WORK SCHEDULE—Continued

Fee base (dollars)	Fee (dollars)	Fee (percent)	Increase (percent)
2,000,000	27,350	1.37	0.93
4,000,000	45,948	1.15	0.77
6,000,000	61,264	1.02	0.71
8,000,000	75,486	0.94	0.66
10,000,000	88,614	0.89	0.61
15,000,000	119,246	0.79	0.53
25,000,000	171,758	0.69	0.47
40,000,000	242,868	0.61	0.43
60,000,000	329,294	0.55	0.39
80,000,000	406,968	0.51	0.37
100,000,000	480,266	0.48	0.28
150,000,000	619,204	0.41	0.23
200,000,000	732,980	0.37	0.13
300,000,000	867,542	0.29	.....
Over \$300 Million	867,542	.....	0.13

Section 915.972 is amended by revising the introductory text of paragraph (a) to read as follows:

915.972 Special considerations for cost-plus-award-fee contracts.

(a) When a contract is to be awarded on a cost-plus-award-fee basis in accordance with 48 CFR 916.404-2, several special considerations are appropriate. Fee objectives for management and operating contracts or other site management contracts as determined by the Procurement Executive, including those using the Construction, Construction Management, or Special Equipment Purchases/Subcontract Work schedules from 48 CFR 915.971-5, shall be developed pursuant to the procedures set forth in 48 CFR 970.1509-8. Fee objectives for other cost-plus-award-fee contracts shall be developed as follows:

* * * * *

PART 970—DOE MANAGEMENT AND OPERATING CONTRACTS

4. 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).

5. Section 970.1509, including subsections 970.1509-1 through 970.1509-8, is revised to read as follows:

- 970.1509 Fees for management and operating contracts.
- 970.1509-1 Fee policy.
- 970.1509-2 Special considerations: nonprofit organizations.
- 970.1509-3 Types of Contracts.
- 970.1509-4 General considerations and techniques for determining fixed fees.
- 970.1509-5 Calculating fixed fee.
- 970.1509-6 Fee base.
- 970.1509-7 Special equipment purchases.

970.1509-8 Specific considerations: cost-plus-award-fee.

970.1509-9 Special considerations: fee limitations.

970.1509-10 Documentation.

970.1509-11 Solicitation provision and contract clauses.

970.1509 Fees for management and operating contracts.

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

970.1509-1 Fee policy.

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

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

(c) Fee amounts payable shall be established in accordance with this part. Amounts payable shall not exceed maximum amounts derived from the appropriate fee schedule (and classification factor, if applicable) unless approved in advance by the Procurement Executive or designee. In no event shall any fee exceed statutory limits imposed by 41 U.S.C. 254(b).

(d) Prior to the issuance of a competitive solicitation or the initiation

of negotiations for an extension of an existing contract, the HCA shall coordinate the maximum available fee as allowed by 48 CFR part 970 and the fee amount targeted for negotiation, if less, with the procurement executive. Solicitations shall identify maximum available fee under the contract. Offerors are invited to propose fee less than the maximum available.

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

(f) Multiple fee arrangements may be used in accordance with 48 CFR 970.1509-3.

970.1509-2 Special considerations: nonprofit organizations.

(a) A nonprofit organization is a business entity:

- (1) Which operates exclusively for charitable, scientific, or educational purposes;
- (2) Whose earnings do not benefit any private shareholder or individual;
- (3) Whose activities do not involve influencing legislation or political campaigning for any candidate for public office; and
- (4) Which is exempted from Federal income taxation under section 501 of the Internal Revenue Code (title 26, United States Code).

(b) For nonprofit organizations, the contracting officer:

(1) Should consider whether any fee is appropriate. Considerations should include:

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

(ii) The proportion of retained earnings (as established under generally accepted accounting methods) that relates to DOE contracted effort;

(iii) Facilities capital or capital equipment acquisition plans;

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

(v) The utility of fee as a performance incentive.

(2) In the event fee is considered appropriate, shall determine the amount of fee in accordance with this part.

(i) Fee shall be limited to that amount necessary to reflect the need for fee based on the applicable considerations in 48 CFR 1509-2(b)(1).

(ii) If only a cost-plus-fixed-fee type contract is appropriate, the fee shall not exceed the lesser of: the cost risk associated with liabilities that the contractor assumes; or 75% of the fixed fee that would be calculated per 48 CFR 970.1509-4. If a cost-plus-award-fee type contract is appropriate, the total available fee shall not exceed 75% of the fee calculated per 48 CFR 970.1509-8, with any base fee not exceeding the cost risk associated with liabilities that the contractor assumes and all remaining fee associated with performance.

(iii) If the nonprofit organization is a federally funded research and development center operated by an educational institution, the contractor's use of fee may be restricted.

970.1509-3 Types of contracts.

(a) Contract types suitable for management and operating contracts may include cost, cost-plus-fixed-fee, cost-plus-award-fee, and under a multiple fee arrangement, cost-plus-incentive-fee, fixed-price incentive, or firm-fixed-price. See FAR 16.1.

(b) Consistent with the concept of a performance based management contract, those contract types which incentivize performance and cost control are preferred over a cost-plus-fixed-fee arrangement. Accordingly, a cost-plus-fixed-fee contract may only be used when approved in advance by the Procurement Executive or designee.

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

(1) The attainment of acquisition objectives generally will be enhanced by using a cost-plus-award-fee contract to effectively motivate the contractor to

exceptional performance and to provide the Department with flexibility to evaluate actual performance and the conditions under which it was achieved. Also, it may not be feasible to devise effective predetermined objective incentive targets applicable to cost, technical performance, or schedule for work activities under other types of contracts.

(2) The construct of fee for a cost-plus-award-fee management and operating contract is that total available fee will equal a base fee amount and a performance fee amount. The base fee amount will typically equal zero unless otherwise approved by the Procurement Executive or designee. The performance fee amount will consist of an incentive fee component for objective performance requirements, an award fee component for subjective performance requirements, or both.

(3) In a cost-plus-award-fee type contract any base fee amount is fixed at inception of the contract and the performance fee amount the contractor may earn, in whole or in part during performance, is established sufficient to motivate performance excellence. However, consistent with concepts of performance based contracting, it is Departmental policy to place all fee at risk based on performance. Accordingly, a base fee amount will be available only where approved in advance by the Procurement Executive or designee, except in the case of a nonprofit organization, where a base amount reflecting financial risk assumed under the contract may be used.

(d) Consistent with performance based contracting concepts, performance objectives and criteria related to performance fee should be as clearly defined as possible, and where feasible expressed in terms of desired performance results or outcomes. Specific measures for determining performance achievement may be used.

(e) Because the nature of the work performed under a management and operating contract may be complex and varied, opportunities may exist to utilize multiple contract types. The contracting officer should apply that contract type most appropriate to the work component, consistent with FAR 16.1. However, such multiple fee arrangements must conform to the requirements of FAR part 16, and where appropriate to the type, must be supported by negotiated costs subject to the requirements of the Truth in Negotiations Act, and require a pre-negotiation memorandum and a plan describing how each contract type will be administered.

(f) A clause providing for cost reduction incentives which result in quantifiable cost reductions for contractor proposed changes to a design, process, or method that has an established baseline, is defined, and is subject to a formal control procedure may be included in management and operating contracts. Proposed changes must be initiated by the contractor, must be innovative, applied to a specific project or program, and not otherwise be included in an incentive under the contract. Such cost reduction incentives do not constitute fee and are not subject to statutory or regulatory fee limitations, however, they shall be subject to all appropriate requirements set forth in this section.

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

970.1509-4 General considerations and techniques for determining fixed fees.

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

(b) Use of a purely cost-based structured approach for determining fee objectives and amounts for typical DOE management and operating contracts is inappropriate considering the limited level of contractor cost, capital goods, and operating capital outlays for performance of such contracts. Instead of being solely cost-based, the desirable approach calls for a structure that allows judgmental evaluation of eight significant factors, as outlined in this paragraph (b) in order of importance, and the assignment of appropriate fee values (subject to the limitations on fixed fee in 48 CFR 970.1509-5):

(1) Management risk relating to performance, including:

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

(ii) The labor intensity of the job;

(iii) The special control problems; and
(iv) The advance planning, forecasting and other such requirements;

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

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

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

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

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

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

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

(c) The total fee objective for a particular fixed fee negotiation is established by evaluating the factors in paragraph (b) of this section, assigning fee values to them, and totaling the

resulting amounts (subject to limitations on total fixed fee in 48 CFR 970.1509-5).

970.1509-5 Calculating fixed fee.

(a) In recognition of the complexities of the fee determination process, and to assist in promoting a reasonable degree of consistency and uniformity in its application, the following fee schedules set forth the maximum amounts of fee that contracting activities are allowed to award for a particular fixed fee transaction.

(b) Fee schedules representing the maximum allowable fixed fee available under management and operating contracts have been established for the following management and operating contract efforts:

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

(c) The schedules are:

PRODUCTION EFFORTS

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

RESEARCH AND DEVELOPMENT EFFORTS

Fee base (dollars)	Fee (dollars)	Fee (percent)	Increase (percent)
Up to \$1 Million .....	.....	.....	8.42
1,000,000	84,238	8.42	7.00
3,000,000	224,270	7.48	6.84
5,000,000	361,020	7.22	6.21
10,000,000	671,716	6.72	5.71
15,000,000	957,250	6.38	4.85
25,000,000	1,441,892	5.77	4.22
40,000,000	2,075,318	5.19	3.69
60,000,000	2,813,768	4.69	3.27
80,000,000	3,467,980	4.33	2.69
100,000,000	4,006,228	4.01	1.69
150,000,000	4,850,796	3.23	1.14
200,000,000	5,420,770	2.71	0.66
300,000,000	6,083,734	2.03	0.58
400,000,000	6,667,930	1.67	0.50
500,000,000	7,172,264	1.43	.....
Over \$500 Million	7,172,264	.....	0.50

ENVIRONMENTAL MANAGEMENT EFFORTS

Fee base (dollars)	Fee (dollars)	Fee (percent)	Increase (percent)
Up to \$1 Million .....	.....	.....	7.33
1,000,000	73,298	7.33	6.49
3,000,000	203,120	6.77	5.95
5,000,000	322,118	6.44	5.40
10,000,000	592,348	5.92	4.83
15,000,000	833,654	5.56	4.03
25,000,000	1,236,340	4.95	3.44
40,000,000	1,752,960	4.38	3.29
60,000,000	2,411,890	4.02	3.10
80,000,000	3,032,844	3.79	2.49
100,000,000	3,530,679	3.53	1.90
150,000,000	4,479,366	2.99	1.48
200,000,000	5,219,924	2.61	1.12
300,000,000	6,337,250	2.11	0.88
400,000,000	7,219,046	1.80	0.75
500,000,000	7,972,396	1.59	0.58
750,000,000	9,423,463	1.26	0.55
1,000,000,000	10,786,788	1.08	.....
Over \$1.0 Billion	10,786,788	.....	0.55

970.1509-6 Fee base.

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

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

(1) Any part of the following types of costs which are of such magnitude or nature as to distort the technical and management effort actually required of the contractor:

(i) Estimated cost of capital equipment (other than special equipment) which the contractor procures by subcontract;

(ii) Estimated cost or price of subcontracts and other major contractor procurements, however, up to 80 percent of such costs may be included if the contracting officer determines that there are unique circumstances involving extraordinary management effort required to manage subcontract activities; and

(iii) Other similar costs.

(2) Special equipment as defined in 48 CFR 970.1509-7;

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

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

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

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

(7) Any cost of work funded with uncosted balances previously included in a fee base of this or any other contract; and

(8) Cost of rework attributable to the contractor.

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

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

the provisions of 48 CFR 915.9 relating to architect-engineer or construction fees. Fees paid for such purchases shall be in addition to the operating fees calculated for the Production, Research and Development, or Environmental Management work to be performed. Special equipment purchases shall be addressed in accordance with the provisions of 48 CFR 970.1509-7 relating to Special equipment.

970.1509-7 Special equipment purchases.

(a) Special equipment is sometimes procured in conjunction with management and operating contracts. When a contractor procures special equipment, the DOE negotiating official shall determine separate fees for the equipment and use the schedule in 48 CFR 915.971-5(h).

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

(c) The maximum allowable fee for such services shall not exceed the fee schedule set forth in 48 CFR 915.971-5(h) for such services as performed by construction contractors. The fee is based on the estimated price of the equipment being purchased.

(d) For purposes of this part, special equipment is equipment for which the purchase price is of such a magnitude compared to the cost of installation as to distort the amount of technical direction and management effort required of the contractor. Special

equipment is of a nature that requires less management attention. When a contractor procures special equipment, the DOE negotiating official shall determine separate fees for the equipment using the schedule in 48 CFR 915.971-5(h). The determination of specific items of equipment in this category requires application of judgment and careful study of the circumstances involved in each project. This category of equipment would generally include:

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

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

970.1509-8 Special considerations: cost-plus-award-fee.

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

(b) All performance incentives identified under these contracts are funded from total available fee, which consists of a base fee amount (which may be zero) and a performance fee amount (which may consist of an incentive fee component for objective performance requirements, an award fee component for subjective performance requirements, or both).

(c) The total available fee for the contract shall equal the product of the fee(s) that would have been calculated for a fixed fee contract and the classification factor(s) most appropriate for the work. (The fixed fee(s) for nonprofit organizations is calculated per 48 CFR 970.1509-2. The fixed fee(s) for profit making organizations is calculated per 48 CFR 970.1509-4) If more than one fee schedule is applicable to the contract, the total available fee shall be the sum of the available fees derived from: each fee schedule; consideration of significant factors applicable to each fee schedule; and application of a Classification Factor(s) most appropriate for the work.

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

Facility/task category	Classification factor
A	3.00
B	2.50
C	2.00
D	1.25

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

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

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

(ii) The physical cleanup, processing, or storage of nuclear radioactive or toxic chemicals if the nature of the work is significantly advancing state of the art technologies in cleanup, processing or storage operations and/or the inherent difficulty or risk of the work is significantly more demanding than that found in similar industrial/DOE settings (i.e., nuclear energy, chemical processing, industrial environmental cleanup); or

(iii) Research and development directly supporting paragraphs (e)(1)(i) or (ii) of this section and not conducted in a laboratory, or as designated by the Procurement Executive. (Classification factor 3.0)

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

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

(ii) The manufacture or assembly of nuclear components;

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

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

(v) Research and development directly supporting paragraphs (e)(2)(i), (ii), (iii), or (iv) of this section and not conducted in a laboratory, or as designated by the Procurement Executive. (Classification factor 2.5)

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

(i) The physical cleanup, processing, or storage of nuclear radioactive or toxic chemicals if the nature of the work is using routine technologies in cleanup, processing or storage operations and/or the inherent difficulty or risk of the work is similar to that found in similar

industrial/DOE settings (i.e., nuclear energy, chemical processing, industrial environmental cleanup);

(ii) Plant and facility maintenance;

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

(iv) Research and development directly supporting paragraphs (e)(3)(i), (ii) or (iii) of this section and not conducted in a laboratory, or as designated by the Procurement Executive. (Classification factor 2.0)

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

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

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

(h) All management and operating contracts awarded on a cost-plus-award-fee basis shall set forth in the contract, or the Performance Evaluation and Measurement Plan(s) required by the contract clause at 48 CFR 970.5204-54, a site specific method of rating the contractor's performance of the contract requirements in relation to the required/ desired performance of the contract requirements, and a method of fee determination tied to the method of rating.

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

(j) Fee Determination Officials must ensure that all important areas of contract performance are specified in the contract or Performance Evaluation and Measurement Plan(s), even if such areas are not assigned specific weights or percentages of available fee.

970.1509-9 Special considerations: fee limitations.

In situations where the objective performance incentives are of unusual difficulty or where the successful completion of the performance incentives would provide extraordinary value to the Government, fees in excess of those allowed under other provisions of this fee policy may be allowed with the approval of the Procurement Executive or designee. Requests to allow fees in excess of those allowed under other provisions of the fee policy in this section must be accompanied by a written justification with detailed supporting rationale as to how the

specific circumstances satisfy the two criteria listed in this subsection.

970.1509-10 Documentation.

The contracting officer shall tailor the documentation of the determination of fee prenegotiation objective based on FAR 15.406-1, Prenegotiation objectives, and the determination of the negotiated fee in accordance with FAR 15.406-3, Documenting the negotiation. The contracting officer shall include as part of the documentation: the rationale for the allocation of cost and the assignment of facility/task categories; a discussion of the calculations described in 48 CFR 970.1509-4; and discussion of any other relevant provision of this section.

970.1509-11 Solicitation provision and contract clauses.

(a) The contracting officer shall insert the clause at 48 CFR 970.5204-54, Total Available Fee: Base Fee Amount and Performance Fee Amount, in management and operating contracts, and other contracts designated by the Procurement Executive or designee, that include cost-plus-award-fee structures.

(b) Due to the various types of fee and incentive arrangements which may be included in a contract and the need to ensure the overall balanced performance of the contract, the contracting officer shall insert the clause at 48 CFR 970.5204-XX, Conditional Payment of Fee or Incentives, in management and operating contracts, and other contracts designated by the Procurement Executive or designee, awarded on a cost-plus-award-fee, multiple fee, or incentive basis.

(c) The contracting officer shall insert the clause at 48 CFR 970.5204-YY, Cost Reduction, in management and operating contracts, and other contracts designated by the Procurement Executive or designee, if cost savings programs are contemplated.

(d) The Contracting Officer shall insert the provision at 48 CFR 970.5204-ZZ, Limitation on Fee, in solicitations for management and operating contracts, and other contracts designated by the Procurement Executive or designee.

6. Section 970.5204-54 is revised to read as follows:

970.5204-54 Total available fee: base fee amount and performance fee amount.

As prescribed in 48 CFR 970.1509-11(a), insert the following clause. The clause should be tailored to reflect the contract's actual inclusion of base fee amount and performance fee amount.

Total Available Fee: Base Fee Amount and Performance Fee Amount (Month and Year TBE)

(a) *Total available fee.* Total available fee, consisting of a base fee amount (if any) and a performance fee amount (consisting of an incentive fee component for objective performance requirements, an award fee component for subjective performance requirements, or both) determined in accordance with the provisions of this clause, is available for payment in accordance with the clause of this contract entitled "Payments and advances."

(b) *Fee Negotiations.* Prior to the beginning of each fiscal year under this contract, or other appropriate period as mutually agreed upon, the Contracting Officer and Contractor shall enter into negotiation of the evaluation areas and individual requirements subject to incentives, the amount of fee, and the allocation of fee. The Contracting Officer shall modify this contract at the conclusion of each negotiation to reflect the negotiated evaluation areas and individual requirements subject to incentives, the amount of fee, and the allocation of fee. In the event the parties fail to agree on the amount of fee, the Contracting Officer may make a unilateral decision, subject to appeal under the clause of the contract entitled Disputes. In the event the parties fail to agree on the evaluation areas and individual requirements subject to incentives or on the allocation of fee, a unilateral determination will be made by the Contracting Officer. It is herein agreed the total available fee amount shall be allocated to a twelve month cycle composed of one or more evaluation periods, or such longer period as may be approved by the Procurement Executive or designee.

(c) Determination of Total Available Fee Amount Earned.

(1) The Government shall, at the conclusion of each specified evaluation period, evaluate the contractor's performance of all requirements, including performance based incentives completed during the period and determine the total available fee amount earned. At the Contracting Officer's discretion, evaluation of incentivized performance may occur at the scheduled completion of the incentivized requirement.

(2) The Government Fee Determination Official (FDO) will be (insert title of FDO). The contractor agrees that the determination as to the total available fee earned is a unilateral determination made by the Government FDO.

(3) The evaluation of contractor performance shall be in accordance with the Performance Evaluation and Measurement Plan(s) described in subparagraph (d), below, unless otherwise set forth in the contract. The Contractor shall be promptly advised in writing of the fee determination, and the reasons why the total available fee amount was or was not earned. In the event that the contractor's performance is considered to be less than the level of performance set forth in the Statement of Work, as amended to include the current Work Authorization Directive or similar document, for any contract requirement, the FDO may at his/her discretion adjust the fee determination to reflect such performance. Any such

adjustment shall be in accordance with the clause entitled "Conditional Payment of Fee or Incentives" if contained in the contract.

(d) *Performance Evaluation and Measurement Plan(s).* To the extent not set forth elsewhere in the contract:

(1) The Government shall establish a Performance Evaluation and Measurement Plan(s) upon which the determination of the total available fee amount earned shall be based. The Performance Evaluation and Measurement Plan(s) will contain all important areas of contract performance specified in the contract, even if such areas are not assigned specific weights or percentages of available fee; and evaluation areas and individual requirements that are subject to incentives and the amount and allocation of fee to such areas and requirements. A copy of the Plan(s) shall be provided to the Contractor:

(i) prior to the start of an evaluation period if the evaluation areas, individual requirements, amount of fee, and allocation of fee to such evaluation areas and individual requirements have been mutually agreed to by the parties; or

(ii) not later than thirty days prior to the scheduled start date of the evaluation period, if the evaluation areas, individual requirements, amount of fee, and allocation of fee to such evaluation areas and requirements have been unilaterally established by the Contracting Officer.

(2) The Performance Evaluation and Measurement Plan(s) will set forth the criteria upon which the Contractor will be evaluated relating to any technical, schedule, management, and/or cost objectives selected for evaluation. Such criteria may be objective, subjective, or both. The Plan(s) shall also set forth the method by which the total available fee amount will be allocated and the amount earned determined.

(3) The Performance Evaluation and Measurement Plan(s) may, consistent with the contract statement of work, be revised during the period of performance. The Contracting Officer shall notify the contractor:

(i) of such unilateral changes at least ninety calendar days prior to the end of the affected evaluation period and at least thirty calendar days prior to the effective date of the change;

(ii) of such bilateral changes at least sixty calendar days prior to the end of the affected evaluation period; or

(iii) if such change, whether unilateral or bilateral, is urgent and high priority, at least thirty calendar days prior to the end of the evaluation period.

(e) *Schedule for total available fee amount earned determinations.* The FDO shall issue the final total available fee amount earned determination in accordance with the schedule set forth in the Performance Evaluation and Measurement Plan(s). However, a determination must be made within sixty calendar days after the receipt by the Contracting Officer of the Contractor's self-assessment, if one is required or permitted per paragraph (f) of this clause, or seventy calendar days after the end of the evaluation period, whichever is later. If the Contracting Officer evaluates the Contractor's performance of specific requirements on their

completion, the payment of any earned fee amount must be made within seventy calendar days (or such other time period as mutually agreed to between the Contracting Officer and the Contractor) after such completion. If the determination is delayed beyond that date, the Contractor shall be entitled to interest on the determined total available fee amount earned at the rate established by the Secretary of the Treasury under section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611) that is in effect on the payment date. This rate is referred to as the "Renegotiation Board Interest Rate," and is published in the **Federal Register** semiannually on or about January 1 and July 1. The interest on any late total available fee amount earned determination will accrue daily and be compounded in 30-day increments inclusive from the first day after the schedule determination date through the actual date the determination is issued. That is, interest accrued at the end of any 30-day period will be added to the determined amount of fee earned and be subject to interest if not paid in the succeeding 30-day period.

Alternate I: When the award fee cycle consists of two or more evaluation periods, add the following as paragraph (c)(4): At the sole discretion of the Government, unearned total available fee amounts may be carried over from one evaluation period to the next, so long as the periods are within the same award fee cycle.

Alternate II: When the award fee cycle consists of one evaluation period, add the following as paragraph (c)(4): Award fee not earned during the evaluation period shall not be allocated to future evaluation periods.

Alternate III: When the FDO requires the contractor to submit a self-assessment, add the following text as paragraph (f): *Contractor self-assessment.* Following each evaluation period, the Contractor shall submit a self-assessment within (*Insert Number*) calendar days after the end of the period. This self-assessment shall address both the strengths and weaknesses of the Contractor's performance during the evaluation period. Where deficiencies in performance are noted, the Contractor shall describe the actions planned or taken to correct such deficiencies and avoid their recurrence. The FDO will review the Contractor's self-assessment, if submitted, as part of the evaluation of the contractor's management during the period. The self-assessment, if any, itself will not be the basis for the award fee determination.

Alternate IV: When the FDO permits the contractor to submit a self-assessment at the contractor's option, add the following text as paragraph (f): *Contractor self-assessment.* Following each evaluation period, the Contractor may submit a self-assessment, provided such assessment is submitted within (*Insert Number*) calendar days after the end of the period. This self-assessment shall address both the strengths and weaknesses of the Contractor's performance during the evaluation period. Where deficiencies in performance are noted, the Contractor shall describe the actions planned or taken to correct such deficiencies and avoid their recurrence. The FDO will review the Contractor's self-assessment, if submitted,

as part of the evaluation of the Contractor's management during the period. The self-assessment, if any, itself will not be the basis for the award fee determination.

7. Section 970.5204-XX, Conditional Payment of Fee or Incentives; 970.5204-YY, Cost Reduction; and 970.5204-ZZ, Limitation on Fee, are added to read as follows:

970.5204-XX Conditional payment of fee or incentives.

As prescribed in 48 CFR 970.1509-11(b), insert the following clause:

Conditional Payment of Fee or Incentives (Month and Year TBE)

In order for the Contractor to receive all otherwise earned fee, profit, or share of cost savings under the contract in an evaluation period, the Contractor must meet the minimum requirements in paragraphs (a) through (d) of this clause. If the Contractor does not meet the minimum requirements, the DOE Operations Office Manager or his/her designee may make a unilateral determination to reduce the evaluation period's otherwise earned fee, profit or share of cost savings as described in paragraphs (a) through (d) of this clause. This clause does not apply to any Base Fee included in the contract.

(a) *Minimum requirements for Environment, Safety & Health (ES&H) Program.* The Contractor shall develop, obtain DOE approval of, and implement a Safety Management System in accordance with the provisions of the clause entitled, "Integration of Environment, Safety and Health into Work Planning and Execution," if included in the contract, or as otherwise agreed to with the Contracting Officer. The minimal performance requirements of the system will be set forth in the approved Safety Management System, or similar document. If the Contractor fails to obtain approval of the Safety Management System or fails to achieve the minimum performance requirements of the system during the evaluation period, the DOE Operations Office Manager or his/her designee, at his/her sole discretion, may reduce, any otherwise earned fees, profit or share of cost savings, for the evaluation period by an amount up to the amount earned.

(b) *Minimum requirements for catastrophic event.* If, in the performance of this contract, there is a catastrophic event (such as a fatality, or a serious workplace related injury or illness to one or more employees, loss of control over classified or special nuclear material, or significant damage to the environment), the DOE Operations Office Manager or his/her designee, may reduce any otherwise earned fee for the evaluation period by an amount up to the fees earned. In determining any diminution of fee resulting from a catastrophic event, the DOE Operations Office Manager or his/her designee will consider whether willful misconduct and/or negligence contributed to the occurrence and will take into consideration any mitigating circumstances presented by the contractor or other sources. This clause is in addition to any other

remedies available to the Government that may be contained in this contract.

(c) *Minimum requirements for specified level of performance.*

(1) At a minimum the Contractor must perform the following:

(i) the requirements with specific incentives at the level of performance set forth in the Statement of Work, Work Authorization Directive, or similar document;

(ii) all of the performance requirements directly related to the incentive requirements at a level of performance such that the overall performance of these requirements is at an acceptable level; and

(iii) all other requirements at a level of performance such that the total performance of the contract is not jeopardized.

(2) The evaluation of the Contractor's achievement of the level of performance shall be unilaterally determined by the Contracting Officer. To the extent that the Contractor fails to achieve the minimum performance levels specified in the Statement of Work, Work Authorization Directive, or similar document, during the evaluation period, the DOE Operations Office Manager or his/her designee, may reduce any otherwise earned fee, profit, or shared net savings for the evaluation period, by an amount up to the amount earned.

(d) *Minimum requirements for cost performance.*

(1) Requirements incentivized by other than cost incentives must be performed within their specified cost and must not adversely impact the costs of performing unrelated activities.

(2) The performance of requirements with a specific cost incentive must not adversely impact the costs of performing unrelated requirements.

(3) The Contractor's performance within the stipulated cost performance levels for the evaluation period shall be determined by the Contracting Officer. To the extent the Contractor fails to achieve the stipulated cost performance levels, the DOE Operations Office Manager or his/her designee, at his/her sole discretion, may reduce in whole or in part any otherwise earned fee, profit, or shared net savings for the evaluation period by an amount up to the amount earned.

970.5204-YY Cost Reduction.

As prescribed in 48 CFR 970.1509-11(c), insert the following clause:

Cost Reduction (Month and Year TBE)

(a) *General.* It is the Department of Energy's (DOE's) intent to have its facilities and laboratories operated in an efficient and effective manner. To this end the Contractor shall assess its operations and identify areas where cost reductions would bring cost efficiency to operations without adversely affecting the level of performance required by the contract. The Contractor, to the maximum extent practical, shall identify areas where cost reductions may be effected and develop and submit Cost Reduction Proposals (CRPs) to the Contracting Officer. If accepted, the Contractor may share in any shared net savings from accepted CRPs in accordance with paragraph (g).

(b) *Definitions.*

Administrative cost is the contractor cost of developing and administering the CRP.

DOE cost is the Government cost incurred in implementing and validating the CRP.

Design, process, or method change is a change to a design, process, or method which has an established baseline, is defined, and is subject to a formal control procedure. Such a change must be innovative, initiated by the contractor, and applied to a specific project or program.

Development cost is the contractor cost of up front planning, engineering, prototyping, and testing of a design, process, or method.

Implementation cost is the contractor cost of tooling, facilities, documentation, etc., required to effect a design, process, or method change once it has been tested and approved.

Net Savings means a reduction in the total amount (to include all related costs and fee) of performing the effort where the savings revert to the DOE control and may be available for deobligation. Such savings may result from a specific cost reduction effort which is negotiated on a cost-plus-incentive-fee, fixed-price incentive, or firm-fixed-price basis, or may result directly from a design, process, or method change. They may also be savings resulting from formal or informal direction given by DOE or from changes in the mission, work scope, or routine reorganization of the Contractor due to changes in the budget.

Shared Net Savings are those net savings which result from:

(1) a specific cost reduction effort which is negotiated on a cost-plus-incentive-fee or fixed-price incentive basis and are the difference between the negotiated target cost of performing an effort as negotiated and the actual allowable cost of performing that effort or

(2) which result directly from a design, process, or method change, occur in the fiscal year in which the change is accepted and the subsequent fiscal year and are the difference between the estimated cost of performing an effort as originally planned and the actual allowable cost of performing that same effort utilizing a revised plan intended to reduce costs along with any Contractor development costs, implementation costs, administrative costs, and DOE costs associated with the revised plan. Administrative costs and DOE costs are only included at the discretion of the Contracting Officer. Savings resulting from formal or informal direction given by the DOE or changes in the mission, work scope, or routine reorganization of the Contractor due to changes in the budget are not to be considered as shared net savings for purposes of this clause and do not qualify for incentive sharing.

(c) *Procedure for submission of CRPs.*

(1) CRPs for the establishment of cost-plus-incentive-fee, fixed-price incentive, or firm-fixed-price efforts or for design, process, or methods changes submitted by the Contractor shall contain, at a minimum, the following:

(i) Current Method (Baseline)—A verifiable description of the current scope of work, cost, and schedule to be impacted by the initiative; and supporting documentation.

(ii) New Method (Baseline)—A verifiable description of the new scope of work, cost, and schedule, how the initiative will be accomplished; and supporting documentation.

(iii) Feasibility Assessment—A description and evaluation of the proposed initiative and benefits, risks, and impacts of implementation. This evaluation shall include an assessment of the difference between the current method (baseline) and proposed new method including all related costs.

(2) In addition, CRPs for the establishment of cost-plus-incentive-fee, fixed-price incentive, or firm-fixed-price efforts shall contain, at a minimum, the following:

(i) the proposed contractual arrangement and the justification for its use; and

(ii) a detailed cost/price estimate and supporting rationale. If the approach is proposed on an incentive basis, minimum and maximum cost estimates should be included along with any proposed sharing arrangements.

(d) *Evaluation and Decision.* All CRPs must be submitted to and approved by the Contracting Officer. Included in the information provided by the CRP must be the following regarding the extent the proposed cost reduction effort may:

(1) pose a risk to the health and safety of workers, the community, or to the environment;

(2) result in a waiver or deviation from DOE requirements, such as DOE Orders and joint oversight agreements;

(3) require a change in other contractual agreements;

(4) result in significant organizational and personnel impacts;

(5) create a negative impact on the cost, schedule, or scope of work in another area;

(6) pose a potential negative impact on the credibility of the Contractor or the DOE; and

(7) impact successful and timely completion of any of the work in the baseline.

(e) *Acceptance or Rejection of CRPs.*

Acceptance or rejection of a CRP is a unilateral determination made by the Contracting Officer. The Contracting Officer will notify the Contractor that a CRP has been accepted, rejected, or deferred within (*Insert Number*) days of receipt. The only CRPs that will be considered for acceptance are those which the Contractor can demonstrate, at a minimum, will:

(1) result in net savings (in the sharing period if a design, process, or method change);

(2) not reappear as costs in subsequent periods; and

(3) not result in any impairment of essential functions. The failure of the Contracting Officer to notify the Contractor of the acceptance, rejection, or deferral of a CRP

within the specified time shall not be construed as approval.

(f) *Adjustment to Original Estimated Cost and Fee.* If a CRP is established on a cost-plus-incentive-fee, fixed-price incentive or firm-fixed-price basis, the originally estimated cost and fee for the total effort from which the CRP effort was removed shall be adjusted to remove the estimated cost and fee amount associated with the CRP effort.

(g) *Sharing Arrangement.* If a CRP is accepted, the Contractor may share in the shared net savings. For a CRP negotiated on a cost-plus-incentive-fee or fixed-price incentive basis, with the specific incentive arrangement (negotiated target costs, target fees, share lines, ceilings, profit, etc.) set forth in the contractual document authorizing the effort, the Contractor's share shall be the actual fee or profit resulting from such an arrangement. For a CRP negotiated as a cost savings incentive resulting from a design, process, or method change, the Contractor's share shall be a percentage no greater than 25 percent of the shared net savings. The specific percentage and sharing period shall be set forth in the contractual document.

(h) *Validation of Shared Net Savings.* The Contracting Officer shall validate actual shared net savings. If actual shared net savings can not be validated, the contractor will not be entitled to a share of the net shared savings.

(i) *Relationship to Other Incentives.* Only those benefits of an accepted CRP not rewardable under other clauses of this contract shall be rewarded under this clause.

(j) *Subcontracts.* The Contractor may include a clause similar to this clause in any subcontract. In calculating any estimated shared net savings in a CRP under this contract, the Contractor's administration, development, and implementation costs shall include any Subcontractor's allowable costs, and any CRP incentive payments to a Subcontractor resulting from the acceptance of such CRP. The Contractor may choose any arrangement for Subcontractor CRP incentive payments, provided that the payments not reduce the DOE's share of shared net savings.

970.5204-ZZ Limitation on Fee.

As prescribed in 48 CFR 970.1509-11(d), insert the following provision: Limitation of Fee (Month and Year TBE)

For the purpose of this solicitation fee amounts shall not exceed the total available fee allowed by the fee policy. The Government reserves the unilateral right, in the event an offeror's proposal is selected for award, to limit: fixed fee to not exceed an amount established pursuant to 48 CFR 970.1509-4; and total available fee to not exceed an amount established pursuant to 48 CFR 970.1509-8.

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