

(d)(1) and (d)(3), paragraph (g) introductory text, paragraph (g)(3) and the concluding text of paragraph (g), redesignating paragraphs (h)(1) through (h)(5) and (i) as paragraphs (i)(1) through (i)(5) and (j), revising newly designated paragraphs (i)(1) and (j), adding new paragraph (h), and revising paragraph (k) introductory text and paragraph (k)(3) to read as follows:"

2. On page 51798, in the first column, second line from the bottom, insert the designation "(1)" after the designation "(i)" and before the word "If".

3. On page 51798, in the second column, insert 5 asterisks in a line following paragraph (i)(1) and preceding paragraph (j).

Magalie Roman Salas,

Secretary.

[FR Doc. 98-12411 Filed 5-8-98; 8:45 am]

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DEPARTMENT OF ENERGY

48 CFR Part 970

RIN 1991-AB43

Acquisition Regulation: Limitation on Allowability of Compensation for Certain Contractor Personnel

AGENCY: Department of Energy.

ACTION: Final rule.

SUMMARY: The Department of Energy (DOE) amends its Acquisition Regulation to incorporate the statutory provisions contained in Section 808 of the National Defense Authorization Act for Fiscal Year 1998 (Pub. L. 105-85). Section 808 establishes a cap on allowable compensation costs for certain officers of Department of Defense and civilian agency contractors which applies to costs of compensation incurred after January 1, 1998 for executive compensation.

DATES: This rule is effective on May 11, 1998.

ADDRESSES: Terrence D. Sheppard, Office of Policy (HR-51), Office of Procurement and Assistance Policy, Department of Energy, 1000 Independence Avenue S.W., Washington, D.C. 20585.

FOR FURTHER INFORMATION CONTACT: Terrence D. Sheppard (202) 586-8193; e-mail terry.sheppard@hq.doe.gov; fax (202) 586-0545.

SUPPLEMENTARY INFORMATION:

I. Background

II. Section by Section Analysis

III. Procedural Requirements

A. Review Under Executive Order 12866

B. Review Under Executive Order 12988

C. Review Under the Paperwork Reduction Act

D. Review Under the National Environmental Policy Act

E. Review Under Executive Order 12612

F. Review Under Small Business Regulatory Enforcement Fairness Act of 1996

G. Review Under the Unfunded Mandates Reform Act of 1995

I. Background

This notice amends the Department of Energy Acquisition Regulation (DEAR) based on provisions contained in Section 808 of the National Defense Authorization Act for Fiscal Year 1998 (Pub. L. 105-85). Section 808 establishes a cap on allowable compensation costs for certain officers of Department of Defense and civilian agency contractors which applies to costs of compensation incurred after January 1, 1998, under covered contracts entered into before, on, or after the date of enactment of the Act. Section 808 states that costs of compensation of senior executives of contractors for a fiscal year, regardless of the contract funding source, to the extent that such compensation exceeds the benchmark compensation amount determined applicable for the fiscal year by the Administrator for Federal Procurement Policy, are unallowable.

Further, for purposes of section 2324(e)(1)(P) of title 10, United States Code, and section 306(e)(1)(P) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 256(e)(1)(P)), the Administrator shall review commercially available surveys of executive compensation and, on the basis of the results of the review, determine a benchmark compensation amount to apply for each fiscal year. In making determinations under this subsection the Administrator shall consult with the Director of the Defense Contract Audit Agency and such other officials of executive agencies as the Administrator considers appropriate.

The benchmark compensation amount applicable for a fiscal year is the median amount of the compensation provided for all senior executives of all benchmark corporations for the most recent year for which data is available at the time the determination under subsection (a) is made.

The term "compensation", for a fiscal year, means the total amount of wages, salary, bonuses and deferred compensation for the fiscal year, whether paid, earned, or otherwise accruing, as recorded in an employer's cost accounting records for the fiscal year.

The term "senior executive", with respect to a corporation, means the chief

executive officer of the corporation or any individual acting in a similar capacity for the corporation; the four most highly compensated employees in management positions of the corporation other than the chief executive officer; and in the case of a corporation that has components which report directly to the corporate headquarters, the five most highly compensated individuals in management positions at each such component.

The term "benchmark corporation", with respect to a fiscal year, means a publicly-owned United States corporation that has annual sales in excess of \$50,000,000 for the fiscal year.

The term "publicly-owned United States corporation" means a corporation organized under the laws of a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a possession of the United States and the voting stock of which is publicly traded.

The term "fiscal year" means a fiscal year established by a contractor for accounting purposes.

II. Section by Section Analysis

1. The authority for Part 970 is restated.

2. Section 970.3102-2, Compensation for personnel services, is revised by adding a new paragraph (q) which addresses the statutory compensation limits.

3. Section 970.5204-13(d)(8) is revised by adding a new paragraph (viii) which addresses the statutory compensation limits.

4. Section 970.5204-14(d)(8) is revised by adding a new paragraph (viii) which addresses the statutory compensation limits.

III. Procedural Requirements

A. Review Under Executive Order 12866

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

B. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, "Civil Justice Reform," 61 FR 4729 (February 7, 1996), imposes on Executive agencies the general duty to adhere to the following

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

C. Review Under the Paperwork Reduction Act

No new information or recordkeeping requirements are imposed by this rulemaking. Accordingly, no OMB clearance is required under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

D. Review Under the National Environmental Policy Act

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

E. Review Under Executive Order 12612

Executive Order 12612 (52 FR 41685, October 30, 1987) requires that regulations, rules, legislation, and any other policy actions be reviewed for any substantial direct effects on States, on the relationship between the National Government and the States, or in the distribution of power and responsibilities among the various levels of Government. If there are sufficient substantial direct effects, then the Executive Order requires the preparation of a federalism assessment to be used in all decisions involved in promulgating and implementing a policy action. This rule revises certain policy and procedural requirements. States which contract with DOE will be subject to this rule. However, DOE has determined that this rule will not have a substantial direct effect on the institutional interests or traditional functions of the States.

F. Review Under Small Business Regulatory Enforcement Fairness Act of 1996

As required by 5 U.S.C. 801, the Department of Energy will report to Congress promulgation of the rule prior to its effective date. The report will state that it has been determined that the rule is not a "major rule" as defined by 5 U.S.C. 804(3).

G. Review Under the Unfunded Mandates Reform Act of 1995

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

List of Subjects in 48 CFR Part 970

Government procurement.

Issued in Washington, DC on April 22, 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 amended as set forth below.

PART 970—DOE MANAGEMENT AND OPERATING CONTRACTS

1. 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).

2. Section 970.3102-2 is amended by adding a new paragraph (q) to read as follows:

970.3102-2 Compensation for personal services.

* * * * *

(q) Limitation on allowability of compensation for certain contractor personnel. Costs incurred for compensation of a senior executive in excess of the benchmark compensation amount determined applicable for the contractor fiscal year by the Administrator, Office of Federal Procurement Policy, are unallowable. Allowable costs of executive compensation shall be determined pursuant to Federal Acquisition Regulation 31.205-6(p).

3. Section 970.5204-13 is amended by adding a new paragraph (d)(8)(viii) immediately after paragraph (d)(8)(vii) and before the Note to read as follows:

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

* * * * *

(d)(8) * * *

(viii) Compensation of a senior executive, provided that such compensation does not exceed the benchmark compensation amount determined applicable for the contractor fiscal year by the Administrator, Office of Federal Procurement Policy. Costs of executive compensation shall be determined pursuant to Federal Acquisition Regulation 31.205-6(p).

* * * * *

4. Section 970.5204-14 is amended by adding a new paragraph (d)(8)(viii) immediately after paragraph (d)(8)(vii) and before the Note to read as follows:

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

* * * * *

(d)(8) * * *

(viii) Compensation of a senior executive, provided that such compensation does not exceed the benchmark compensation amount determined applicable for the contractor fiscal year by the Administrator, Office of Federal Procurement Policy. Costs of executive compensation shall be determined pursuant to Federal Acquisition Regulation 31.205-6(p).

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