

a prerequisite to marketing and importation. The reporting and recordkeeping requirements associated with these equipment authorizations would not be changed by the proposals contained in this Notice. These changes to the regulations would permit the introduction of an entirely new category of radio transmitters. All radio equipment manufacturers, large and small, would be provided with the opportunity to produce this equipment.

*E. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered*

The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives: (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities. We do not expect that the rules proposed in this Notice of Proposed Rule Making will have a significant economic impact on small entities.

In response to the *Notice of Inquiry*, in this proceeding no party raised small entity issues. We have considered several alternatives to the proposed standards, however. For example, in response to some of the comments, we considered the possibility of prohibiting all UWB operation below 2 GHz, (except for ground penetrating radar systems) in order to provide additional interference protection to the authorized radio services operating below this frequency. Instead, we have indicated our concerns about operation below 2 GHz and have stated that such operation would be considered provided test results and technical analysis demonstrated that there was no risk of harmful interference to other authorized entities (which would include small authorized entities). Similar issues were considered for all of the standards proposed in this Notice of Proposed Rule Making. The proposed standards are intended to accommodate most of the systems presented to us without favoring any particular manufacturer's design.

*F. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rule*

None.

18. The proposed action is authorized under sections 4(i), 301, 302, 303(e), 303(f), 303(r), 304 and 307 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 301, 302, 303(e), 303(f), 303(r), 304, and 307.

Federal Communications Commission.

**Magalie Roman Salas,**

*Secretary.*

[FR Doc. 00-14982 Filed 6-13-00; 8:45 am]

**BILLING CODE 6712-01-P**

## DEPARTMENT OF ENERGY

### 48 CFR Part 970

RIN 1991-AB46

#### Acquisition Regulation: Changes to Department of Energy Cost Principles and Various Clauses

**AGENCY:** Energy.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Department of Energy (DOE) proposes to amend its Acquisition Regulation to delete those cost principles and related provisions of Department of Energy Acquisition Regulation (DEAR) that are adequately covered by the Federal Acquisition Regulation (FAR) and retaining only that coverage which supplements the FAR. There is one policy change in this rulemaking. Cost of Money, a previously unallowable cost, is proposed as an allowable cost. This proposed rulemaking results from a special review performed by DOE and it will be finalized concurrently with another recently proposed rule published March 13, 2000. The two rules will result in a complete reissuance of the DEAR.

**DATES:** Written comments must be submitted no later than August 14, 2000.

**ADDRESSES:** Comments (3 copies) should be addressed to: Terrence D. Sheppard, Office of Procurement and Assistance Management, Office of Procurement and Assistance Policy (MA-51), 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](mailto:terry.sheppard@hq.doe.gov); fax (202) 586-0545.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

##### II. Section by Section Analysis

##### III. Public Comments

##### IV. Procedural Requirements

A. Review Under Executive Order 12866

B. Review Under Executive Order 12988

C. Review Under the Regulatory Flexibility Act

D. Review Under the Paperwork Reduction Act

E. Review Under the National Environmental Policy Act

F. Review Under Executive Order 12612

G. Review Under the Unfunded Mandates Reform Act of 1995

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

## I. Background

The Department of Energy (DOE) and its predecessor agencies have traditionally accomplished their defense and energy research mission responsibilities through the use of management and operating (M&O) contracts. Although M&O contracts are authorized by the Federal Acquisition Regulation (FAR) at Part 17.6, FAR policies generally do not provide the special terms and conditions for award and contract administration processes tailored to the M&O contracting environment. Accordingly, the Department has established specific policies and procedures at Department of Energy Acquisition Regulation (DEAR) Parts 917 and 970. Included among these policies and procedures is a unique set of cost principles which govern the allowability of costs under M&O contracts.

Last year DOE conducted a review of the policies and procedures governing the award and administration of M&O contracts. One of the objectives of the review was to determine whether current DEAR cost principle coverage could be eliminated and reliance placed on similar coverage contained in the FAR. As a result of a comparative analysis between the FAR and the DEAR cost principles and related procedures, the review concluded that the FAR cost principles adequately addressed DOE interests, and that supplemental coverage was necessary only in a limited number of cases.

In this notice DOE proposes to amend the DEAR to implement the results of a comparative analysis of the FAR, Part 31, and DEAR 970.31, and 970.52. The amendments will delete those cost principles and related provisions of DEAR 970 that are adequately covered by the FAR and renumber those cost principles supplemented in the DEAR to conform to the FAR numbering.

One exception is the "Travel costs" cost principle (FAR 31.205-46 and DEAR 970.3102-17). DOE has retained separate coverage, although identical to the current FAR coverage, because there is a proposed change to the FAR section on travel costs that will change the government-wide standard of travel cost allowability to a "reasonableness" standard. If the FAR change is made, DOE will need to retain the current

travel cost requirements mandated by Congress. Section 309, Pub. L. 106-60, Energy and Water Appropriations Act, 2000, requires DOE to limit travel cost reimbursement to the "rates and amounts" that apply to federal employees.

Also, DOE has conducted a separate review of the Department's policies addressing home office/corporate allocations, bid and proposal costs, and cost of money. This separate review

resulted in a determination that existing policy relative to home office/corporate allocations remains valid and that the individual locations should continue to determine appropriate home office/corporate allocations. The review also determined that bid and proposal costs should remain unallowable due to the unique nature of the M&O arrangement. For cost of money, DOE policy will be amended to state that such costs are allowable, rather than unallowable. This

change should have little impact on DOE as most facilities are government-owned. Accordingly, the existing language which makes this cost unallowable is deleted. The result of this deletion is to make this an allowable cost under indirect and overhead cost allocations.

In summary, DOE chooses to adopt all of the FAR cost principles except as supplemented in the areas identified:

#### TREATMENT OF CURRENT SECTIONS

Section No.	Section Title	Retain	Delete	Amend	Relocate
<b>Subpart 970.25—Foreign Acquisition</b>					
970.2501 .....	Severance payments for foreign nationals .....		✓		
<b>Subpart 970.31—Contract Cost Principles and Procedures</b>					
970.3100 .....	Scope and applicability of subpart .....		✓		
970.3100-1 .....	Definitions .....		✓		
970.3100-2 .....	Responsibilities .....				✓
970.3100-3 .....	Deviation .....				✓
970.3101 .....	General policy .....		✓		
970.3101-1 .....	Actual cost basis .....		✓		
970.3101-2 .....	Direct and indirect costs .....		✓		
970.3101-3 .....	General basis for reimbursement of costs .....		✓		
970.3101-4 .....	Cost determination based on audit .....		✓		
970.3101-5 .....	Contractor's system of accounting .....		✓		
970.3101-6 .....	Advance understandings on <sup>1</sup> particular cost items .....		✓	✓	✓
970.3101-7 .....	Cost submission, certification, penalties, and waivers .....				✓
970.3102 .....	Application of cost principles .....		✓		
970.3102-1 .....	General and administrative expenses .....				✓
970.3102-2 .....	Compensation for personal services .....			✓	✓
970.3102-3 .....	Cost of money .....		✓		
970.3102-4 .....	Depreciation .....		✓		
970.3102-5 .....	Employee morale, health, welfare, food service, and dormitory costs.		✓		
970.3102-6 .....	Facilities (plant and equipment) .....		✓		
970.3102-7 .....	Political activity costs .....			✓	✓
970.3102-8 .....	Membership in trade, business and professional organizations ...		✓		
970.3102-9 .....	Outside technical and professional consultants .....		✓		
970.3102-10 .....	Overtime, shift, and holiday premiums .....				✓
970.3102-11 .....	Page charges in scientific journals .....				✓
970.3102-12 .....	Plant reconversion costs .....		✓		
970.3102-13 .....	Precontract costs .....		✓		
970.3102-14 .....	Preparatory and make-ready costs .....		✓		
970.3102-15 .....	Procurement: Subcontracts, contractor-affiliated sources, and leases.		✓		
970.3102-16 .....	Relocation costs .....		✓		
970.3102-17 .....	Travel costs .....	✓			✓
970.3102-18 .....	Special funds in the construction industry .....		✓		
970.3102-19 .....	Public relations and advertising .....		✓		
970.3102-20 .....	Cost prohibitions related to legal and other proceedings .....		✓		
970.3102-21 .....	Fines and penalties .....		✓		
970.3103 .....	Contract clauses .....		✓		
970.5204-4 .....	New Mexico Gross Receipts .....			✓	
970.5204-13 .....	Allowable costs and fixed-fee (Management and Operating contracts).		✓		
970.5204-14 .....	Allowable costs and fixed-fee (support contracts) .....		✓		
970.5204-15 .....	Obligation of funds .....	✓			
970.5204-16 .....	Payments and advances .....			✓	
970.5204-17 .....	Political activity cost prohibition .....		✓		
970.5204-61 .....	Cost prohibitions related to legal and other proceedings .....		✓		
970.5204-75 .....	Preexisting conditions .....	✓			
970.5204-84 .....	Waiver of limitations on severance payments to foreign nationals		✓		

<sup>1</sup>Footnote: This subject heading has been moved to 970.3101-9, but all of the original text has been deleted and replaced with new text.

## ORGANIZATION OF NEW SECTIONS

New Section No.*	Section title (FAR headings where appropriate)	Summary of supplemental coverage/references
970.3100-1 .....	Scope of subpart .....	Coverage relocated from current 970.3100-2.
970.3101-1 .....	Objectives .....	Coverage relocated from current 970.3100-3.
970.3101-3 .....	Home Office Expenses .....	The coverage addressing Home Office expenses is rewritten in terms of allocability rather than allowability (moved from 970.3102-1(b)).
970.3101-9 .....	Advance Agreements .....	CO may identify selected cost items requiring CO approval.
970.3101-10 .....	Indirect cost rate certification and penalties on unallowable costs.	Coverage relocated from current 970.3101-7.
970.3102-4 .....	Bonding Costs .....	References DEAR 970.5204-31.
970.3102-6 .....	Compensation .....	—Personnel costs determined in accordance with personnel appendix —Limits on executive compensation.
970.3102-18 .....	Bid and Proposal costs .....	B&P costs unallowable.
970.3102-19 .....	Insurance and indemnification .....	References DEAR 970.5204-31.
970.3102-20 .....	Interest and Other Financial Costs .....	Imputed interest on capital leases allowable.
970.3102-22 .....	Lobbying and Political Activity Costs .....	Addresses costs for transportation, lodging, and meals associated with providing information, advice etc.
970.3102-28 .....	Other Business Expense .....	Establishment and maintenance of financial institution accounts; allowable (moved from 970.5204-13(d)(15)).
970.3102-46 .....	Travel costs .....	Section 309 of Pub. L. 106-60, Energy and Water Development Appropriations Act 2000 requires the Department to limit travel cost reimbursement to the “rates and amounts” that apply to Federal employees. Revise documentation threshold from \$25 to \$75.
970.3102-53 .....	Preexisting conditions .....	References DEAR 970.5204-75.
970.4207-1 .....	Contracting Officer Determination procedure ..	Identifies procedures associated with cost resolution (moved from 970.3101-3(b)).
970.4207-2 .....	Certificate of costs. ....	Addresses procedures for cost certification, assessment and waiver of penalties (moved entire 970.3101-7).
970.5204-4 .....	New Mexico Gross Receipts. ....	Change cross reference.
970.5204-16 .....	Payments and Advances .....	Adds paragraph (k) to reference FAR 31 and DEAR 970.31
970.5204-31 .....	Insurance-litigation and claims .....	Changes reference in Paragraph (h) to FAR 31.2.
970.5204-xx .....	Penalties for unallowable costs .....	Adds -13/-14 (d)(4) language at paragraph (m) Clause for assessment of penalties (repeats part of 970.4207-2).

\* Proposed section numbers correspond directly with the numbering of FAR coverage being supplemented.

## II. Section-by-Section Analysis

1. Subpart 970.25, Foreign Acquisitions, and the coverage contained in Section 970.2501, Severance payments for foreign nationals, would be removed because FAR 31.205-6(g)(3) provides coverage.

2. We propose to revise subpart 970.31 and remove current sections 970.3100 through 970.3103. They would be replaced by the following sections:

A. Section 970.3100-1, Scope of subpart, prescribes the responsibilities and roles of the Procurement Executive and the Head of the Contracting Activity.

B. Section 970.3101-1, Objectives, identifies the procedures for deviations to the cost principles.

C. Section 970.3101-3, Home Office Expenses, is moved from 970.3102-1, renamed, and rewritten in plain language.

D. Section 970.3101-9, Advance agreements, establishes the contracting officer's authority to require the contracting officer's approval on selected items of cost.

E. Section 970.3101-10, Indirect cost rate certification and penalties on unallowable costs, addresses the requirement for a cost certification and penalties associated with unallowable costs.

F. Section 970.3102-4, Bonding costs, paragraph (d) references the clause at 970.5204-31, Insurance-litigation and claims.

G. Section 970.3102-6(a) and (p) establish the requirement for a personnel appendix and set limits on the allowability of compensation costs for certain contractor personnel.

H. Section 970.3102-18(c), Independent research and development and bid and proposal costs, addresses the allowability of bid and proposal costs.

I. Section 970.3102-19, Insurance and indemnification, references 970.5204-31, Insurance-litigation and claims.

J. Section 970.3102-20, Interest and other financial costs, addresses the allowability of interest relating to capital leases.

K. Section 970.3102-22(b)(1), Lobbying and political activity costs,

addresses the allowability of costs of transportation, lodging, and/or meals associated with providing technical information.

L. Section 970.3102-28(i), Other business expense, addresses the the maintenance of financial institution accounts. (Moved from 970.5204-13(d)(15)).

M. Section 970.3102-46, Travel costs, is retained as Section 309 of Pub. L. 106-60, Energy and Water Development Appropriations Act, 2000, requires the Department to limit travel cost reimbursement to the “rates and amounts” that apply to Federal employees.

Documentation threshold to support actual costs are revised from \$25 to \$75.

N. Section 970.3102-53, Preexisting conditions, references 970.5204-75, Preexisting conditions.

3. Section 970.4207-1, Contracting officer determination procedure, identifies procedures associated with the resolution of questioned costs.

4. Section 970.4207-2, Cost certification, identifies administrative

procedures associated with the cost certification.

5. Section 970.5204-4, New Mexico gross receipts and compensating tax, would be revised by changing cross reference from "Allowable costs and fixed fee" which would be removed by this rulemaking and is replaced by a reference to "Payments and advances."

6. Section 970.5204-13, Allowable costs and fixed-fee (Management and Operating contracts), would be removed and reserved.

7. Section 970.5204-14, Allowable costs and fixed-fee (support contracts), would be removed and reserved.

8. Section 970.5204-16 would be revised to add language referencing FAR Part 31 coverage and DEAR supplemental coverage.

9. Section 970.5204-17, Political activity cost prohibition, would be removed and reserved. This section would be addressed in new section 970.3102-22.

10. Section 970.5204-31, Insurance-litigation and claims, would be revised by deleting the paragraph (h) cross reference to DEAR 970.3101-3 and replacing with a reference to FAR Part 31 and DEAR 970.31, and adding a new paragraph (m) addressing the DOE approved contractor legal management procedures.

11. Section 970.5204-61, Cost prohibitions related to legal and other proceedings, would be removed and reserved.

12. Section 970.5204-84, Waiver of limitations on severance payments to foreign nationals, would be removed and reserved.

13. Section 970.5204-XX, Penalties for unallowable costs, explains the penalty provisions associated with the submission of unallowable costs.

### III. Public Comments

Interested persons are invited to participate by submitting data, views, or arguments with respect to the proposed 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. All comments received will be available for public inspection in the DOE Reading Room, Room 1E-190, Forrestal Building, 1000 Independence Avenue, SW., Washington, D.C. 20585, between the hours of 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. All written comments received by the date indicated in the **DATES** section of this notice and all other relevant information in the record will be carefully assessed and fully considered prior to publication of the final rule.

Any information considered to be confidential must be so identified and submitted in writing, one copy only. DOE reserves the right to determine the confidential status of the information and to treat it according to our determination (See 10 CFR 1004.11).

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

### IV. Procedural Requirements

#### A. Review Under Executive Order 12866

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

#### B. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, "Civil Justice Reform," 61 FR 4729 (February 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. With regard to the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations

in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. The Department of Energy has completed the required review and determined that, to the extent permitted by law, the 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, 5 U.S.C. 601 *et seq.*, which requires preparation of a regulatory flexibility analysis for any rule which is likely to have significant economic impact on a substantial number of small entities. Today's proposed rule streamlines the cost principles that apply to DOE M&O contracts. M&O contractors are not small entities. Accordingly, DOE certifies that this 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 or recordkeeping requirements are imposed by this rulemaking. Accordingly, no OMB clearance is required under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

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

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

#### F. Review Under Executive Order 12612

Executive Order 12612 (52 FR 41685, October 30, 1987) requires that regulations, rules, legislation, and any other policy actions be reviewed for any substantial direct effects on States, on the relationship between the National Government and the States, or in the distribution of power and responsibilities among the various

levels of Government. If there are sufficient substantial direct effects, then the Executive Order requires the preparation of a federalism assessment to be used in all decisions involved in promulgating and implementing a policy action. This proposed rule, when finalized, will revise certain policy and procedural requirements. States which contract with DOE will be subject to this rule. However, DOE has determined that this rule will not have a substantial direct effect on the institutional interests or traditional functions of the States.

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

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

#### *H. Treasury and General Government Appropriations Act, 1999*

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105-277) requires Federal agencies to issue a Family Policymaking Assessment for any proposed rule that may affect family well-being. Today's proposal would not have any impact on the autonomy or integrity of the family as in institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

#### **List of Subjects in 48 CFR Part 970**

Government procurement.

Issued in Washington, D.C. on June 6, 2000.

**Richard H. Hopf,**

*Director, Office of Procurement and Assistance Management.*

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

1. The authority citation for Part 970 continues to read as follows:

**Authority:** Atomic Energy Act of 1954 (42 U.S.C. 2201); Department of Energy Organization Act (42 U.S.C. 7101); National Nuclear Security Administration Act (50 U.S.C. 2401, *et seq.*).

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

#### **Subpart 970.25 [Removed]**

2. Subpart 970.25 consisting of 970.2501 is removed.

3. Subpart 970.31, Contract Cost Principles and Procedures, is revised to read as follows:

Sec.	
970.3100-1	Scope of subpart.
970.3101-1	Objectives.
970.3101-3	Home office expenses
970.3101-9	Advance agreements.
970.3101-10	Cost certification.
970.3102-4	Bonding costs.
970.3102-6	Compensation for personal services.
970.3102-18	Independent research and development and bid and proposal costs.
970.3102-19	Insurance and indemnification.
970.3102-20	Interest and other financial costs.
970.3102-22	Lobbying and political activity costs.
970.3102-28	Other business expenses.
970.3102-46	Travel costs.
970.3102-53	Preexisting conditions.

#### **Subpart 970.31—Contract cost principles and procedures**

##### **970.3100-1 Scope of subpart.**

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

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

##### **970.3101-1 Objectives.**

Deviations from the policy and principles set forth in this subpart shall not be made unless such action is authorized by the Procurement Executive, on the basis of a written justification stating clearly the special circumstances involved.

##### **970.3101-3, Home office expenses.**

(a) For on-site work, DOE's fee for management and operating contract, determined under the policy of and calculated per the procedures in 970.15404-4, provides adequate compensation for home or corporate office general and administrative expenses incurred in the general management of the contractor's business as a whole.

(1) DOE recognizes that some Home Office Expenses are incurred for the benefit of a management and operating contract. DOE has elected to recognize that benefit through fee due to the difficulty of determining the dollar value applicable to any management and operating contract. The difficulty arises because:

(i) The general construct of a management and operating contract results in minimal Home Office involvement in the contract work, and

(ii) Conventional Home Office Expense allocation techniques that use bases such as total operating costs, labor dollars, hours etc., are not appropriate because they inherently assume significant contractor investment (in terms of its own resources, such as, labor, material, overhead, etc.). Contractor investments are minimal under DOE's operating and management contracts. The contracts are totally financed by DOE advance payments, and DOE provides government-owned facilities, property, and other needed resources.

(2) From time to time, the fee for a management and operating contract may not be adequate compensation for Home Office Expenses incurred for the benefit of the contract. An indication that such a case exists is the need for significant home office support to deal with issues at the site that occur without the fault or negligence of the contractor, for example, the need for home office legal support to deal with third party, environmental, safety, or health issues.

(3) In such a case, the contracting officer, after obtaining the HCA's approval, may consider a contractor request for additional compensation. The contractor may request:

(i) Fee in addition to its normal fee; or

(ii) Compensation on the basis of actual cost.

(4) Because the contract's fee provides some compensation for Home Office Expenses, the contractor's request for additional compensation must always be for an amount less than the Home Office Expenses that are incurred for the benefit of the management and operating contract.

(b) For off-site work, the DOE allows Home Office Expenses under architect-engineer, supply and research contracts with commercial contractors performing the work in their own facilities. Home Office Expenses may, however, be included for reimbursement under such DOE off-site architect-engineer, supply and research contracts, only to the extent that they are determined, after careful examination, to be allowable, reasonable, and properly allocable to the

work. Work performed in a contractor's own facilities under a management and operating or construction contract may likewise be allowed to bear the properly allocable portion of allowable Home Office Expenses.

**970.3101-9 Advance agreements. (DOE coverage-paragraph (i))**

(i) At any time, the contracting officer may institute an advance approval requirement for any cost item under a contract.

**970.3101-10 Cost certification.**

(a) Certain contracts require certification of the costs proposed for final payment purposes. Section 970.4207-2 states the administrative procedures for the certification provisions and the related contract clause prescription.

(b) If unallowable costs are included in final cost settlement proposals, penalties may be assessed. Section 970.4207-2 states the administrative procedures for penalty assessment provisions and the related clause prescription.

**970.3102-4 Bonding costs. (DOE coverage-paragraph (d))**

(d) The allowability of bonding costs shall be determined pursuant to 970.5204-31, Insurance-litigation and claims.

**970.3102-6 Compensation for personal services. (DOE coverage-paragraphs (a) and (p))**

(a)(6) In determining the reasonableness of compensation, the compensation of each individual contractor employee normally need not be subjected to review and approval. Generally, the compensation paid individual employees should be left to the judgment of contractors subject to the limitations of DOE-approved compensation policies, programs, classification systems, and schedules, and amounts of money authorized for wage and salary increases for groups of employees. However, the contracting officer shall designate a compensation threshold appropriate for the particular situation. The contract shall specifically provide that contracting officer approval is required for compensating an individual contractor employee above the threshold if a total of 50 percent or more of such compensation is reimbursed under DOE cost-type contracts. For purposes of designating the threshold, total compensation includes only the employee's salary and cash bonus or incentive compensation.

(7)(i) Reimbursable costs for compensation for personal services are to be set forth in a personnel appendix which is a part of the contract. This

personnel appendix shall be negotiated using the principles and policies of FAR 31.205-6, Compensation, as supplemented by this section, 970.3102-6, and other pertinent parts of the DEAR. Costs that are unallowable under other contract terms shall not be allowable as compensation for personnel services.

(ii) The personnel appendix sets forth in detail personnel costs and related expenses allowable under the contract and documents personnel policies, practices and plans which have been found acceptable by the contracting officer. The contractor will advise DOE of any proposed changes in any matters covered by these policies, practices or plans which relate to personnel costs. The personnel appendix may be modified from time to time in writing by mutual agreement of the contractor and DOE without execution of an amendment to the contract. Such modifications shall be evidenced by execution of written numbered approval letters from the contracting officer or his representative. Types of personnel costs and related expenses addressed in the personnel appendix, or amendments thereto, are as follows: salaries and wages; bonuses and incentive compensation; overtime, shift differential, holiday, and other premium pay for time worked; welfare benefits and retirement programs; paid time off, and salaries and wages to employees in their capacity as union stewards and committeemen for time spent in handling grievances, or serving on labor management (contractor) committees. Provided, however, that the contracting officer's approval is required in each instance of total compensation to an individual employee above an annual rate as specified in the personnel appendix.

(p)(1) Notwithstanding paragraph (a) of this section, costs incurred for compensation of a senior executive in excess of the benchmark compensation amount determined applicable for the contractor fiscal year by the Administrator, Office of Federal Procurement Policy, are unallowable. Allowable costs of executive compensation shall be determined pursuant to Federal Acquisition Regulation 31.205-6(p).

**970.3102-18 Independent research and development and bid and proposal costs. (DOE coverage-paragraph (c))**

(c) Bid and Proposal costs are unallowable.

**970.3102-19 Insurance and indemnification.**

The supplemental material on the costs of insurance and indemnification

is found in 970.5204-31, Insurance-litigation and claims.

**970.3102-20 Interest and other financial costs.**

Imputed interest costs relating to leases classified and accounted for as capital leases under generally accepted accounting principles (GAAP) are allowable when the decision to enter into a capital leasing arrangement has been specifically authorized and approved by the DOE in accordance with applicable procedures and such interest costs are recorded in a DOE account established for such purpose.

**970.3102-22 Lobbying and political activity costs. (DOE coverage—paragraph (b))**

(b) Costs of the following activities are excepted from FAR 31.205-22, Lobbying and political activity costs, coverage, provided that the resultant costs are reasonable and otherwise fall into the following exceptions:

(1) Providing Members of Congress, their staff members or staff of cognizant legislative committees, in response to a request (written or oral, prior or contemporaneous) from Members of Congress, their staff members or staff of cognizant legislative committees, or as otherwise directed by the Contracting Officer, information or expert advice of a factual, technical, or scientific nature, with respect to topics directly related to the performance of the contract or proposed legislation. In providing this information or expert advice, the contractor shall indicate to the recipient that it is not presenting the views of DOE. Reasonable costs for transportation, lodging or meals incurred by contractor employees for the purpose of providing such information or expert advice shall also be reimbursable, provided the request for such information or expert advice is a prior written request signed by a Member of Congress.

(2) Providing State legislatures or subdivisions thereof, their staff members, or staff of cognizant legislative committees, in response to a prior written request from a State legislator, or as otherwise directed by the Contracting Officer, information or expert advice of a factual, technical, or scientific nature, with respect to topics directly related to the performance of the contract or proposed legislation. In providing this information or expert advice, the contractor shall indicate to the recipient that it is not presenting the views of DOE. Reasonable costs for

transportation, lodging, or meals incurred by contractor employees shall be reimbursable.

**970.3102-28 Other business expenses. (DOE coverage—paragraph (i))**

(i) Reasonable costs associated with the establishment and maintenance of financial institution accounts in connection with the work under this subpart are allowable, including, but not limited to, service charges, the cost of disbursing cash, necessary guards, cashiers, and paymasters. If payments to employees are made by check, facilities and arrangements for cashing checks may be provided without expense to the employees, subject to the approval of the contracting officer.

**970.3102-46 Travel costs.**

(a) Costs for transportation, lodging, meals, and incidental expenses.

(1) Costs incurred by contractor personnel on official company business are allowable, subject to the limitations contained in this subsection. Costs for transportation may be based on mileage rates, actual costs incurred, or on a combination thereof, provided the method used results in a reasonable charge. Costs for lodging, meals, and incidental expenses may be based on per diem, actual expenses, or a combination thereof, provided the method used results in a reasonable charge.

(2) Except as provided in paragraph (a)(3) of this subsection, costs incurred for lodging, meals, and incidental expenses (as defined in the regulations cited in paragraphs (a)(2)(i) through (iii) of this subsection) shall be considered to be reasonable and allowable only to the extent that they do not exceed on a daily basis the maximum per diem rates in effect at the time of travel as set forth in the—

(i) Federal Travel Regulation, prescribed by the General Services Administration, for travel in the conterminous 48 United States, available on a subscription basis from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, Stock No. 922-002-00000-2;

(ii) Joint Travel Regulations, DoD Civilian Personnel, Appendix A, prescribed by the Department of Defense, for travel in Alaska, Hawaii, The Commonwealth of Puerto Rico, and territories and possessions of the United States, available on a subscription basis from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, Stock No. 908-010-00000-1; or

(iii) Standardized Regulations (Government Civilians, Foreign Areas), section 925, “Maximum Travel Per Diem Allowances for Foreign Areas,” prescribed by the Department of State, for travel in areas not covered in paragraphs (a)(2)(i) and (ii) of this subsection, available on a subscription basis from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, Stock No. 744-008-00000-0.

(3) In special or unusual situations, actual costs in excess of the maximum per diem rates are allowable provided that such amounts do not exceed the higher amounts authorized for Federal civilian employees as permitted in the regulations referenced in paragraphs (a)(2)(i), (ii), or (iii) of this subsection. For such higher amounts to be allowable, all of the following conditions must be met:

(i) One of the conditions warranting approval of the actual expense method, as set forth in the regulations referred in paragraphs (a)(2)(i), (ii), or (iii) of this subsection, must exist.

(ii) A written justification for use of the higher amounts must be approved by an officer of the contractor’s organization or designee to ensure that the authority is properly administered and controlled to prevent abuse.

(iii) If it becomes necessary to exercise the authority to use the higher actual expense method repetitively or on a continuing basis in a particular area, the contractor must obtain advance approval from the contracting officer.

(iv) Documentation to support actual costs incurred shall be in accordance with the contractor’s established practices, subject to paragraph (a)(7) of this subsection, and provided that a receipt is required for each expenditure of \$75.00 or more. The approved justification required by paragraph (a)(3)(ii) and, if applicable, paragraph (a)(3)(iii) of this subsection must be retained.

(4) Paragraphs (a)(2) and (a)(3) of this subsection do not incorporate the regulations cited in paragraphs (a)(2)(i), (ii), and (iii) of this subsection in their entirety. Only the maximum per diem rates, the definitions of lodging, meals, and incidental expenses, and the regulatory coverage dealing with special or unusual situations are incorporated in those paragraphs.

(5) An advance agreement (see FAR 31.109 and DEAR 970.3101-9) with respect to compliance with paragraphs (a)(2) and (a)(3) of this subsection may be useful and desirable.

(6) The maximum per diem rates referenced in paragraph (a)(2) of this

subsection generally would not constitute a reasonable daily charge—

(i) When no lodging costs are incurred; and/or

(ii) On partial travel days (e.g., day of departure and return). Appropriate downward adjustments from the maximum per diem rates would normally be required under these circumstances. While these adjustments need not be calculated in accordance with the Federal Travel Regulation or Joint Travel Regulations, they must result in a reasonable charge.

(7) Costs shall be allowable only if the following information is documented:

(i) Date and place (city, town, or other similar designation) of the expenses;

(ii) Purpose of the trip; and

(iii) Name of person on trip and that person’s title or relationship to the contractor.

(b) Travel costs incurred in the normal course of overall administration of the business are allowable and shall be treated as indirect costs.

(c) Travel costs directly attributable to specific contract performance are allowable and may be charged to the contract under FAR 31.202.

(d) Airfare costs in excess of the lowest customary standard, coach, or equivalent airfare offered during normal business hours are unallowable except when such accommodations require circuitous routing, require travel during unreasonable hours, excessively prolong travel, result in increased cost that would offset transportation savings, are not reasonably adequate for the physical or medical needs of the traveler, or are not reasonably available to meet mission requirements. However, in order for airfare costs in excess of the standard airfare to be allowable, the applicable condition(s) must be documented and justified.

(e)(1) “Cost of travel by contractor-owned, -leased, or -chartered aircraft,” as used in this paragraph, includes the cost of lease, charter, operation (including personnel), maintenance, depreciation, insurance, and other related costs.

(2) The costs of travel by contractor-owned, -leased, or -chartered aircraft are limited to the standard airfare described in paragraph (d) of this subsection for the flight destination unless travel by such aircraft is specifically required by contract specification, term, or condition, or a higher amount is approved by the contracting officer. A higher amount may be agreed to when one or more of the circumstances for justifying higher than standard airfare listed in paragraph (d) of this subsection are applicable, or when an advance agreement under paragraph (e)(3) of this

subsection has been executed. In all cases, travel by contractor-owned, -leased, or -chartered aircraft must be fully documented and justified. For each contractor-owned, -leased, or -chartered aircraft used for any business purpose which is charged or allocated, directly or indirectly, to a Government contract, the contractor must maintain and make available manifest/logs for all flights on such company aircraft. As a minimum, the manifest/log shall indicate—

- (i) Date, time, and points of departure;
- (ii) Destination, date, and time of arrival;
- (iii) Name of each passenger and relationship to the contractor;
- (iv) Authorization for trip; and
- (v) Purpose of trip.

(3) Where an advance agreement is proposed (see 31.109), consideration may be given to the following:

(i) Whether scheduled commercial airlines or other suitable, less costly, travel facilities are available at reasonable times, with reasonable frequency, and serve the required destinations conveniently;

(ii) Whether increased flexibility in scheduling results in time savings and more effective use of personnel that would outweigh additional travel costs.

(f) Costs of contractor-owned or -leased automobiles, as used in this paragraph, include the costs of lease, operation (including personnel), maintenance, depreciation, insurance, etc. These costs are allowable, if reasonable, to the extent that the automobiles are used for company business. That portion of the cost of company-furnished automobiles that relates to personal use by employees (including transportation to and from work) is compensation for personal services and is unallowable as stated in FAR 31.205-6(m)(2).

#### **970.3102-53 Preexisting conditions.**

Clause 970.5204-75, Preexisting conditions, provides guidance on situations where this category of costs may be allowable.

#### **970.42 Contract Administration.**

4. 970.4207-1, Contracting officer determination procedure, is added to read as follows:

##### **970.4207-1 Contracting officer determination procedure. (DOE coverage-paragraph (b))**

(b)(4) A contracting officer shall not resolve any questioned costs until the contracting officer has obtained:

- (i) Adequate documentation with respect to such costs; and

(ii) The opinion of the Department of Energy's auditor on the allowability of such costs.

(5) The contracting officer shall ensure that the documentation supporting the final settlement addresses the amount of the questioned costs and the subsequent disposition of such questioned costs.

(6) The contracting officer shall ensure, to the maximum extent practicable, that the Department of Energy's auditor is afforded an opportunity to attend any negotiation or meeting with the contractor regarding a determination of allowability.

5. Section 970.4207-2, is added to read as follows:

##### **970.4207-2 Certificate of costs.**

(a) The contracting officer shall require that management and operating contractors provide a submission, pursuant to 970.5204-16(e), for settlement of costs incurred during the period stipulated on the submission and a certification that the costs included in the submission are allowable. The contracting officer shall assess a penalty pursuant to 970.5204-XX if unallowable costs are included in the submission. Unallowable costs are either expressly unallowable or determined unallowable.

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

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

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

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

(iii) Was mutually agreed to be unallowable.

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

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

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

of the Treasury pursuant to Public Law 92-41 (85 Stat. 97).

(2) Determined unallowable, then the contracting officer shall assess a penalty in an amount equal to two times the amount of the disallowed cost allocated to the contract.

(d) The contracting officer may waive the penalty provisions when:

(1) The contractor withdraws the submission before the formal initiation of an audit of the submission and submits a revised submission;

(2) The amount of the unallowable costs allocated to covered contracts is \$10,000 or less; or

(3) The contractor demonstrates to the contracting officer's satisfaction that:

(i) It has established appropriate policies, personnel training, and an internal control and review system that provides assurances that unallowable costs subject to penalties are precluded from the contractor's submission for settlement of costs; and

(ii) The unallowable costs subject to the penalty were inadvertently incorporated into the submission.

(e) The Head of the Contracting Activity may waive the certification when—

(1) It determines that it would be in the best interest of the United States to waive such certification; and

(2) It states in writing the reasons for that determination and makes such determination available to the public.

#### **970.5204-4 [Amended]**

6. Subsection 970.5204-4 is amended by revising the reference to "Allowable Costs and Fixed Fee" to read "Payment and advances."

#### **970.5204-13 and 970.5204-14 [Removed and Reserved]**

7. Section 970.5204-13, Allowable costs and fixed-fee (Management and Operating contracts), is removed and reserved.

8. Section 970.5204-14, Allowable costs and fixed-fee (support contracts), is removed and reserved.

9. Section 970.5204-16 is amended by adding a new paragraph (k) to read as follows:

#### **970.5204-16 Payments and advances.**

\* \* \* \* \*

(k) *Determining allowable costs.* The contracting officer shall determine allowable costs in accordance with the Federal Acquisition Regulation subpart 31.2 and the Department of Energy Acquisition Regulation subpart 970.31 in effect on the date of this contract and other provisions of this contract.



**970.5204-17 [Removed and Reserved]**

10. Section 970.5204-17, Political activity cost prohibition is removed and reserved.

11. Section 970.5204-31 is amended by revising the introductory paragraph of clause paragraph (h) and adding clause paragraph (m) to read as follows:

**970.5204-31 Insurance-litigation and claims.**

\* \* \* \* \*

(h) In addition to the cost reimbursement limitations contained in FAR part 31, as supplemented by DEAR 970.31, and notwithstanding any other provision of this contract, the contractor's liabilities to third persons, including employees but excluding costs incidental to worker's compensation actions, (and any expenses incidental to such liabilities, including litigation costs, counsel fees, judgments and settlements) shall not be reimbursed if such liabilities were caused by contractor managerial personnel:

\* \* \* \* \*

(m) Reasonable litigation and other legal expenses are allowable when incurred in accordance with the DOE approved contractor legal management procedures (including cost guidelines) as such procedures may be revised from time to time, and if not otherwise made unallowable by law or the provisions of this contract.

**970.5204-61 [Removed and Reserved]**

12. Section 970.5204-61, Cost prohibitions related to legal and other proceedings is removed and reserved.

**970.5204-84 [Removed and Reserved]**

13. Section 970.5204-84, Waiver of limitations on severance payments to foreign nationals, is removed and reserved.

14. Section 970.5204-XX is added to read as follows:

**970.5204-XX Penalties for unallowable costs.**

As prescribed in 970.4207-3 use the following clause:

Penalties for unallowable costs (APR 2000)  
(a) Contractors which include unallowable cost in a submission for settlement for cost incurred, may be subject to penalties.

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

(c) Unallowable costs are either expressly unallowable or determined unallowable.

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

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

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

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

(iii) Was mutually agreed to be unallowable.

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

(1) Expressly unallowable, then the contracting officer shall assess a penalty in an amount equal to the disallowed cost allocated to this contract plus interest on the paid portion of the disallowed cost. Interest shall be computed from the date of overpayment to the date of repayment using the interest rate specified by the Secretary of the Treasury pursuant to Public Law 92-41 (85 Stat. 97); or

(2) Determined unallowable, then the contracting officer shall assess a penalty in an amount equal to two times the amount of the disallowed cost allocated to this contract.

(e) The contracting officer may waive the penalty provisions when:

(1) The contractor withdraws the submission before the formal initiation of an audit of the submission and submits a revised submission;

(2) The amount of the unallowable costs allocated to covered contracts is \$10,000 or less; or

(3) The contractor demonstrates to the contracting officer's satisfaction that:

(i) It has established appropriate policies, personnel training, and an internal control and review system that provides assurances that unallowable costs subject to penalties are precluded from the contractor's submission for settlement of costs; and

(ii) The unallowable costs subject to the penalty were inadvertently incorporated into the submission.

(End of clause)

[FR Doc. 00-14866 Filed 6-13-00; 8:45 am]

BILLING CODE 6450-01-P

**DEPARTMENT OF THE INTERIOR****Fish and Wildlife Service****50 CFR Part 17****RIN 1018-AF41****Endangered and Threatened Wildlife and Plants; Proposal to List the Chiricahua Leopard Frog as Threatened With a Special Rule**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), propose threatened status pursuant to the Endangered Species Act of 1973, as amended (Act), for the Chiricahua leopard frog (*Rana chiricahuensis*). The Chiricahua leopard frog is now absent from many historical localities and numerous mountain ranges, valleys, and

drainages within its former range. In areas where it is still present, populations are often few, small, and widely scattered. Known threats include habitat alteration, destruction, and fragmentation, predation by nonnative organisms, and disease. Habitat loss results from water diversions, dredging, livestock grazing, mining, degraded water quality, and groundwater pumping. Problems associated with small population numbers and size also threaten the species. Evidence suggests that adverse effects from water-borne contaminants may also threaten this species. This proposed rule, if made final, would implement Federal protection to this species and provide funding for development and implementation of recovery actions.

**DATES:** We must receive comments from all interested parties by September 12, 2000. We must receive public hearing requests by July 31, 2000.

**ADDRESSES:** Send comments and materials to the Field Supervisor, Arizona Ecological Services Field Office, U.S. Fish and Wildlife Service, 2321 West Royal Palm Road, Suite 103, Phoenix, Arizona 85021-4951. Comments and information received will be available for public inspection, by appointment, during normal business hours at the above address.

**FOR FURTHER INFORMATION CONTACT:** Jim Rorabaugh, Herpetologist, at the above address (telephone 602/640-2720; facsimile 602/640-2730).

**SUPPLEMENTARY INFORMATION:****Background**

Leopard frogs (*Rana pipiens* complex), long considered to consist of a few highly variable species, are now recognized as a diverse assemblage of more than two dozen species (Hillis *et al.* 1983), with many species described in the last 20 years. Mecham (1968) recognized two distinct variations of "*Rana pipiens*" in the White Mountains of Arizona. One of these, referred to as the "southern form," was depicted as a stocky frog with raised folds down both sides of the back (dorsolateral folds) that were interrupted and deflected medially towards the rear. The other form matched previous descriptions of *Rana pipiens*. Based on morphology, mating calls, and genetic analyses (electrophoretic comparisons of blood protein samples), Platz and Platz (1973) demonstrated that at least three distinct forms of leopard frogs occurred in Arizona, including the southern form. This southern form was subsequently described as the Chiricahua leopard frog (*Rana chiricahuensis*) (Platz and Mecham 1979).