DEPARTMENT OF ENERGY

48 CFR Parts 901, 917, 926, 950, 952 and 970

[1991–AB–28]

Acquisition Regulations; Department of Energy Management and Operating Contracts

AGENCY: Department of Energy.

ACTION: Final rule.

SUMMARY: The Department of Energy (DOE) today amends the Department of Energy Acquisition Regulation (DEAR) to implement certain key recommendations of its Department-wide contract reform initiative. This initiative furthers the Department's policy objectives of protecting the environment, safety and health, cost control, and enhancing diversity. Changes are in the following areas: implementation of performance-based management contracting; the reimbursement of costs for fines, penalties, third-party liability, and property loss or damage; requirements for contractor make-or-buy plans; diversity; implementation of Section 3161 of the National Defense Authorization Act for Fiscal Year 1993, including displaced worker hiring preferences; payment of fee; procedures for determining the application of laws, regulations, and Department directives to contractors; a requirement for a contractor safety management system covering the environment, safety, and health; ownership of records; and contractor overtime management policy.

DATES: This final rule is effective August 26, 1997.

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SUPPLEMENTARY INFORMATION:

I. Background

On June 24, 1996, the Department of Energy published in the **Federal Register** (61 FR 32588) a notice of proposed rulemaking to amend the Department's acquisition regulations to implement certain recommendations of its contract reform report, *Making Contracting Work Better and Cost Less* (February 1994). Those proposed changes were to improve the Department's acquisition system, principally in areas affecting management and operating contracts.

On July 25, 1996, the Department published a supplemental notice (61 FR 38701) to the proposed rule providing additional discussion regarding the treatment of *qui tam* costs incurred by management and operating contractors. A public hearing originally scheduled in the proposed rule for August 1, 1996, was canceled on July 31, 1996 (61 FR 39940) because of a lack of requests to speak. Written comments on the proposed rule were due by August 23, 1996. The Department received comments from 24 entities. After reviewing comments, the Department published a notice of limited reopening of the comment period for the proposed Environment, Safety and Health clause (61 FR 53185, October 10, 1996; corrected at 61 FR 53699, October 15, 1996). The purpose of the reopening was to clarify the requirements in the proposed clause. The Department received comments on the reopening from 6 entities.

Today's final rule adopts the amendments in the notice of proposed rulemaking and the limited reopening notice, with certain changes discussed in this section. The Department today also publishes a separate rule that effects as a final rule a previously published interim final rule. That rule (61 FR 32584), published on June 24, 1996, and effective on August 23, 1996, made changes to the Department's policies regarding competition and extension of its management and operating contracts. These two final rules constitute the acquisition regulatory changes to date for the Secretary of Energy's contract reform initiatives.

II. Disposition of Comments

The Department has considered and evaluated the comments received during the public comment period. The following discussion provides a summary of the comments received, the Department's responses to the comments, and any resulting changes from the proposed rule and the limited reopening notice. For convenience, this discussion is grouped by the major items covered. Text changes finalized by this rule are listed at the end of each major item discussed.

Item I—Performance-Based Management Contracting

A. *Comment:* One commenter recommended that the Department defer its rulemaking in this area until after Federal Acquisition Regulation (FAR) coverage for performance-based contracting (services) is adopted as a final rule, citing potential for inconsistencies with the FAR and a concern that the Department's policies could be altered depending on the outcome of the FAR case (FAR CASE 95–311, 61 FR 40284, August 1, 1996). Regarding the latter issue, the commenter expressed concern that meaningful public comments cannot be made. The commenter also believed that the Department's proposed approach mandates the use of performance-based contracting methods as opposed to the FAR coverage which appears to provide greater flexibility.

Response: As indicated in the notice of proposed rulemaking, the Department considered the policies set forth in the Office of Federal Procurement Policy Letter 91–2, Service Contracting, in developing its policies for the application of performance-based contracting to management and operating contracts. At that time, the Department also was aware of the effort by the FAR Council to develop regulatory coverage in FAR Part 37, Service Contracting, that would implement the requirements of the OFPP Policy Letter for service contracts. The Department notes that OFPP Policy Letter 91–2 was effective on May 9, 1991, and was not dependent on the issuance of the FAR coverage. The Department of Energy, along with other Federal agencies, has been complying with the requirements of the Policy Letter in its service contracts since that date. From a practical standpoint, the Department already has incorporated performance-based contracting concepts and methodologies in many of its management and operating contracts and will continue to do so in the future.

In the proposed rule, the Department committed to reviewing the proposed regulatory coverage for FAR Part 37 on performance-based services contracting. The Department has conducted that review and finds no substantive inconsistencies between its coverage as it applies to management and operating contracts and the FAR coverage for service contracts. The proposed FAR coverage, to a large extent, restates policies and concepts from the OFPP

Policy Letter. Accordingly, it does not provide new or additional substantive concepts, approaches, or practices that may cause inconsistencies with the Department's regulatory implementation.

The Department disagrees with the commenter's belief that the FAR coverage appears to provide greater flexibility in applying performance-based contracting approaches. The coverage at FAR Section 37.000, Scope of Part, *requires* the use of performance-based contracting *to the maximum extent practicable* (emphasis added). Section 37.102(d), Policy, establishes performance-based contracting methods as the preferred approach to acquiring services. In this final rule, the Department is adopting the same requirements in its policy governing the application of performance-based contracting methodologies for management and operating contacts found at DEAR Section 970.1001, Performance-based contracting.

Accordingly, the Department does not believe it is necessary to defer its final rule concerning the application of performance-based contracting concepts to its management and operating contracts. In order to strengthen the Department's application of performance-based contracting concepts and methodologies to its management and operating contracts, the Department has added the definition of ''performance based contracting'' from the OFPP Policy Letter to section 917.601, Definitions. In addition, section 970.1001, Performance-based contracting, has been amended to include a reference to OFPP Policy Letter 91–2 and recognize the general application of the concepts and methodologies set out in the policy letter to management and operating contracts. This Section also creates a linkage between contract performance objectives and the Department's strategic planning goals and objectives, and requires the development of quality assurance surveillance plans.

B. *Comment:* Three commenters noted that the use of performance-based management contracting concepts may be administratively burdensome. It was recommended that the final rule spell out the objectives of performance-based contracting and provide additional guidance to contracting officers concerning the development of measures and incentives and that the Department carefully monitor implementation to ensure cost effectiveness of the new approach.

Response: The move to performance-based contracting methodologies represents a significant shift in both policies and practices by the Department and its contract community. Accordingly, the period of transition to this new approach requires considerable commitment from both the Department and its contractors. Although the learning curve has been steep, experience to date has indicated that over the long term, benefits of applying performance-based management concepts will exceed the administrative difficulties. Because guidance on the use of performance-based contracting must be continually updated and developed as experience is gained, the Department believes that it is impractical to provide such guidance in a regulation and, further, to do so would be contrary to the Administration's initiatives to streamline regulations. The Department has already established several cross-cutting and independent initiatives to monitor implementation.

C. *Comment:* One commenter recommended that the Department identify those contracts which are, or will become, subject to the revised requirements pertaining to performance-based management contracting concepts, as expressed in Sections 917.600, 917.601, and 917.1001.

Response: The Department believes that the scope of its policies pertaining to the use and application of performance-based management contracting concepts and methodologies is sufficiently clear to indicate that it is the Department's intent to employ such concepts and methodologies, to the maximum extent practicable, in all of its contracts for the management and operation of DOE sites and facilities. The Department believes that this approach is consistent with, and in support of, Governmentwide efforts to move to results-oriented performance under contracts. As such it is unnecessary to specifically identify each contract and solicitation subject to the policies.

D. *Comment:* Regarding the scope of the Department's policy on the use of performance-based management contracting, as set forth in Section 917.600, one commenter questioned whether the subpart applies to ''management and integration'' contracts for environmental restoration work.

Response: As a preface to the response to this comment, it should be noted that the Department is required by regulation to periodically review the continued need for the use of a management and operating type contract (referred to as a performance-based management contract). This review normally is conducted concurrent with the process of deciding whether to compete a management and operating contract upon expiration of the current contract. In conducting this review, the Department assesses, among other things, whether alternative contracting approaches to the traditional management and operating contract may be viable and could present more effective contracting solutions. Considerations in this assessment include potential changes to the current and future missions at the site or facility and whether the nature and scope of the contemplated work effort meets the purpose of the management and operating contract format. As a result of such assessments, the Department has, in recent years, converted numerous management and operating contracts into FAR-based support services and management and integration contracts. These contracts are not subject to DEAR Part 970. Nonetheless, certain aspects of the management and operating contract concept may be applied to management and integration contracts, if deemed appropriate.

The policies set forth in section 917.600 and Part 970 govern those contracts that are traditionally considered ''management and operating contracts.'' Other contracts recently awarded by the Department, such as those contracts labeled as ''management and integration contracts,'' have a purpose that is different from the traditional management and operating contract. Accordingly, such contracts are not, *per se*, subject to Section 917.600 and other applicable regulations set forth in Part 970 of the DEAR. As a practical matter, however, these management and integration contracts may include some terms, conditions, and features similar to those found in management and operating contracts. In any case, because these contracts are governed by other provisions and requirements of the FAR and DEAR, it is the Department's intent that these contracts also use performance-based contracting approaches.

The final rule makes the following changes:

1. *917.600,* Scope of subpart. This Section is revised to recognize the applicability of the requirements of the Subpart to performance-based management contracts.

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

incentives. This Section also defines ''performance based contracting'' in a manner consistent with Office of Federal Procurement Policy Letter 91–2.

3. *970.10,* Specifications, Standards and Other Statement of Work Descriptions. Section 970.1001 is revised as a new Section entitled, Performance-based contracting, and Section 970.1002 is retitled, Additional considerations.

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

A. Shifting Burden of Proof

Comment: Sixteen of the commenters recommended against creating a rebuttable presumption of unallowability of costs resulting from third-party claims or damage to or loss of government property. About half of these commenters emphasized the increased costs of reporting and record keeping that would result and some compared this increased administrative burden with the problems created by the Accountability Rule, which the Department is eliminating. Nine of the commenters recommended the Department use the burden of proof standard under FAR 31.201–3, rather than create a new standard inconsistent with government-wide policy. They believed the FAR standard created a better balance between the Government's right to question costs and the administrative burden on the contractor to justify and document, in advance, the contractor's costs under the contract.

Several commenters believed the Department's proposed rule was unclear concerning the degree of proof that would be necessary to overcome the presumption of unallowability since the Department seemed to be requiring proof of a negative (i.e., that a cost is not unallowable). Finally, one commenter pointed out that presumptions are only appropriate where courts and legislatures have extensive experience with a recurrent set of facts and there is a strong likelihood of the existence of presumed conclusions.

Response: The Department has considered the comments on this issue and has decided to adopt the burden of proof requirements articulated in FAR 31.201–3, Determining reasonableness. The Department has decided that FAR 31.201–3, combined with a recent amendment to FAR 31.201–2, Determining allowability, adequately protects the Government's interest in avoiding the reimbursement of unallowable costs by placing responsibility for documenting costs on the contractor.

Paragraph (a) of FAR 31.201–3 states in part:

No presumption of reasonableness shall be attached to the incurrence of costs by a contractor. If an initial review of the facts results in a challenge of a specific cost by the contracting officer or the contracting officer's representative, the burden of proof shall be upon the contractor to establish that such cost is reasonable.

Additionally, FAR 31.201–2, Determining allowability, now clarifies and expands the contractor's responsibility for documenting costs. More particularly, paragraph (d) provides:

A contractor is responsible for accounting for costs appropriately and for maintaining records, including supporting documentation, adequate to demonstrate that costs claimed have been incurred, are allocable to the contract, and comply with applicable cost principles in this subpart and agency supplements. The contracting officer may disallow all or part of a claimed cost which is inadequately supported.

The Department believes that, taken together, these provisions appropriately balance the Department's right to question contractor costs and the administrative burden placed on the contractor to justify its costs. For these reasons, the language ''demonstrates to the contracting officer,'' has been deleted from DEAR 970.5204–21(f)(1), 970.5204–31(h), and 970.5204–31(j)(2).

B. Prudent Business Judgment

Comment: Fifteen commenters recommended against the use of the term ''prudent business judgment,'' as used in the proposed rule, since the Department appeared to be introducing an ambiguous term or standard. Almost all of the commenters expressed concern about how this term would be interpreted, particularly since the Department seemed to be going beyond the standard articulated in FAR 31.201–3. Commenters questioned how a demonstration of ''prudent business judgment'' would be made and what would be the basis for a finding that prudent business judgment had not been exercised. A number of commenters also pointed out that the Department appeared to be creating a standard which would allow the Contracting Officer to second guess the judgments of contractor management. Five of the commenters recommended against creating a ''cost reasonableness'' definition that differed from that established by FAR 31.201–3.

Response: There appears to be some confusion on the part of the commenters. Except for costs related to third-party liabilities under the Insurance—Litigation and Claims clause, the Department is not creating a new standard for determining cost reasonableness, beyond that provided in FAR 31.201–3.

With respect to the allowability of costs arising from third-party claims, the Department is establishing, in this final rule, a new requirement that the contractor's managerial personnel exercise prudent business judgment in order to be reimbursed for costs resulting from third-party liabilities. This is in addition to the standard (i.e., ''willful misconduct or lack of good faith'' on the part of contractor managerial personnel) found in the Federal Acquisition Regulation at 48 CFR 52.228–7, which addresses the unallowability of third-party claims, and in the current Department of Energy Acquisition Regulation at 48 CFR (DEAR) 970.5204–13(e)(17) and 970.5204–14(e)(15), which address the unallowability of ''losses.''

The prudent business judgment standard is specifically defined in the final rule as (1) failure to act in the same manner as a prudent person in the conduct of a competitive business, or (2) in the case of a nonprofit educational institution, failure to act in the manner that a prudent person would have under the circumstances prevailing at the time the events which resulted in third-party liability occurred or the decision to incur the cost was made. These are well-established standards in the Federal Acquisition Regulation and OMB Circular A–21, Cost Principles for Educational Institutions, for determining the reasonableness of a cost for purposes of allowability.

The following situation illustrates how this standard will operate in a typical third-party action. A sexual harassment suit is brought by an employee against the contractor. The contractor eventually seeks reimbursement from the Department for costs incurred in defending against the suit and for any settlement or judgment of the employee's action. After an initial review of the facts, the contracting officer may decide that there is reason to believe that the costs resulted from management's failure to exercise prudent business judgment and so informs the contractor. In this case, the contracting officer would then proceed to consider, among other things: whether management has an effective process for addressing employee discrimination complaints; whether this process was followed by management in this case; and whether management had effective notice of previous sexual

harassment activities by the same individual or in the same work place. The Department acknowledges that third-party actions, including employee discrimination complaints, are normal business risks, and is not seeking to shift all such risk to the contractor. However, the Department does intend that the contractor assume the risk for management's unreasonable actions or unreasonable failure to act in those situations which carry the potential for third-party liability.

The Department is adopting this standard to foster contractor responsibility and accountability. Unlike the former ''Accountability Rule,'' this standard is to be applied to the decisions and actions of the contractor's management, not to the individual actions of contractor employees who are not managers. In this way the Department intends to focus the contractor's attention on the quality of its management and the effectiveness of its management systems and controls, and to shift the risk of loss arising out of contractor management deficiencies to the party that can prevent the loss—the contractor.

Some commenters expressed concern that this approach would permit contracting officers to second guess decisions made by contractor management. As a point of fact, contracting officers are often required to exercise their judgment in determining the allowability or reasonableness of contractor costs. If the contractor disagrees with the contracting officer's judgment, and no reasonable settlement can be reached on the issue, the contractor has recourse to the rights and procedures established under the Contract Disputes Act, 41 U.S.C. § 609, *et seq.* (Federal Acquisition Regulation Subpart 33.2).

C. Fines and Penalties

Comment: Three of the commenters argued that the Department should exercise its special contracting authority under the Atomic Energy Act to deviate from government-wide policies on fines and penalties. A fourth commenter argued that the Department can legitimately defend reimbursement of criminal fines and penalties resulting from compliance with specific terms of a contract or written instruction from a contracting officer.

Response: Congress has repeatedly expressed its position on the reimbursement of contractor fines and penalties. Most recently, this cost category was addressed in the Federal Acquisition Streamlining Act of 1994 (FASA), 41 U.S.C. 256(e)(1)(D). With regard to the Department of Energy, statutes on this issue can be found at 42 U.S.C. § 7256a, which contains language similar to that found in FASA, and § 7273a, which prohibits the use of appropriated funds to pay penalties under environmental laws.

It should be noted that the Department has retained the rebuttable presumption of unallowability with respect to fines and penalties. In order for a civil fine or penalty to be an allowable cost, the contractor must demonstrate to the contracting officer one of the two conditions set forth in DEAR 970.5204–13(e)(12).

D. Litigation and Losses From Third-Party Liabilities

Comment: Two commenters thought the Department should expand the language in 970.5204–31(f), concerning the availability of funds, to provide that the Department would make its best effort to obtain any necessary additional funding.

Response: The Department has decided not to include the requested language in this final rule. The Antideficiency Act (31 U.S.C. 1301) and Comptroller General decisions restrict expansion of the language on availability of funds to include the requested phrasing.

Comment: Three commenters stated that the Department should define ''third party'' to include other government agencies. One of the commenters was concerned about cost recovery or contributory actions by Federal or state agencies under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601, *et seq.*

Response: Expansion of the term ''third party'' to include governmental entities would create a conflict with the Major Fraud Act, 41 U.S.C. 256(k). An action for contribution under CERCLA § 107 would not normally result in one of the dispositions listed in the Major Fraud Act and would be reimbursable unless otherwise made unallowable under terms of an individual contract. Additionally, legal actions brought by a state, local or foreign government, such as ordinary commercial disputes, and not covered by the Major Fraud Act or the provisions of DEAR 970.5204–61, would be considered a ''third-party'' action subject to the terms of the Insurance—Litigation and Claims clause.

Comment: Six of the commenters believed that clarification was needed on the inclusion of ''employees'' in paragraph (h) of the Insurance-Litigation and Claims clause. Four of these commenters recommended, in particular, that worker's compensation claims be excluded from the cost prohibition.

Response: As pointed out by these commenters, workers' compensation insurance is a cost area normally covered as an allowable cost under the Department of Energy and other federal contracts. It was not the Department's intent to make workers' compensation insurance an unallowable cost. Clarifying language has been added to 970.5204–31 (h) in the final rule.

Comment: One commenter noted that there is an inconsistency in the definition of expenses incidental to litigation liabilities found in paragraphs (e) and (g) of 970.5204–31 since paragraph (g) also has the phrase ''* * * counsel fees, judgment and settlements. * * *''

Response: No difference in treatment was intended and correction has been made in 970.5204–31(g) of this final rule.

Comment: One commenter argued that the requirement for adequate security for conditional payment of litigation costs is unnecessary with management and operating contractors, which are large companies.

Response: The Department has revised subparagraph (i)(1) of 970.5204–31 to simplify any necessary exchanges between the contractor and contracting officer on this issue.

E. Insurance

Comment: One commenter argued that the Department was being inconsistent by making the costs of insurance for correcting defects in materials or workmanship unallowable but permitting the reimbursement of the costs of correction.

Response: The Department included the second sentence in DEAR 970.5204–13(e)(36) and 970.5204–14(e)(34) in order to conform this final rule with the Federal Acquisition Streamlining Act. The prohibition against reimbursing these insurance costs was codified at 41 U.S.C. § 256(e)(1)(L) and implemented at FAR 31.205–19(a)(4).

The Department is deleting, in Part 970, language from the Accountability Rule that specifically addressed the costs of correcting defects in materials and workmanship, and this area of cost will now fall under other less-specific terms and conditions in the Department's contracts. While the cost of insurance for correction will now be unallowable in all federal contracts, the treatment for the actual costs of correction will depend on the terms of individual contracts. Costs of correction will be allowable under most of the Department's cost reimbursement contracts, as long as the costs are

reasonable and are not a result of the willful misconduct or lack of good faith of managerial personnel.

Comment: Three commenters requested that the Department provide clarification to its Field Offices and contractors on pro-rating insurance costs. One of these commenters recommended the Department also permit pro-rating self-insurance costs, and another recommended pro-rating be specifically provided for in the clause at 970.5204–31.

Response: It is the Department's intent that equitable arrangements be reached on a case-by-case basis with its contractors to address pro-rating of insurance costs. The policy of pro-rating the cost of insurance to reimburse the portion of the premium or cost attributable to insurance coverage for allowable costs is intended to extend to self-insurance agreements. Language has been added to this final rule to provide additional guidance on pro-rating of insurance costs.

F. Environmentally-Related Third-Party Liabilities

Comment: Two commenters pointed out that shifting risks to the Department's contractors would inhibit innovative and alternative technologies.

Response: It is the intent of the Department to make exceptions on a case-by-case basis and agree to reduced risk terms if a situation warrants such an approach.

Comment: One commenter believed that the Department should require flowdown of DEAR 970.5204–31, Insurance-Litigation and Claims, to all environmental subcontractors, in addition to all major subcontractors. This was done in a recent solicitation at the Department's Hanford site.

Response: The requirement for flowdown of coverage to special groups of subcontractors will be addressed on a case by case basis, as the circumstances warrant such a requirement.

G. Damage to or Loss of Government Property

Comment: Six commenters recommended the Department revise the language in paragraph (f)(1) of the Property clause so that the reference in all the subparagraphs was consistent and referred to the conduct of contractor managerial personnel.

Response: As noted above, this language has been clarified and now includes the words ''managerial personnel.'' It is the Department's intent to hold the contractor's corporate entity responsible in those areas and the Department is seeking to incentivize contractor management to put in place adequate systems for ensuring compliance with contracting officer directions and for establishing, administering, and maintaining an approved property system.

Comment: Two commenters questioned whether the inventory requirement applied to only government furnished property or to all government property.

Response: It is the Department's intent to cover all government property in the inventory requirement. Inventory baselines provide for reconciliation of records between old and new contractors and are the basis on which the new or follow-on contractor accepts accountability and responsibility for the government property to be used under the contract.

Comment: Three commenters urged the Department to eliminate the security, classification, and environment, safety and health concerns from the property clause and limit that provision to traditional issues.

Response: The Department disagrees with this comment because, in the Department's view, it is necessary to ensure that contractors account for, control, and protect the kinds of high-risk property unique to the Department's contracts.

Comment: Two commenters questioned how the Department would address any contributory role by federal employees if an unallowable cost was due in whole or in part to an act or omission by the government or its agent.

Response: It is not the Department's intent to make a contractor pay for costs, or the portion of costs, resulting from mistakes it is not responsible for under the terms of its contract. Where appropriate, negotiation for apportionment of cost responsibility should occur under the provisions contained in this rule.

Comment: Two commenters indicated that the term ''fair market value'' needed additional guidance or definition.

Response: As stated in the Federal Property Management Regulations, at 41 CFR 101–43.001–8, ''fair market value means the best estimate of the gross proceeds that would be recovered if the property were sold by competitive bid.'' The Department intends to rely on that meaning for purposes of this clause.

H. Preexisting Conditions

Comment: One commenter believed the inspection obligation was overly broad, while another argued that contractors must be allowed time to inspect and inspection costs must be allowable under the ''duty to inspect'' provision.

Response: The Department intends to place a reasonable duty to inspect upon the contractor. Under most circumstances, this inspection would occur during the transition period stated under the contract. The proposed Preexisting Conditions contract clause has been modified to make the inspection requirement an alternate paragraph for use in contracts with contractors not previously under contract at the particular site or facility.

A contractor will not be precluded from recovering costs resulting from or related to preexisting conditions merely because the inspection failed to discover the condition. Whether a condition will be determined to be preexisting and covered under the clause will depend upon the circumstances in each individual case.

Comment: One commenter advocated that paragraph (a) of the proposed Preexisting Conditions clause also include medical conditions of current or past personnel.

Response: While not specifically listed, any liabilities or costs resulting from medical conditions which arose from pre-existing conditions would be covered by the clause.

I. Increased Risk and Fee for Nonprofit Contractors

Comment: Five commenters stated that the Department should perform a cost benefit analysis for provisions covering nonprofit entities. These commenters pointed out that increased fees would be a direct charge to program funds and result in less research for the money available. Two of the commenters pointed out that requiring nonprofit entities to dedicate funds to protect against liability was contrary to the usual operating procedures of a nonprofit entity and that payment of fees could threaten the nonprofit status of these contractors. Three of the commenters believed it was premature for the Department to propose new liabilities for contractors when the nature of the fees to mitigate those liabilities is unknown.

Response: Certain of the liabilities in question (such as those for fines and penalties and under the Major Fraud Act) are statutorily imposed. Others are not imposed by statute, but reflect Departmental policy that its contractors, regardless of business status, should employ good business practices and mitigate risks associated with potential liabilities. Nevertheless, the commenters have raised concerns that the Department believes are best resolved in the context of individual contract circumstances, given the variability among nonprofit contractor institutions

and differences in the nature of the work that they perform for the Department.

Accordingly, the Department's contracting officers will determine, on a case-by-case basis in individual contract negotiations, the extent to which a particular nonprofit institution will be subject to: (1) the ''prudent business judgment'' standard for third-party liabilities; (2) liability for punitive damages; and (3) liability for loss of or damage to government property because of a failure to administer or properly maintain an approved property management system. The Department will consider ''co-insurance'' provisions (under which the Department of Energy and the contractor share losses) as well as overall limitations on an institution's exposure to non-statutory liabilities arising out of these contracts. The Department will, in addition, consider whether to accept contractor self-insurance or commercial insurance arrangements as a substitute for non-statutory liability provisions.

The Department plans to compensate nonprofit educational institutions consistent with the level of financial and management risk they assume in connection with their work for the Department. The Department is amending 48 CFR (DEAR) 970.1509–2(a) in this final rule to reflect this decision.

Finally, with regard to the commenters' request for a cost benefit analysis, the Department has responded elsewhere in this final rule to those comments that argue that Executive Order 12866 is applicable and requires a regulatory impact analysis. With respect to the more general requests for a cost benefit analysis, the Department believes that such an analysis will provide little useful information until it has had more experience with third-party claims under the new form of contract and with the level of fees that is likely to be negotiated under these contracts.

J. Qui Tam

Comment: Five of the commenters stated opposition to the proposed disallowance of proceeding costs when the United States does not elect to participate in the action. Some of these commenters stated that there was no statutory authority for this requirement, since the statutory provision at 41 U.S.C. § 256(k) is silent on *qui tam* costs.

Response: The Department disagrees with these commenters. *Qui tam* proceeding costs are subject to the provisions at 41 U.S.C. § 256(k) because the relator ''stands in the shoes'' of the United States in a *qui tam* action. This is true, whether or not the United States elects to intervene in the action.

Comment: Three commenters opposed adoption of the proposed Federal Acquisition Regulation amendment (61 FR 31790, June 20, 1996) which would limit reimbursement of settlement costs in all cases to 80% of otherwise allowable and allocable proceeding costs. The commenters argued that contracting officers should have the discretion to approve full recovery of settlement costs, particularly in those cases in which the United States has decided that the case does not merit government intervention.

Response: In this final rule, the Department is adopting the same provisions as the proposed Federal Acquisition Regulation amendment. In addition to addressing the allowability of costs incurred for *qui tam* suits in which the Government does not intervene, these provisions also clarify that the maximum reimbursement contractors can receive for costs incurred in connection with proceedings which are resolved by consent or compromise is 80% of allowable costs. Based on the analysis which follows, the Department has concluded that these provisions are required by 41 U.S.C. § 256(k).

Subsection (k)(1) of section 256 states that, unless otherwise provided in the section, all costs incurred in connection with any criminal, civil, or administrative proceeding brought by the United States or a State are not allowable if the proceeding: (1) relates to a failure to comply with, or a violation of, Federal or state law; and (2) results in one of five specified dispositions. Subsection (k)(3) provides for the allowability of proceeding costs if a matter is resolved by settlement, provided the settlement agreement specifically addresses the extent to which such costs are allowable. Subsection (k)(5) provides that costs not specifically disallowed under subsection (k)(1) may be allowed, but only up to 80% of the amount of costs incurred. One category of costs not disallowed by subsection (k)(1) are those costs made allowable under subsection (k)(3). Therefore, proceedings costs incurred when a matter is resolved by settlement are subject to the 80% limitation.

Comment: Four commenters stated that authority to provisionally allow costs should reside with the contracting officer rather than the General Counsel.

Response: The Department is adopting the Federal Acquisition Regulation approach on this issue, which is to allow the contracting officer to provide conditional payment in appropriate circumstances.

Comment: Six commenters stated that they preferred the Federal Acquisition Regulation standard for provisionally allowing costs, i.e., ''very little likelihood that the *qui tam* plaintiff would have been successful on the merits'', as opposed to the ''frivolous or devoid of merit'' standard in the proposed rule.

Response: The Department is adopting the Federal Acquisition Regulation approach on the standard to be used for provisionally allowing costs.

The final rule makes the following changes:

1. *950.7101.* General contract authority indemnity. Paragraph (c)(2) is removed.

2. *970.1509–2(a).* Is amended to provide for the payment of fees to nonprofit educational institutions in appropriate circumstances.

3. *970.28.* Is amended to add a new section 970.2830, Contract clause, which prescribes the use of the clause at 970.5204–31, Insurance—Litigation and Claims.

4. *970.3101–3.* General basis for reimbursement of costs. Subparagraph (a)(1) is amended to add a reference to FAR 31.201–2(d) and FAR 31.201–3.

5. *970.3102–21.* Fines and penalties. This subsection is revised to reflect the Department's policy on the unallowability of fines and penalties.

6. *970.3102–22.* Avoidable costs for profit making contractors. This subsection is removed.

7. *970.3103.* Contract Clauses. Paragraph (d) is added to address preexisting conditions.

8. *970.45.* Government property, and *970.4501,* Contract clause. This subpart and subsection are added.

9. *970.5204–13.* Subparagraph (c)(1) is amended to refer to FAR 31.201–2(d) and FAR 31.201–3; subparagraph (d)(1) is amended to update the clause reference.

10. *970.5204–13(d)(4).* This subparagraph is amended to add references to Department of Energy approved contractor litigation management procedures and cost guidelines to be included in an Appendix to the contract.

11. *970.5204–13(d)(9).* This subparagraph is amended to add ''and as allowable under subparagraph (f) of the clause of this contract entitled, Property.''

12. *970.5204–13(e)(12).* This subparagraph, concerning fines and penalties, is revised.

13. *970.5204–13(e)(17).* This subparagraph is reorganized and revised.

14. *970.5204–13(e)(36).* This subparagraph is revised to remove most of the discussion; the statement that the cost of insurance for an unallowable cost is an unallowable cost is retained.

15. *970.5204–14.* Subparagraph (c)(1) is amended to refer to FAR 31.201–2(d) and FAR 31.201–3; subparagraph (d)(1) is amended to update the clause reference.

16. *970.5204–14(d)(4).* This subparagraph is amended to add references to Department of Energy approved contractor litigation management procedures and cost guidelines to be included in an Appendix to the contract.

17. *970.5204–14(d)(10).* This subparagraph is amended to add ''and as allowable under subparagraph (f) of the clause of this contract entitled Property.''

18. *970.5204–14(e)(10).* This subparagraph concerning fines and penalties for profit making and nonprofit contractors is revised.

19. *970.5204–14(e)(15).* This subparagraph is reorganized and revised.

20. *970.5204–14(e)(34).* This subparagraph is revised to remove most of the discussion; the statement that the cost of insurance for an unallowable cost is an unallowable cost is retained.

21. *970.5204–18.* Definition of nonprofit and profit making management and operating contractors and subcontractors. This subsection is removed and reserved.

22. *970.5204–21.* Property. Paragraphs (e), (f), (g), (i) and (j) are revised; the definition of contractor's managerial personnel which previously appeared at the end of paragraph (f) now appears as paragraph (j).

23. *970.5204–31.* Litigation and claims. This subsection is removed and a new subsection, Insurance—litigation and claims, is added in its place.

24. *970.5204–32.* Required bond and insurance-exclusive of Government property. This subsection is removed and reserved.

25. *970.5204–55.* Ceiling on certain liabilities for profit making contractors. This subsection is removed and reserved.

26. *970.5204–56.* Determining avoidable costs. This subsection is removed and reserved.

27. *970.5204–61.* Cost prohibitions related to legal and other proceedings. Paragraphs (b), (c), and (e) are amended.

28. *970.5204–XX.* Preexisting Conditions. This subsection is added.

Item III—Make-or-Buy Decisions

A. *Comment:* Several commenters opined that the Department should be more prescriptive in describing the nature and extent of the make-or-buy plan and the attendant analytical approach that will be used by contractors to accomplish make-or-buy decisions. One commenter suggested that the rule specify a methodology for comparing the cost-effectiveness of in-house performance versus outsourcing.

Response: The purpose of the regulatory coverage is to provide a contractual mechanism to require contractors to establish a make-or-buy plan, consistent with the Department's needs. Because the considerations that must be taken into account by a contractor in making prudent make-or-buy decisions can be complex and may be different depending on such variables as the mission at the Department of Energy facility or site, the nature and type of supplies or services required, local market conditions, and the contractor's buying practices, the Department does not believe that it should adopt an overly prescriptive approach in defining a precise methodology to be followed by contractors through its acquisition regulations.

B. *Comment:* Regarding Subsection 970.1507–1 and clause 970.5204–XX, Make-or-Buy plan, addressing the requirements that the contractor conduct its make-or buy decisions in an environment that promotes participation with affected stakeholders, three commenters indicated that the Department should be more prescriptive in requiring that certain stakeholder groups be included in the process. One commenter suggested that the clause specifically require that the prime contractor include environmental contractors as stakeholders. One commenter suggested that the requirement in subparagraph (b)(1) of the proposed contract clause at 970.5204–XX, Make-or-Buy plan, be modified to require the contractor, when implementing in-house productivity improvement plans, to include participation by the workforce to optimize in-house productivity efforts prior to outsourcing decision. Another commenter expressed a similar concern that the rule should be more prescriptive in its requirements and directions to contracting officers and contractors regarding public information concerning make-or-buy decisions.

In addition, a commenter, in addressing the requirements of 970.1507–1(b)(2), expressed concern that the requirement to include stakeholders in development of make-or-buy plans adds no value, and is, in any event, vague, because: (1) the term ''stakeholders'' is not defined; (2) the requirement to include stakeholders is derived from Section 3161 requirements and therefore can only be applied to defense nuclear facilities; (3) it is impractical to subject every make-or-buy decision to public scrutiny; and (4) providing cost analysis information is unwise and probably illegal since it would convey proprietary information.

Response: As indicated in the previous response, the Department believes that the precise requirements of a contractor's make-or-buy plan, including elements such as appropriate stakeholder identification and involvement, are subject to great variance and both Department officials administering the contract and contractors must be given sufficient latitude in constructing programs to reflect the unique considerations of the specific site or facility and contract. Accordingly, the Department believes that it is inappropriate to provide further regulatory prescription in this matter.

Regarding the specific comment that the Department can require stakeholder involvement in the make-or-buy process only with regard to those sites and facilities subject to Section 3161, the Department disagrees. The Department believes that parties involved in, or affected by, a make-or-buy decision of a contractor benefit through an open process of communication and that such a process is in the best interests of the Department. Accordingly, the Department has elected to adopt such a requirement as a matter of policy.

Regarding the Department's expectations for openness by the prime contractor in its make-or-buy program, the Department believes that the standard of ''maximum practicable regard for open communication'', as set forth in subparagraph 970.5204–xx(b)(2), Make-or-Buy plan, provides sufficient flexibility to the contractor to determine the appropriate nature and extent of stakeholder participation. The inclusion or exclusion of specific groups is necessarily broad and undefined because of the need to determine both the identity of the stakeholders and the most appropriate approach in obtaining their participation based on the facts and circumstances surrounding an individual make-or-buy decision. The Department believes that the current language provides contractors the needed latitude and flexibility to effectively implement the intent of the provision.

Lastly, it is not the Department's intent that the contractor release proprietary information protected by law to the public under its make-or-buy plan or otherwise provide information

concerning its acquisition approach or costs that might provide one party with an unfair competitive advantage over another party. Information falling into this category would not be releasable.

C. *Comment:* Two commenters recommended that the Department adopt the Federal Acquisition Regulation (FAR) 15.7 coverage on this subject. One commenter, while supporting a move to the FAR make-or-buy coverage, believed that even the FAR is too prescriptive and detailed and that the Department should move to best commercial practices in this area.

Response: In developing its requirements for contractor make-or-buy plans, the Department considered whether the FAR make-or-buy (see FAR 15.7) approach could be used. After careful analysis, it was determined that the make-or-buy requirements of the FAR were only generally suitable for subcontracting decisions under the Department's management and operating contracts, and that, in any case, additional considerations would have to be applied to reflect the special contractual relationship between the Department and its management and operating contractors. The basis for this assessment is that the requirements of the FAR generally apply to the manufacture, development, and assembly of hardware items (systems, subsystems, assemblies, etc.) under a typical commercial operation. Although the FAR guidance concerning make-or-buy plans may be helpful in providing general instruction in this matter, the decisions regarding make-or-buy plans by the Department's management contractors are not directly analogous. In the typical commercial operation, make-or-buy decisions are generally driven by purely economic considerations in meeting a one-time contract requirement (or a series of contracts) to fulfill a Government production or manufacturing need. In these contracts, the traditional ''arms-length'' buyer-seller relationship between the contracting parties is preserved. In contrast, the management and operation of a Department of Energy owned or controlled facility by a contractor is in direct fulfillment of the Department's mission and is characterized by a close relationship not usually associated with Federal contracts. As such, make-or-buy decisions by the contractor must reflect not only the typical economic considerations, but also programmatic and policy considerations. Accordingly, it was determined that a tailored approach to contractor make-or-buy plans was needed to reflect these considerations.

Regarding the comment that the Department's make-or-buy program requirements appear to conflict with recent actions by the Department to move its contractors' buying practices away from the Federal model to a more commercial-like approach, the Department does not agree. In crafting the make-or-buy plan requirements, the Department has provided sufficient leeway to contractors, within the broad parameters set forth in the contract clause, to acquire appropriate supplies or services under commercial buying practices.

D. *Comment:* One commenter noted that subparagraph 970.1507–2(d)(2), Requirements, directs the contracting officer, when evaluating a contractor's make-or-buy plan, to consider ''whether small, small disadvantaged, or other minority-owned businesses will be afforded maximum practicable opportunity to compete for work that is subcontracted'' may be in conflict with recent actions stemming from *Adarand Constructors, Inc.* v. *Pena* 115 S.Ct. 2097 (1995).

Response: Public Law 95–507, as implemented at Subpart 19.7 of the FAR requires that certain contractors, as a condition for receiving a Federal contract, agree to provide the maximum practicable opportunity to small business concerns, small disadvantaged business concerns, and women-owned small business concerns to participate in contract performance. This subpart requires the apparent successful offeror to submit and negotiate a subcontracting plan to be eligible for award. The requirements established by Pub. L. 95–507 remain public policy.

The Department's contracts for the management and operation of its laboratories and facilities are subject to both the statutory and regulatory requirements pertaining to the submission of small business subcontracting plans. Because decisions made by a prime contractor under the make-or-buy program have a direct impact on the nature and number of subcontracting opportunities available under the contract, the Department believes that a natural nexus exists between the contractor's obligations under the requirements of Pub. L. 95–507 and its make-or-buy program. Accordingly, it is both appropriate and necessary that the contracting officer, in evaluating the contractor's make-or-buy plan, consider the impact of make-or-buy decisions in the context of the approved subcontracting plan.

In addition, the Department takes this opportunity to reaffirm its commitment to diversity and the implementation of its diversity-related authorities, including section 3021 of the Energy Policy Act of 1992 (42 U.S.C. 13556), section 241 and 641 of the Department of Energy Organization Act (42 U.S.C. 7141, 7256) and Executive Orders 12876, 12900, and 13021. As part of its strategic plan for diversity, the Department has established performance criteria and measures for enhanced partnerships with small, small disadvantaged, and small women-owned businesses; minority educational institutions; employees; and communities. The Department has expressed publicly on numerous occasions its intention to evaluate contractor performance consistent with its policies and authorities as they may be interpreted and implemented in light of Adarand.

The language at 970.1507–2(d)(5) has been modified to more closely align the language to Pub. L. 95–507 requirements through the inclusion of a cross-reference to the clause at FAR 52.219–9, Small, Small Disadvantaged, and Women-Owned Small Business Subcontracting Plan, a mandatory clause in the Department's management and operating contracts. In addition, a new paragraph, 970.2601(b), has been added to articulate fully the Department's diversity policy.

E. *Comment:* One commenter believes that the requirement of paragraph 970.1507–2(a) that Department of Energy programmatic sponsors develop criteria to override a ''least cost decision'' is in conflict with the requirement in paragraph 1(a) of the same section that the objective of the make-or-buy plan is to operate the site at least cost. Two commenters expressed a similar belief, disagreeing with the Department's proposed requirement that programmatic sponsors develop make-or-buy criteria for work under their programs. These commenters believed that (1) the Department's acquisition regulation is not the appropriate vehicle to prescribe internal operating procedures, and (2) conflicts will arise at multi-program sites regarding ultimate responsibility for make-or-buy criteria.

Response: The Department does not agree with the commenters. The purpose of the program specific make-or-buy criteria, as stated in paragraph 970.1507–2(a), Development of program-specific make-or-buy criteria, is to permit consideration of those factors that would make a decision based on purely economic analysis inappropriate. To assess make-or-buy opportunities solely on the basis of an economic analysis artificially limits flexibility in business judgment and ignores the reality of important programmatic and

policy factors that must be considered by both the Department and the prime contractor.

Regarding the commenters' assertion that the Department's acquisition regulation is not the appropriate vehicle to prescribe internal operating procedures, Federal Acquisition Regulation (FAR) 1.301 provides for agency-specific acquisition regulations necessary to implement and supplement the FAR. The purpose of agency acquisition regulations, in conjunction with the FAR, is to set out agency policies, procedures, contract clauses, solicitation provisions, and forms that govern the agency's contractual relationships. The Department recently completed an aggressive initiative to reduce its acquisition regulations that resulted in a regulatory reduction of approximately 50%. In promulgating new regulations, the Department carefully considers whether the subject matter is best implemented by regulation or by another mechanism. This approach was taken with respect to all of the regulatory proposals set forth in the proposed rule. The Department has determined that the coverage at Section 970.1507 is appropriately included in its acquisition regulation.

With respect to the concern that potential conflicts will arise among the various programmatic interests at a particular site or facility, the Department believes that appropriate mechanisms exist within the Department's management infrastructure to ensure that the program specific make-or-buy criteria applicable to a particular contract will reflect the balanced needs of the facility or site and its programmatic sponsors.

F. *Comment:* One commenter identified a potential inconsistency between language in the preamble citing ''cost efficient and effective manner'' as the underlying premise of DOE's make-or-buy policy and language at paragraph 970.1507–1(a), citing ''least cost basis.'' The commenter notes that ''best value'' approaches as opposed to ''least cost'' approaches may be better suited under certain make or buy scenarios. A second commenter expressed confusion over DOE's desire to operate on a least cost basis as a contradiction to obtaining what the commenter characterized as the ''best and highest value''.

Response: Paragraph 970.1507–1(a) sets forth the Department's expectations for a contractor's make-or-buy plan that establishes ''a preference for providing property or services * * * on a least-cost basis''. That same paragraph elaborates on the Department's expectations, as follows: ''[t]he emphasis of this make-or-buy structure is to eliminate bias for in-house performance where an activity may be performed *at less cost* or *otherwise more efficiently* through subcontracting.'' (emphasis added).

The Department does not intend to equate the term ''least cost'' with ''low bid.'' Neither ''least cost'' nor ''efficiency'' are synonymous with ''low bid'' contracting approaches. A work activity, supply, or service is provided at ''least cost'' when, after consideration of a variety of appropriate programmatic, business, and financial factors, it is concluded that performance by either ''in-house'' resources or by contracting out is likely to provide the property or service at the lowest overall cost. Programmatic factors include, but are not limited to, program specific make-or-buy criteria established by the Department of Energy, the impact of a ''make'' or a ''buy'' decision on mission accomplishment, and anticipated changes to the mission of the facility or site. Business factors pertain to such elements as market conditions, past experience in obtaining similar supplies or services, and overall operational efficiencies that might be available through either in-house performance or contracting out. Among the financial factors that may be considered to determine a least-cost alternative in a make-or-buy analysis are both recurring and one-time costs attributable to either retaining or contracting out a particular item, financial risk, and the anticipated contract price. A new paragraph (b) has been added to subsection 970.1507–1 to incorporate this explanation of ''least cost'' basis to the regulatory coverage.

Regarding the use of ''best value'' approaches, the prime contractor is responsible for determining whether a particular supply or service can be acquired on the basis of price only, or should be acquired on a ''best value'' basis with appropriate trade-offs between price and non-price factors. The Department believes that the policies and requirements of 970.1507, and the corresponding contract clause at 970.5204–76, Make-or-Buy Plan, do not impinge on a contractor's responsibility and discretion in this area.

G. *Comment:* With regard to paragraph 970.1507–2(c), one commenter believes that the wording of the submission requirement may contractually require the contractor to submit a make-or-buy plan prior to the Department having developed its make-or-buy factors.

Response: Paragraph (a) of subsection 970.1507–2, Development of program specific make-or-buy criteria, directs that the criteria developed by the Department be provided to a contractor for use in developing its make-or-buy plan for the facility or site. Paragraph (d) of the same subsection instructs contracting officers to consider these criteria in evaluating a contractor's make-or-buy plan. Further, paragraph (c) of the contract clause provides that the contractor must consider the program specific make-or-buy criteria in categorizing each work item subject to inclusion in the plan. Accordingly, the Department believes that the language of 970.1507, when read in conjunction with paragraph 970.5204–76(c), clearly conveys the Department's intent that a critical part of a contractor's make-or-buy plan is consideration of the program specific make-or-buy criteria developed by the Department. Indeed, the contractor cannot prepare an acceptable make-or-buy plan absent consideration of such criteria.

H. *Comment:* A number of commenters were concerned with the clause proposed at 970.5204–XX, Displaced Employee Hiring Preference, and its relationship to the coverage concerning contractor Make-or-Buy Plans at 970.1507. In particular, one commenter recommended that the proposed clause be modified to parallel the language in proposed clause 970.5204–XX(b)(3), Make-or-Buy Plan, regarding actions that contractors are to employ to mitigate the social and economic impact of subcontracting decisions, specifically with regard to retraining. Two commenters believed that the clause regarding hiring preferences for displaced workers is unclear, in regard to such matters as the general scope of the coverage; subcontract flow down requirements; and defining employees eligible for Section 3161 hiring preferences.

Response: Based on the comments received in response to the coverage on make-or-buy plans and displaced employee hiring preference, and after a careful review of the statutes, regulations, and the Department's internal policies governing Section 3161 of the National Defense Authorization Act for Fiscal Year 1993, the Department has concluded that a number of changes are needed in the coverage to more accurately conform the regulatory coverage with the intent of the statute. Significant considerations in the Department's decision to modify its regulatory coverage in this final rule were:

(1) A recognition, from both a policy and practical standpoint, that a determination by the Secretary of Energy under Section 3161 that a change in workforce at a defense nuclear facility is necessary is separate

and apart from a contractor's make-or-buy decision;

(2) The requirements of Section 3161 apply to Department of Energy defense nuclear facilities. Such facilities are identified in Appendix C of the Department's Interim Planning Guidance for Contractor Workforce restructuring (February 1996);

(3) In cases where the Secretary has determined that a change in workforce is necessary, pursuant to Section 3161, and a workforce restructuring plan is to apply to the facility or site, the management and operating contractor must comply with the plan and use its best efforts to mitigate the social and economic impacts of workforce restructuring;

(4) The requirement under Section 3161(c) that a hiring preference be provided, to the extent practicable, to contractor employees whose employment in positions at defense nuclear facilities has been terminated, is not limited to management and operating contracts and subcontracts awarded thereunder. It applies to all Department of Energy contracts; and

(5) Workforce restructuring and worker displacement resulting from a Section 3161 determination are appropriate program specific make-or-buy criteria that may be applied in certain cases to obviate make-or-buy decisions based on a purely economic basis.

Accordingly, the Department has determined that the regulatory coverage concerning Section 3161 should be separated from the regulatory coverage of contractor make-or-buy plans. The regulatory coverage regarding Section 3161 in this final rule is substantially the same as that set out in the proposed rule.

The final rule makes the following changes:

(1) *970.1507*, Make-or-buy plans. A section, consisting of 970.1507–1, 970.1507–2, and 970.1507–3, is added to require management and operating contractors to develop and implement make-or-buy plans.

(2) *970.5204–76*, Make-or-buy plan. A clause is added to address the make-or-buy plan requirement.

(3) *926.71*, Displaced employee hiring preference. A subpart has been added to 48 CFR Part 926 that implements the requirements of Section 3161(c)(2) regarding hiring preferences under Department of Energy contracts for employees whose employment was terminated as a result of a determination by the Secretary that a change in workforce was necessary at a Department of Energy defense nuclear facility. Substantively, the language in Section 926.7101, Policy, of this new subpart is the same as language in the proposed rule at 970.1705–1(b)(3).

The definition of ''eligible employee'' found at Section 926.7102 is substantially the same as the definition that was in the proposed rule at 970.5204–XX, Displaced Employee Hiring Preference. Modifications were made to the definition to more closely conform the definition to existing Department of Energy guidance. New Section 926.7103, Requirements, explains the application of the requirements of Section 3161(c)(2) and identifies the Department of Energy Office of Worker and Community Transition as the office responsible for matters relating to implementation of Section 3161. New Section 926.7104 provides contract clause prescriptions.

(4) *952.226–74*, Displaced employee hiring preference. This new subsection contains a contract clause that implements the hiring preference requirements of Section 3161. The text of the clause is substantially the same as the clause in the proposed rule at 970.5204–XX, Displaced Employee Hiring Preference. Modifications were made to the definition of ''eligible employee'' in paragraph (a) to more closely conform the definition to existing Department of Energy guidance.

(5) *970.2601*, Implementation of Section 3021 of the Energy Policy Act of 1992. The existing paragraph is designated (a) and a new paragraph (b) is added to state the goals of the Department's diversity policy.

(6) *970.2602–1, Implementation of Section 3161 of the National Defense Authorization Act for Fiscal Year 1993.* Subsection 970.2602–1 has been added to 970.26, Other Socioeconomic Programs. This new subsection recognizes that Department of Energy contractors and subcontractors at Department of Energy defense nuclear facilities have a responsibility to mitigate the social and economic impacts of workforce restructuring and displacement resulting from a determination by the Secretary that a change in workforce is necessary pursuant to Section 3161. The new subsection requires a hiring preference for employees whose employment has been terminated under a Section 3161 restructuring action and applies the hiring preference requirements of 48 CFR (DEAR) 926.71 to management and operating contracts. The new subsection captures the intent of the language in the proposed rule under 970.1507–1(b)(3), which stated in pertinent part: ''[p]otential displacement may require the Department of Energy to prepare a work force restructuring plan. The contractor shall implement the plan, which may require the following initiatives for eligible workers consistent with the objectives of Section 3161: retraining, early retirement, or other options to avoid lay-offs; retraining for new missions; out-placement assistance, including tuition reimbursement; relocation assistance; and 60 days individual layoff notice.''

(7) *970.5204–77*, Workforce Restructuring Under Section 3161 of the National Defense Authorization Act for Fiscal Year 1993. A new contract clause has been added that requires the contractor to comply with the applicable Department of Energy Restructuring Plan for the Defense Nuclear Facility and use its best efforts to mitigate the social and economic impacts of workforce restructuring or displacement. This new clause captures the intent of language in the proposed rule under 970.5204–XX(b)(3), Make-or-Buy Plan.

Item IV—Payment of Fee

Comment: One commenter requested that the Department limit the contracting officer's authority to offset fee payments against ''amounts owed to the government by the contractor.'' This commenter suggested offsets only be allowed against amounts owed to the government on or under the specific management and operating contract. The commenter stated that adopting this approach would conform the Department's rule to the ''recently reauthorized Alternate I at FAR Clause 52.232–23, Assignment of Claims,'' cited at 61 FR 29539 (June 11, 1996).

Response: The Department does not agree. The **Federal Register** citation provided by the commenter addresses the need to facilitate the private financing of defense contracts, particularly contracts to be performed by small businesses. Management and operating contracts are generally not performed by small businesses and typically provide for advance payments. Department sees no reason to restrict its ability to offset fee payments against any amounts owed to the government.

The final rule adopts the changes in the proposed rule, as follows:

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

Item V—Laws, Regulations, and DOE Directives

A. Summary of 48 CFR (DEAR) 970.5204–78—Laws, Regulations, and DOE Directives in This Final Rule

Paragraph (a) provides that the contractor is obligated to comply with applicable Federal, state, and local laws and regulations, unless relief has been granted in writing by the appropriate regulatory agency. In addition, this paragraph provides that a List of Applicable Laws and Regulations (to be labeled List A) identifying all applicable Federal, state, and local laws and regulations, including Department of Energy regulations, may be appended to the contract, but the contractor is not excused from compliance with applicable laws and regulations in the event a law or regulation is omitted from the List.

Paragraph (b) provides for the inclusion of a List of Applicable Directives (to be labeled List B) containing a listing of Department of Energy directives, or parts thereof, applicable to a particular contract on the effective date of the contract, and explains the mechanism to be used by the Department to revise List B. (Compliance with applicable Department of Energy regulations is required under paragraph (a), and these regulations should be included in List A when such a list is prepared by the contracting officer.) When the contracting officer decides to revise List B, the contractor is given an opportunity to assess and advise the contracting officer of the potential impact of such a revision. When revisions to List B are necessary, they are made in accordance with the Changes clause of the contract.

With regard to paragraph (c), revisions in the language now provide that a contractor may develop tailored environment, safety, and health requirements as appropriate for the work and associated hazards at a facility or site using any Department-approved process. This may include Work Smart Standards (WSS) (formerly the Necessary and Sufficient Process), the Standards/Requirements Identification Document (S/RID) Process, or any other approved tailoring process as described in a contractor's Safety Management System. The Integration of Environment, Safety, and Health into Work Planning and Execution clause published in this final rule describes the Safety Management System and tailoring of requirements at subparagraphs (b)(5) and (c). Finally, the clause makes clear that when the appropriate set of ES&H requirements identified by using any Department-approved process does not include a requirement of an applicable law or regulation, a contractor must request and obtain an exemption from the law or regulation and must abide by the requirement until relief is granted by the appropriate regulatory agency.

The Department expects that when the clause describing the Safety Management System and the Directives clause are included in the contract, the contractor will develop a Safety Management System. One essential element of the Safety Management System is the evaluation of the work and associated hazards by use of a Department-approved tailoring process such as WSS or S/RIDs. As discussed above, the Department also recognizes that other tailoring processes may be developed and, when approved for use by the Department, may be used. Moreover, the Department plans to actively participate in the tailoring process. Among other responsibilities, the Department must approve the use of any tailoring process and the final set of ES&H requirements produced by use of the process. The Department anticipates working cooperatively with the contractor in the evaluation of the work and hazards and identification and selection of the ES&H requirements.

This clause provides a uniform contractual mechanism by which sets of tailored ES&H requirements produced by any Department-approved process could be incorporated into contracts. If any Department-approved tailoring process concludes before a contract is executed, the resulting set of standards should be used as the basis for developing the initial list of environment, safety, and health requirements. If the set of standards is developed and approved after execution of the contract, it would be incorporated into the contract pursuant to paragraph (c), and would substitute for environment, safety, and health requirements identified in List B.

Information and background on the S/RID development process may be found in the Department of Energy Implementation Plan in response to the Defense Nuclear Facilities Safety Board Recommendation 90–2 (Revision 5; November 1994), and in Standards/Requirements Identification Document Development and Approval Instruction (September 1994). The Work Smart Standards Process (formerly the Necessary and Sufficient Closure Process) is described in Department of Energy Closure Process for Necessary and Sufficient Set of Standards (DOE M 450.3–1, January 25, 1996). The Safety Management System is described in ''Safety Management System Policy,'' (DOE P 450.4, October 15, 1996).

B. Compliance With List of Applicable Laws and Regulations (Para. a of Directives Clause)

Comment: Two commenters opposed the inclusion of the list of applicable laws and regulations because they believed the clause was overly burdensome and unnecessary. One commenter stated that a requirement to obtain written confirmation of what laws and regulations were applicable was too burdensome. Another commenter contended that the list was unnecessary because contractors were expected to comply with applicable laws and regulations regardless of whether or not they were included in the list.

Response: The Department does not believe that providing the list places a burden on the contractor. The clause does not require a contractor to seek confirmation from Federal, state, or local authorities as to whether a law or regulation is applicable or not. In contrast, exemption relief from a law or regulation that is applicable must be granted in writing by the appropriate authority.

C. Compliance With List of DOE Directives (Para. b of Directives Clause)

Comment: One commenter objected to the list of directives because it believed that the clause requires the contractor to determine which directives are applicable to the contract and that the list would become a ''moving target'' because the Department expected compliance with both existing and future versions of a directive. Two commenters stated that changes within DOE directives amount to changes in the contract and must be subject to mutual agreement between the parties. Unilateral modification of the list of directives would increase the cost of performance. Another commenter believed that a list of directives was counterproductive and inconsistent with the National Performance Review objectives. The commenter also opined that the process was micro-management and argued that the list of directives could contain not only the order requirements but also guidance documents as well. Two commenters stated that the Department should be limited in its ability to impose contractual requirements if it failed to provide adequate funding to perform the work. They argued that some type of dispute resolution process should be added to resolve questions regarding the applicability of a directive or on adequate funding. Finally, one commenter believed that the suggested 30-day assessment period given when

the contracting officer proposed to add or revise the list of directives was too short.

Response: The clause published today does not require a contractor to determine the applicability of a directive. Applicability will be determined based on the List of Applicable Directives. Substantive revisions or updates to a listed directive do not automatically become contract requirements. The clause provides for the contractor to assess the impact of a directive's revision and to discuss the impact with the Department. However, it remains the Department's prerogative to impose requirements by listing a directive. The Department anticipates that it will make every effort to consider contractor concerns regarding a change but fundamentally disagrees that mutual agreement on changes to what is contained in the list of directives is necessary before such changes may be imposed as contract requirements. The Department reiterates its commitment to streamline its directives and believes that its efforts to date are consistent with National Performance Review objectives. Moreover, efforts to include guidance documents as mandatory requirements will be actively discouraged. Finally, based on past experience, the Department believes that a 30-day assessment period is sufficient time to perform a review of a revised directive and points out that nothing in the clause prevents a contractor from asking the contracting officer for more time, if needed.

D. Use of Department-Approved Processes for Tailoring Environment, Safety, and Health Requirements (Para. c of the Directives Clause)

Comment: One commenter objected to being forced to use the S/RID Process because it was not a defense nuclear facility. Another commenter advised that use of the S/RID and the Necessary and Sufficient Processes should be clarified to include a review of the set of standards by the contractor prior to the incorporation into the contract. A third commenter advised that, based on a Department Standards Committee decision, the S/RID process was not available for use after April 1, 1996. Finally, a commenter objected to the incorporation of the set of standards derived from the use of the S/RID and Necessary and Sufficient Processes unless the Department approved the sets.

Response: The clause does not compel the use of either the S/RID or the Work Smart Standards Process (formerly the Necessary and Sufficient Process). Other Department-approved processes for tailoring environment, safety, and health requirements to the particular work and associated hazards may be used as part of, and in concert with, the development of a Safety Management System. There also appears to be a basic misunderstanding of how the Work Smart Standards process is conducted. The process contemplates contractor and Department cooperation in every aspect of selecting standards. Accordingly, prior to incorporation of the results of such a process into the contract, both the contractor and the Department will have reviewed the selected standards. Finally, with regard to Department approval of the set prior to incorporation into the contract, the Work Smart Standards Process and the S/RID Process provide that Department approval of the final set is mandatory.

The final rule makes the following changes:

1. *970.04,* Administrative Matters. Section 970.0470, Department of Energy directives, is added, describing the Department of Energy directives system.

2. *970.5204–78,* Laws, Regulations, and DOE Directives. A clause is added to identify directives and related requirements applicable to a specific contract.

Item VI—Environment

A. As indicated in the ''Background'' section to this rulemaking, the notice of proposed rulemaking was re-opened on October 15, 1996, (61 FR 32588). That notice proposed further changes to 48 CFR (DEAR) 970.5204–2, Safety and Health reflecting the Defense Nuclear Facilities Safety Board's (DNFSB) Recommendation 95–2, Integrated Safety Management and the Department of Energy's Implementation Plan, dated April 18, 1996, responding to that recommendation. The revisions to the clause proposed at that time included: (1) a change in the title of the clause; (2) the addition of guiding principles for contractors to follow in the performance of work as outlined in the Department's Implementation Plan dated April 18, 1996, for DNFSB Recommendation 95–2 and the Department's Safety Management System (SMS) Policy, DOE P 450.4; and (3) a requirement for submission of a documented SMS. Safety was defined to include environment, safety, and health (ES&H).

The requirement for an SMS is intended to be the cornerstone of the 95–2 implementation effort of integrating environment, safety and health into business systems and work management processes throughout the Department's complex. The clause describes the Department's expectations for contractors and subcontractors to perform work safely. While these expectations for performing work safely are contract requirements, the Department anticipates that each facility or site will tailor the efforts commensurate with the work and associated hazards.

The submission of an SMS description does not conflict with, or create a greater burden than, the submission of the ES&H Management Plan described in the ES&H clause published in the original proposed rule of June 24, 1996. Submission of an SMS description expands the submission of an ES&H Management Plan, and the SMS encompasses the same integrated safety management functions (e.g. work planning, budgeting, priority-setting, and work execution). The clause expands and modifies the original language to assure that contractors understand Department expectations regarding integrated safety management. Specifically, the clause requires documentation of the contractor's SMS for approval by the Department. This establishes an agreement between the contractor and the Department on how the contractor will ensure the protection of employees, the public, and the environment.

The submission and approval of an SMS description would likely be done on a one-time basis at the start of a contract. The clause also requires that the contractor provide annual documented updates and that the Department and the contractor mutually agree on ES&H performance objectives, performance measures tied to contract incentives, and performance commitments. Such commitments are intended to highlight the contractor's most significant ES&H priorities specific to work to be accomplished, as well as assure that major obligations to external oversight and regulatory bodies are met within budget constraints. Accordingly, the contractor, in its annual updates, must identify the resources needed to conduct work safely in terms of ES&H support and assure appropriate skill mix and numbers of personnel in the ES&H area.

The clause requires documentation of the SMS, including development and implementation of hazard controls and the establishment of an agreed-upon set of ES&H standards and requirements. The contractor, with Department approval and active participation, may use Department-approved tailoring processes that evaluate the work and the hazards at individual facilities or sites, such as Work Smart Standards (WSS) or Standards/Requirements Identification Document (S/RID). Paragraphs (b) and (c) of this clause and the contract clause

entitled Laws, Regulations and DOE Directives describe the use of processes for tailoring requirements for a facility or site and provide the contract mechanism by which the tailored set of environment, safety, and health requirements is to be incorporated into the contract.

The contractor may also require subcontractors to submit an SMS description, depending on the complexity and nature of the hazards associated with their work. The contracting officer will provide guidance for the flowdown of ES&H requirements in subcontracts.

B. Integrated Safety Management, DNFSB Recommendation 95–2

Comment: Three commenters to the original proposed rule stated that the proposed environment, safety, and health clause needed to address the Defense Nuclear Facilities Safety Board (DNFSB) Recommendation 95–2. One commenter stated that including a reference in the clause to the guidance document for DNFSB Recommendation 95–2 would make that document mandatory when, in fact, it is not and should be guidance. One commenter noted that the guidance is yet to be developed and recommended it be removed as a reference. One commenter stated that by adding the seven guiding principles to the clause, they become mandatory requirements. The commenter explained that the original seven principles were meant as guidance and recommended language providing that contractors should conduct business consistent with the principles instead of requiring their implementation. The same commenter recommended that dates for submittal of the Safety Management System (SMS) be mutually agreed upon by the contracting officer and the contractor.

Response: The Department agrees with the commenters on addressing DNFSB Recommendation 95–2 and the clause has been revised to incorporate those concepts. The clause includes the principles outlined in the Department's Implementation Plan for DNFSB 95–2 and adopted in the Department's SMS Policy 450.4; it requires the development and maintenance of an SMS that fulfills the conditions of those principles. The Department also agrees that referring to the guidance document, DOE Guide G 450.4, may be confusing and has deleted it from the clause. The Department expects that contractors will adhere to the seven principles during the performance of work and, therefore, has laid out the essential elements of a Safety Management System. In addition, paragraph (c) of the clause provides that an SMS shall fulfill all the conditions stated in the guiding principles. Finally, the Department expects that contracting officers will set reasonable dates for document submittal based upon discussions between the contracting officer and the contractor. Therefore, mutual agreement between the contractor and the Department regarding submittal dates is not needed.

C. Clarification of Requirements and Terms

Comment: Three commenters stated that the requirement in the clause to comply with all applicable Federal and non-Federal environment, safety, and health laws, regulations, and applicable directives needed to be clarified. The commenters explained that the Department should identify the specific laws, regulations, and directives are applicable to contractors. One commenter stated that one way to be clearer about how directives are identified is to identify or reference, specifically, the Laws, Regulations, and DOE Directives clause in this clause.

Another commenter recommended that the Department make clear that the Necessary and Sufficient and Standards/Requirements Identification Document (S/RID) processes were not the only methods by which environment, safety, and health (ES&H) requirements could be identified. The commenter proposed additional language that permits the Department and the contractor to mutually agree upon alternate processes for identification of ES&H requirements.

One commenter stated that the use of the terms ''workers'' and ''employees'' in the clause could cause confusion by implying two different sets of personnel. Another commenter stated that using the phrase ''ensuring ES&H'' was too vague and the phrase ''hazard controls'' was too narrow in context. The commenter recommended using language such as ''managing ES&H'' and ''work controls'' respectively.

One commenter found the inclusion of subcontractor employees in the definition of the terms ''employees'' and ''line management'' troublesome. The commenter believed that the language could be used to assert that contractors have a legal duty of care to protect subcontractor employees from harm thus exposing contractors, as well as the Department, to liability for subcontractor employee injuries where ordinarily none would exist. One commenter stated that paragraph (h) of the proposed clause required a language modification because contractors cannot be responsible for the ES&H performance of a third party.

Another commenter recommended deletion of the requirement in the clause that the contractor cooperate with Federal and non-Federal agencies having jurisdiction over ES&H matters or changing the clause so that a contractor would retain the right to contest agency allegations that it has failed to comply with laws, regulations, or directives.

Response: The Department generally agrees with these comments and has referenced 970.5204–78, Laws, Regulations, and DOE Directives, in this clause. In response to the comment about the use of alternative tailoring processes other than Work Smart Standards (WSS) or S/RIDs, the Department has changed the language in the clause to allow a contractor to use any Department-approved tailoring process. See II—Disposition of Comments, Item V, of this rulemaking for further discussion.

The Department agrees with the comment regarding the use of the terms ''workers'' and ''employees'' and has revised the clause to use only the term ''employees''; however, no changes were made to ''ensuring ES&H'' and ''hazard controls'' because these phrases appear in the Department's Implementation Plan for DNFSB Recommendation 95–2 and have gained general acceptance by the Department of Energy complex.

In response to the comment that the Department has created a new duty of protection for subcontractor employees, the Department believes that the language does not create a legal duty of care.

The Department does not agree that paragraph (h) of the clause needs to be modified. This paragraph establishes the requirement for contractors to be responsible for compliance with ES&H requirements regardless of the performer of the work. The Department's intent in this paragraph is that contractors be responsible for ensuring compliance with ES&H requirements for all parties who are doing work at the Department's facilities, including visiting scientists and students for whose activities the contractor is responsible.

The Department retained the requirement for cooperating with Federal and non-Federal agencies. ''Cooperation'' with an agency does not mean that a contractor loses its right to contest non-compliance allegations.

D. Stop Work Order

Comment: Two commenters concluded that contractors should be entitled to an extension of time or additional fee if a contracting officer mistakenly issues a stop work order. One commenter believed that the clause

should state that a stop work order should be issued only after the contracting officer has notified the contractor in writing and after the contractor has had a reasonable opportunity to take corrective action. This same commenter also stated that a stop work order should only be issued for a substantial noncompliance, imminent danger, or substantial harm to the environment. In any event, the commenter explained, the contracting officer should only stop the specific work that has experienced the noncompliance and should allow restart of this work after that noncompliance has been abated. One commenter stated that the clause permits only the Department to restart work even if it is stopped by the contractor. The commenter suggested that authority should be given to contractors to restart work that they have stopped. Another commenter requested that the Department establish time frames in the contract clause during which the contractor will have the ability to evaluate non-compliances and initiate remedies without the threat of a stop work order.

Response: The Department places its highest priority on performing work safely and has determined that contractors who act or fail to act causing a danger to employees or to the public should not be entitled to an additional fee or extension of time in the event the contracting officer issues a stop work order. When a contracting officer issues a stop work order under this clause, it is intended that sufficient Department review of cause occurs. The Department must retain the authority to stop work in whole or in part based on the unsafe conduct of work on the part of the contractor. The Department agrees with the suggestion that when contractors have issued a stop work order, they should be able to restart work; the clause has been revised accordingly.

E. Exercising Care Commensurate With Hazards

Comment: One commenter stated that paragraph (b) of the SMS clause, requiring a contractor to exercise a degree of care commensurate with the harm involved, goes beyond the protection afforded by applicable law. The commenter suggested that the clause specify that the care exercised by contractors is limited to requirements of applicable law.

Response: The Department does not agree with the commenter's suggestion. The variety of missions assigned to the Department and the number of hazardous materials controlled and managed by the Department warrant the exercising of care associated with the particular hazard of any operation or material. The SMS helps to ensure that contractors will focus on work planning and make all reasonable attempts to perform work safely.

F. Use of Authorization Agreement

Comment: A commenter expressed concern about the use and timing of authorization agreements.

Response: The Department understands the concern expressed by the commenter and is deleting the term, ''authorization agreement,'' from the clause. In accordance with subparagraph (b)(7), depending upon the hazards existing at a facility or site, certain contractors and the Department may also execute additional agreements for highly hazardous operations. Guidance on these agreements will be furnished by the contracting officer.

The final rule makes the following changes:

1. *952.223–71,* Safety and health. The title of this subsection for non-management and operating contracts is changed to be consistent with 970.5204–2, Integration of environment, safety, and health into work planning and execution.

2. *952.223–74,* Nuclear facility safety applicability. This subsection is removed.

3. *952.223–75,* Preservation of individual occupational radiation exposure records. The clause prescription is revised.

4. *970.2303–2,* Clauses. Paragraphs (c), (d), and (e), prescribing clauses at 970.5204–26, 970.5204–41, and 970.5204–62, respectively, are removed, since these clauses are also being removed.

5. *970.5204–2,* Integration of environment, safety, and health into work planning and execution. Environmental requirements are added to those for safety and health in this clause. A requirement for a Safety Management System is also added.

6. *970.5204–26,* Nuclear facility safety. This clause is removed.

7. *970.5204–41.* Preservation of individual occupational radiation exposure records. This clause is removed.

8. *970.5204–62,* Environmental protection. This clause is removed.

Item VII—Ownership of Records

Nine commenters provided views on this issue.

A. Title of the Clause

Comment: One commenter believed that the title of this portion of the regulation should be revised to read ''Access to and Ownership of Records.'' This suggestion reflects the view that the real issue being addressed is who has a right of access to records maintained by the Department's contractors. The commenter believed that the Department should avoid any implication that contractor records in the possession of a contractor are subject to the Freedom of Information Act (FOIA) merely because they are available to the Department. Another commenter requested that the Department clarify the right of access that the public would have to records covered by paragraph (b) of the clause.

Response: The title of the clause has been changed to read, ''Access to and Ownership of Records,'' to reflect the fact that this clause delineates the government's rights of access to, and ownership of, records acquired or generated in the performance of the contract. The public's right of access to government-owned records in the possession of the contractor is described in section 1004.3(e) of the Department of Energy Freedom of Information Regulation, 10 CFR Part 1004. Under section 1004.3(e), government-owned records in the possession of the contractor may be subject to disclosure under FOIA, if they meet the requirements enumerated in the regulation. However, contractor-owned records in the possession of the contractor are not subject to FOIA, even though they are accessible to the Department. Although records that come within the Department's possession generally are subject to FOIA, such records also are subject to withholding under the FOIA's nine exemptions, as appropriate. The Department will protect sensitive records from disclosure in accordance with the FOIA and other applicable laws. Also, in the interest of clarity, the title of paragraph (a) has been revised to read ''Government-owned Records,'' and the title of paragraph (b) has been revised to read ''Contractor-owned Records.''

B. Paragraph (a) of the Clause

Comment: Three commenters disagreed with the Department's view that records created or acquired by the contractor in connection with work performed under management and operating contracts, and thus paid for by the government, are the property of the government. In addition, one of these commenters believed that it was inappropriate to view as government property, documents that were paid for through overhead charges under the contract, while another believed that the entire concept of ownership of records

is unworkable and needs to be reconsidered. Another commenter believed that the language in paragraph (a) of the clause which provides that ''all records acquired or generated by the contractor in the performance of the contract shall be the property of the Government'' could be interpreted to include records created at the contractor's expense and, therefore, recommended that the matter be clarified.

Response: Through this clause, the Department seeks to standardize the manner in which records acquired or generated under its management and operating, and similar, contracts are treated. Generally, all records generated or acquired by the contractor in connection with work performed under management and operating contracts or similar contracts for the management of the Department's owned or leased facilities have been considered the property of the government. This view stems from the unique nature of these contracts. Under management and operating contracts and similar contracts, the work is performed at government facilities and is closely related to the Department's mission. Separate companies or subsidiaries that are wholly or substantially separate from the company's other business generally are established to conduct the work at these facilities. The contractors at these facilities are performing work identified and approved by the government. The work is of a long-term and continuing nature, often far exceeding the term of any one contractor. Therefore, the Department needs to be able to preserve all records in order to ensure a continuity of functions and the orderly transition of the personnel and the work in the event of a change of contractors. Documents generated or acquired in the performance of these contracts provide a record of the activities undertaken by the Department in furtherance of its mission. Under these circumstances, it is not surprising that the government has asserted an ownership interest in all records that the Department pays for under these contracts. To the extent that the Department has granted contractors the option to own certain types of these records, it does so only under the explicit condition of an absolute right of access to the records during the course of the contract and of complete reversion of the records to the Department upon termination of the contract. In this context, the term ''contractor-owned records'' must be understood to include the right of access by, and reversion to, the government. Conversely, records for which the contractor is not reimbursed, directly or indirectly, under the contract are not considered to be records ''acquired or generated in the performance of the contract'' and would not be covered by this clause.

C. Paragraph (b) of the Clause

Comment: Six commenters believed that the list of records owned by contractors should be expanded to include legal documents, including those that are covered by the attorney-client and attorney work product privileges. Another commenter believed that all records related to claims and complaints should be included in the list of contractor-owned documents. One commenter believed that the list of contractor-owned records should be expanded to include documents related to ethics, employee concerns, and other investigations conducted under an expectation of confidentiality.

Response: As a preliminary matter, the Department notes that the categories of records listed in paragraph (b) are the maximum types of records that during the term of the contract may be considered the property of the contractor. When negotiating the contract with the government, the contractor may choose not to include any or all of the categories listed from coverage under paragraph (b). The parenthetical language in the introduction to paragraph (b) has been revised to clarify this matter. With respect to legal records, the Department believes that privileges are best protected in the event of a change in contractors by maintaining them as government-owned. Nonetheless, so long as the government retains an absolute right of access and reversion, the Department agrees to allow contractors the option to assert ownership. Accordingly, paragraph (b) is amended to include legal records among those that the contractor may choose to own. In response to the other comments, subparagraph (b)(1) has been revised to include ''records on ethics, employee concerns, and other employee related investigations conducted under an expectation of confidentiality'' and ''employee assistance program records.''

Comment: Another commenter noted that, under some management and operating contracts, certain employment related records are required to be maintained under a Privacy Act system of records. The commenter further stated that the Privacy Act only covers records maintained by, or on behalf of, a federal agency, and, therefore, concluded that, when records maintained by the contractor must be kept in a Privacy Act system of records, they must be considered government property. The commenter recommended that subparagraph (b)(1) of the clause be revised to clarify this matter.

Response: The Department agrees that Privacy Act records that are maintained by contractors on behalf of the Department are government-owned. Therefore, subparagraph (b)(1) has been revised to make clear that records that, under the contract, are being maintained in a Privacy Act system of records are not covered by subparagraph (b)(1).

Comment: Another commenter suggested that subparagraph (b)(3) be revised to cover all records related to any procurement action by the contractor. The commenter believed that the term ''non-accounting records'' is ambiguous and could create confusion in the event of Freedom of Information Act requests.

Response: The term ''nonaccounting'' records was used to ensure consistency between the provisions of the proposed Ownership of Records clause and paragraph (d) of DEAR clause 970.5204–9, Accounts, records, and inspection. DEAR 970.5204–9(d) provides that, unless the parties agree otherwise, ''all financial and cost reports, books of account and supporting documents, and other data evidencing costs allowable, revenues, and other applicable credits under this contract, shall be the property of the Government * * *'' The reference to ''nonaccounting'' records was included in the proposed rule to clarify that subparagraph (b)(3) is not intended to change the designation of records described in DEAR 970.5204–9(d) from government-owned to contractor-owned. To further clarify this matter, the language in paragraph (b)(3) has been revised by deleting the word ''nonaccounting'' and including a specific reference to the exception contained in DEAR clause 970.5204–9.

D. Paragraphs (c) and (d) of the Clause

Comment: Four commenters had varying, but related, suggestions for revising paragraphs (c) and (d) of the proposed clause. In general, they recommended that paragraphs (c) and (d) be revised to provide that copies of certain contractor-owned records (e.g., legal opinions, litigation files, and other documents covered by the attorney work product and attorney-client privileges, investigations of employee related concerns conducted under an expectation of confidentiality, and confidential contractor financial information and correspondence between the contractor and its parent, affiliates, and divisions located away from the Department facility) be

excluded from the audit, inspection, copying, and delivery authorities provided in these paragraphs. The concern is that once copies of these documents are provided to the Department, they will be available to the public under the Freedom the Information Act, and any privileges against disclosure will be lost. Some commenters also believed that the breadth of disclosure required by paragraphs (c) and (d) would have a chilling effect on a contractor's operations, because it would discourage the free exchange of ideas among contractor employees and between the contractor and its counsel. Also, two commenters suggested that these paragraphs should be revised to clarify that records generated without reimbursement from the Department would not be subject to copying and delivery under paragraph (c) or audit, inspection, and copying under paragraph (d). Another commenter requested that paragraph (c) be revised to provide expressly for the contractor's right of access to records after termination of the contract. Another commenter requested that the paragraphs be revised to clarify that the government's use of personnel records or other personal information would be consistent with applicable federal laws, including the Privacy Act. This commenter and one other also suggested that the regulation provide that the government's right of access to contractor records may be negotiated on a case-by-case basis to enable the parties to address a contractor's obligations under state law. Finally, in contrast to the comments provided above on paragraphs (c) and (d) by private companies and nonprofit organizations, the National Institute for Occupational Safety and Health (NIOSH) believed that the government's right to inspect, audit, and copy contractor-owned records must be maintained. NIOSH emphasized the importance of the Department maintaining access to records needed to conduct exposure assessment and epidemiologic research, including contractor-owned records that have personal identifiers.

Response: As indicated above, this clause is being promulgated to facilitate uniform treatment of records acquired or generated in the performance of the Department's management and operating and similar contracts. Records for which the contractor is not reimbursed, directly or indirectly, under the contract are not considered records ''acquired or generated in the performance of the contract'' and would not be covered by this clause. Records that the Department pays for, directly or indirectly, under the contract are considered the property of the government. Also, as previously noted, the government can and will protect records that come into its possession from disclosure under the Freedom of Information Act, as appropriate. With respect to the suggestion to exclude certain categories of records from the coverage of paragraphs (c) and (d), the Department disagrees. The Department believes that the right to audit, inspect, and obtain copies or records is essential to ensure continuity and to enable the government to carry out responsibilities imposed by statute and regulation. For example, access to, and copies of, contractor-owned medical records may be necessary to enable the Department to carry out its public health and safety responsibilities under existing law. The right to obtain copies of records is not intended to discourage the free exchange of ideas among contractor employees, but rather to ensure that the Department can perform its functions. As noted above, the government will withhold records from disclosure under the Freedom of Information Act, as appropriate. Moreover, most records that are transferred to successor contractors under paragraph (c) do not come into the possession of the government, and therefore access to such records under the Freedom of Information Act is not increased. With respect to personnel records, the government's use and disclosure of such information will be consistent with applicable laws. To the extent the government under paragraphs (c) or (d) obtains copies of contractor-owned records that are covered by subparagraph (b)(1), such as personnel, medical, or other employment-related records, such records will be maintained in Privacy Act systems of records, and the use and disclosure of these records would be covered by that Act. Paragraphs (c) and (d) have been revised to make clear that the government's use of records obtained pursuant to paragraphs (c) or (d) shall be in accordance with applicable federal laws, including the Privacy Act. If, in an unusual situation, additions or changes to these paragraphs are necessary or appropriate, section 901.403 of the Department of Energy Acquisition Regulation, entitled ''Individual Deviations,'' provides authority for approval of deviations that are clearly in the best interests of the government. Finally, paragraph (c) does not preclude the contractor from keeping copies of any or all of the records generated or acquired under the contract upon termination or completion of the contract. The Department, therefore, believes that this paragraph provides ample opportunity for the contractor to maintain access to contract records.

Comment: One commenter requested that the term ''designee'' be limited to other federal agencies, to address its concern that contractor-owned records could be turned over to a private party without compensation to the contractor and with no restrictions on the use of the information by the private party.

Response: As noted above, the government has asserted an ownership interest in all records that the Department pays for, directly or indirectly, under the contract. The contractor is not entitled to additional compensation for providing copies of these records to the Department or its designee, nor is it entitled to impose restrictions on the use of this information. The term ''designee'' must remain sufficiently broad to encompass private parties, because the Department sometimes requires the services of private parties to help carry out its functions. For example, the Department must be able to provide to successor contractors the documents necessary to carry out their responsibilities under the contract. Also, federal agencies frequently rely on the services of academic researchers to carry out epidemiological studies.

E. Paragraph (e) of the Clause

Comment: Two commenters believed that the Department is attempting to assert ownership of records that it has no legal right to claim (e.g., records that the contractor may have brought with it at the start of performance of the contract or records provided to the contractor by its corporate headquarters or affiliates during performance of the contract). One of the commenters requested that the clause be revised to make it clear that requirements of this paragraph do not apply to records that were created with funds that are not related to the current contract.

Response: Paragraph (e) is intended to ensure that management and operating contract records provided to the contractor during the transition from one management and operating contractor to another remain available to the government for audit, inspection, and copying. As indicated above, this clause does not apply to records that the contractor pays for with its own funds.

F. Paragraph (f) of the Clause

Comment: One commenter recommended that contractor-owned records be exempt from the record retention schedules referenced in this

paragraph. The commenter believed that this requirement is inconsistent with the concept of ownership and could conflict with corporate retention schedules that in some cases may exceed the government's requirements. Another commenter observed that the imposition of Department of Energy record retention schedules on contractor records will involve substantial storage costs and further noted that DEAR 970.5204–13(e)(23) provides that, after completion of the contract, costs associated with the storage of records pertaining to the contract are unallowable. The commenter recommended that DEAR 970.5204–13(e)(23) be revised to allow the contractor to recoup any increase in storage costs that would result from this requirement.

Response: The Department believes that application of the records retention schedules are necessary to ensure that the Department's contractors employ uniform approaches to the collection, maintenance, and disposition of records that the government pays for under its management and operating and similar contracts. When a contract is terminated or completed, the government may exercise its right to obtain copies and delivery of certain contract records. Once acquired, the Department does not anticipate that the government would continue to require that the contractor maintain its copy of those records. Accordingly, paragraph (f) is revised to provide that the government may waive the application of the records retention schedules when, under paragraph (c), the government requests copies and takes delivery of the records described in paragraphs (a) and (b).

G. Paragraph (g) of the Clause

Comment: One commenter believed that the requirement to flow down the terms of this clause to certain subcontracts will reduce the pool of eligible subcontractors because they will not want to risk the Department's claim of an ownership interest in company records. Another commenter believed that the flow down requirement will increase significantly the operating costs of management and operating contractors and their subcontractors. In the view of this commenter, the increased costs are related to additional requirements to create, maintain, and ship records as well as additional storage space that may be required to house the documents delivered to the Department. This commenter believed that this requirement was inconsistent with the Paperwork Reduction Act. A third commenter believed that this paragraph would be difficult, if not impossible, to implement, but offered no reasons for this view.

Response: The Department received no comments from potential subcontractors objecting to the flow down of this clause. In light of this fact, the Department has no reason to believe that the pool of eligible subcontractors will be significantly affected by this requirement. With respect to the view that this requirement will substantially increase the cost of these contracts and the paperwork burden imposed on the contractor, the Department has revised paragraph (c) to provide that, upon termination or completion of the contract, contractors will be required to deliver only those records that the Department requests. In addition, paragraph (f) has been revised to provide that, if the government exercises its right under paragraph (c) to obtain copies and delivery of the records, the government also may waive record retention schedules that apply to records in the possession of the contractor. With respect to the Paperwork Reduction Act issue raised, the Department notes that this clause does not require the contractor or its subcontractors to create any records or collect any information. It merely addresses the ownership and disposition of records that are acquired or generated in performance of the contract.

The final rule makes the following changes:

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

2. *970.0407–2,* Access to and ownership of records. This subsection is added to explain the circumstances under which contractor ownership of certain records may be appropriate.

3. *970.5204–79,* Access to and ownership of records. A clause is added to identify government-owned records; contractor-owned records; the government's rights to inspection, copying, use, and audit of records; and records retention requirements under the contract.

Item VIII—Management and Operating Contract Overtime Practices

A. Overtime Control Plan Requirement

Comment: Six commenters provided information related to the requirement for an overtime control plan. Five commenters opposed the requirement for an overtime control plan. Four of these five believed that this requirement was micro-management, unnecessarily prescriptive, and/or antithetical to the Department's philosophy of contract reform. One commenter believed that achieving control of overtime costs would be better achieved through the use of contract incentives or the award fee process because the preparation of an overtime control plan would be costly, the plan would not guarantee control of overtime costs, and adherence to a plan would reduce contractor flexibility to cope with changing workloads.

Response: Based on comments received and further review of this subject, the Department has significantly simplified its policy on overtime management in this final rule.

B. Use of the Median Overtime Usage Rate

Comment: Two commenters addressed the Department's use of the median overtime usage rate as a percentage of payroll. One commenter stated, '' the DOE should revise and expand the clause because its reliance on a median overtime usage figure is unclear * * * the median figure is a calculation only the DOE can perform, meaning that DOE would have to provide this figure to the contractor. The [rule] should be revised to require DOE to make this information available, so contractors on an ongoing basis can monitor their overtime usage.'' Both commenters believed that the Department should elaborate on the definition of median overtime usage and how it is computed.

Response: The Department has removed the median overtime usage rate as a standard and has provided that the contracting officer may require an overtime control plan when contractor overtime usage as a percentage of payroll has exceeded, or is likely to exceed, 4%, or the contracting officer otherwise deems overtime expenditures excessive.

C. Consistency With Draft DOE Order 350.1, Contractor Human Resource Management Programs

Comment: One commenter stated that the Department should make this rule consistent with the draft DOE Order 350.1.

Response: The Department agrees that the final rule and the order must be consistent. Revisions have been made accordingly.

The final rule adopts the changes in the proposed rule, as follows:

1. *970.2275.* A new section, Overtime management, is added.

2. *970.2275–1.* A new subsection, General, is added to state the Department's overtime management policy.

3. *970.2275–2.* A new subsection, Contract clause, is added to prescribe

the use of the overtime management clause.

4. *970.5204–80.* The clause, Overtime Management, is added.

Item IX—Procedural Matters

A. Review Under Executive Order 12866

Comment: One commenter opined that the notice of proposed rulemaking was a ''significant regulatory action'' that should have been reviewed by the Office of Management and Budget in accordance with Executive Order 12866, Regulatory Planning and Review. The commenter noted a recent Department of Energy Inspector General Report indicating certain approaches to determining fees on management and operating contracts could increase available fees by as much as $218 million per year.

Response: Since the subject of the Inspector General's report referred to by the commenter, determination of fees, was not a part of the proposed rule, the Inspector General's estimate is irrelevant as to whether this rulemaking is a ''significant regulatory action'' under Executive Order 12866. The Department estimates that the incremental effect on the economy of the changes to the existing regulations made by this final rule will be well under $100 million.

Based on this estimate, the Department determined that the proposed rulemaking was not a ''significant regulatory action,'' and, consequently, was not required to be reviewed by the Office of Information and Regulatory Affairs in the Office of Management and Budget. Nevertheless, the Department sought review by and accommodated comments from the Office of Management and Budget and its Office of Federal Procurement Policy at both the proposal and final rule stage.

B. Review Under Executive Order 12988

Comment: One commenter questioned the legal clarity, as described in Executive Order 12988, ''Civil Justice Reform,'' of three clauses (Insurance—Litigation and Claims; Property; and Laws, Regulations, and DOE Directives).

Response: Most of the issues raised are dealt with in the discussion of specific topics above and the responses should satisfy the commenter. The Office of Federal Procurement Policy in the Office of Management and Budget agrees with the Department that the clarity in the clauses published today is sufficient for negotiation purposes. If ambiguities are identified that warrant further clarification, they can be resolved during negotiations.

III. Procedural Requirements

A. Review Under Executive Order 12866

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

B. Review Under Executive Order 12988

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

C. Review Under the Regulatory Flexibility Act

This rule was reviewed under the Regulatory Flexibility Act of 1980, 5 U.S.C. 601, *et seq.*, which requires preparation of a regulatory flexibility analysis for any rule that is likely to have a significant economic impact on a substantial number of small entities. This rule is intended to provide policies for the Department of Energy's management and operating contractors, who have traditionally been large businesses. There are three clauses which identify flowdown requirements to subcontractors, some of whom may be small businesses. (1) The clause at 970.5204–2, Integration of Environment, Safety, and Health into Work Planning and Execution, provides for the flowdown of ''appropriate requirements'' to subcontractors performing work on-site at a Department-owned or -leased facility. (2) The clause at 970.5204–78, Laws, Regulations, and DOE Directives, provides for subcontract compliance with ''necessary provisions'' as determined by the prime contractor. (3) The clause at 970.5204–79, Ownership of Records, specifies requirements for certain subcontractors meeting specific thresholds. The first two clauses do not impose a significant economic impact since nearly all of the prime and subcontracts in which these clauses are used have been cost reimbursement contracts. The third clause has considered the needs of small business in establishing thresholds above which requirements must be met. The Department anticipates that most small businesses will not meet these threshold requirements for compliance. Based on this review, the Department certifies that this rulemaking 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

The Office of Management and Budget has determined that the Safety Management System description submissions required by the clause at revised section 970.5204–2, Integration of Environment, Safety, and Health Into Work Planning and Execution, and the Make-or-Buy Plan required by section 970.1507 and clause 970.5204–76, Make-or-Buy Plan, are new collections of information. Accordingly, the Department submitted these requirements to OMB for review under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, and OMB's regulations at 5 CFR Part 1320.

1. Safety Management System Description

In the June 24, 1996 notice of proposed rulemaking, the Department proposed revising the Safety and Health clause at DEAR 970.5204–2 to require contractor compliance with applicable laws, regulations, and directives pertaining to the environment as well as to safety and health. The Department

also proposed revising the current safety and health implementation plan requirement to: (1) change from 30 days to 60 days the period for submitting a plan; (2) provide for periodic updating of the plan; and (3) make plan changes subject to the change control process applicable to the contract. On October 15, 1996, the Department published a notice reopening the comment period on revised proposals for contractor compliance with environment, safety, and health (ES&H) requirements which reflected DNFSB Recommendation 95–2, Integrated Safety Management, and the Department's Implementation Plan. As the notice of reopening proposed, this final rule will require management and operating contractors to submit a Safety Management System (SMS) description that addresses principles of integrated safety management.

The process of preparing and submitting a SMS description is similar to that currently required for submission of a safety and health implementation plan. It does not conflict with or create a greater burden than the originally proposed submission of an ES&H Management Plan. The SMS encompasses the same integrated safety management functions (e.g., work planning, budgeting, priority-setting, and work execution). As discussed earlier in this preamble, the Department received a number of comments on the original proposal for submission of an ES&H Management Plan and on the reopening proposal for submission of an SMS description. While commenting on the specifics of the proposals, none of the commenters questioned the need for such a requirement.

Preparation of the initial SMS description will usually be a one-time action completed at the start of a five-year management and operating contract. The clause also requires contractors to review the description and provide annual updates to the Department. The updates are not a new requirement and have been a part of the Department's planning and budgeting process. Approximately 36 contractors will be subject to the SMS description submission requirement. The Department estimates that in any one year approximately 20% or 7 SMS descriptions will be submitted to the Department for approval. The Department's best estimate is that the burden will average 350 hours per contractor. This estimate is based on discussions with contractors about the burden of meeting the current safety and health implementation plan requirement. The burden of compliance for any contractor will depend upon the particular considerations and circumstances applicable to the site or facility. The total annual paperwork burden that will result from this requirement is estimated to be approximately 2450 hours.

The Office of Management and Budget approved the SMS description information collection on May 28, 1997, and assigned to it OMB Number 1910–5103.

2. Make-or-Buy Plans

In the proposed rule, the Department proposed that contracts for the management and operation of Department facilities require the preparation and administration of a make-or-buy plan. The Department considers this to be necessary for identifying the most efficient and cost effective manner for performing the functions at its facility. As discussed earlier in this preamble, the Department received a number of comments on the proposed make-or-buy plan requirement, but no commenter questioned the need for such a plan.

Preparation of the initial make-or-buy plan will usually be a one-time action. The plan will be effective for the term of the contract. Contractors are required to review the plan annually to ensure that it reflects current conditions and must propose changes when appropriate. Approximately 36 management and operating contractors will be subject to the make-or-buy plan requirement. Based on experience, the Department estimates that in any one year, 20% or approximately 7 initial make-or-buy plans will be submitted to the Department for approval. The Department expects great variance in make-or-buy plans because of the different considerations and circumstances present at Department facilities. The Department also expects these differences among Department facilities to affect the burden hours required to complete make-or-buy plans. The Department's best estimate is that the burden will range from 25 hours to 350 hours per contractor. The Department expects less variance in the burden of conducting the annual make-or-buy plan review; the Department estimates the burden of annual review will be approximately 100 hours per contractor. The total annual paperwork burden that will result from this requirement is estimated to be 5350 hours.

The Office of Management and Budget approved the Make-or-Buy Plan information collection on June 5, 1997, and assigned to it OMB Number 1910–5102.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number. 5 CFR § 1320.5(b).

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 rulemaking 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 rulemaking is categorically excluded from the need to prepare an environmental impact statement or environmental assessment.

G. 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).

H. 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 Parts 901, 917, 926, 950, 952 and 970

Government procurement.

Issued in Washington, D.C., on June 13, 1997.

Richard H. Hopf,

Deputy Assistant Secretary for Procurement and Assistance Management.

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

PART 901—FEDERAL ACQUISITION REGULATIONS SYSTEM

1. The authority citation for Part 901 continues to read as follows:

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

2. Section 901.105, OMB control numbers, is amended by deleting the last sentence and adding the following sentence at the end of the paragraph:

901.105 OMB control numbers.

* * * The OMB control number for the collection of information under 48 CFR chapter 9 is 1910–4100, except for the following: Reporting and Recordkeeping Requirements for Make-or-Buy Plans (see 48 CFR (DEAR) 970.5204–76)—OMB number 1910–5102; Reporting and Recordkeeping Requirements for Safety Management (see 48 CFR (DEAR) 970.5204–2)—OMB number 1910–5103.

PART 917—SPECIAL CONTRACTING METHODS

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

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

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

917.600 Scope of subpart.

* * * The requirements of this subpart apply to any Department of Energy management and operating contract, including performance-based management contracts as defined in 48 CFR (DEAR) 917.601. References in this subpart to ''management and operating contracts'' shall be understood to include ''performance-based management contracts.''

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

917.601 Definitions.

Performance-based contracting means structuring all aspects of an acquisition around the purpose of the work to be performed as opposed to the manner by which the work is to be performed or broad or imprecise statements of work.

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

PART 926—OTHER SOCIOECONOMIC PROGRAMS

6. The authority citation for Part 926 continues to read as follows:

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

7. Part 926, Other Socioeconomic Programs, is amended by adding a new Subpart 926.71, Implementation of Section 3161 of the National Defense Authorization Act for Fiscal Year 1993, to read as follows:

Subpart 926.71—Implementation of Section 3161 of the National Defense Authorization Act for Fiscal Year 1993

926.7101 Policy.

Consistent with the requirements of Section 3161(c)(2), 42 U.S.C. 7474h(c)(2), in instances where DOE has determined that a change in workforce at a DOE Defense Nuclear Facility is necessary, the Department, to the extent practicable, is required to provide employees under Department of Energy contracts whose employment in positions at such a facility is terminated with a preference in any hiring of the Department. Consistent with published DOE guidance regarding Section 3161, such preference in hiring extends to hiring by DOE contractors and subcontractors.

926.7102 Definition.

Eligible employee means a current or former employee of a contractor or subcontractor employed at a DOE Defense Nuclear Facility—

(1) Whose position of employment has been, or will be, involuntarily terminated (except if terminated for cause),

(2) Who has met the eligibility criteria contained in Department of Energy guidance for contractor work force restructuring, as may be amended or supplemented from time to time, and

(3) Who is qualified for a job vacancy with the Department or one of its contractors with respect to work under its contract with the Department at the time a position is available.

926.7103 Requirements.

(a) Section 3161, 42 U.S.C. 7474h, confers a continuing right to a preference in hiring to an eligible employee of Department of Energy Defense Nuclear Facilities. This right to a preference in hiring includes employment opportunities of any Department of Energy contractor, regardless of the place of performance of the contract. Accordingly, eligible former employees of contractors and subcontractors employed at Department of Energy Defense Nuclear Facilities, to the extent practicable, shall be provided a hiring preference in employment opportunities of other Department of Energy contractors for work under their contracts.

(b) The Office of Worker and Community Transition (WT) is responsible for establishing policies and procedures relating to the Department of Energy implementation of Section 3161. Contracting Officers, in concert with representatives of the field office responsible for implementation of Section 3161 at the Department of Energy Defense Nuclear Facility and local counsel, should consult with the Office of Worker and Community Transition to determine applicability of Section 3161 requirements, including hiring preference requirements, for displaced workers.

926.7104 Contract clause.

The contracting officer shall insert the clause at 48 CFR (DEAR) 952.226–74, Displaced Employee Hiring Preference, in contracts (except for contracts for commercial items, pursuant to 41 U.S.C. 403) which exceed $500,000 in value.

PART 950—EXTRAORDINARY CONTRACTUAL ACTIONS

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

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

950.7101 [Amended]

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

PART 952—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

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

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

11. Section 952.223–71 is amended by revising the section heading to read as follows:

952.223–71 Integration of environment, safety, and health into work planning and execution.

952.223–74 [Removed and Reserved]

12. Subsection 952.223–74, Nuclear facility safety applicability, is removed and reserved.

13. Subsection 952.223–75, Preservation of individual occupational radiation exposure records, is amended by revising the introductory paragraph to read as follows:

952.223–75 Preservation of individual occupational radiation exposure records.

The contracting officer shall insert this clause in contracts containing 952.223–71, Integration of environment, safety, and health into work planning and execution, or 952.223–72, Radiation protection and nuclear criticality.

* * * * *

14. Subpart 952.2, Text of Provisions and Clauses, is amended to add a new section 952.226–74, Displaced Employee Hiring Preference, to read as follows:

952.226–74 Displaced employee hiring preference.

As prescribed in 48 CFR (DEAR) 926.7104, insert the following clause.

Displaced Employee Hiring Preference (June 1997)

(a) *Definition.*

Eligible employee means a current or former employee of a contractor or subcontractor employed at a Department of Energy Defense Nuclear Facility (1) whose position of employment has been, or will be, involuntarily terminated (except if terminated for cause), (2) who has also met the eligibility criteria contained in the Department of Energy guidance for contractor work force restructuring, as may be amended or supplemented from time to time, and (3) who is qualified for a particular job vacancy with the Department or one of its contractors with respect to work under its contract with the Department at the time the particular position is available.

(b) Consistent with Department of Energy guidance for contractor work force restructuring, as may be amended or supplemented from time to time, the contractor agrees that it will provide a preference in hiring to an eligible employee to the extent practicable for work performed under this contract.

(c) The requirements of this clause shall be included in subcontracts at any tier (except for subcontracts for commercial items pursuant to 41 U.S.C. 403) expected to exceed $500,000.

PART 970—DOE MANAGEMENT AND OPERATING CONTRACTS

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

Authority: Sec. 161 of the Atomic Energy Act of 1954 (42 U.S.C. 2201), sec. 644 of the Department of Energy Organization Act, Public Law 95–91 (42 U.S.C. 7254).

970.0407 [Removed]

16. The text of section 970.0407, Record retention requirements, is removed.

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

970.0407–1 Alternate retention schedules.

Records produced under the Department's contracts involving management and operation responsibilities relative to DOE-owned or -leased facilities are to be retained and disposed of in accordance with the requirements of DOE Order 1324.5B, Records Management Program and DOE Records Schedules, (see current version) rather than those set forth at FAR subpart 4.7, Contractor Records Retention.

18. New section 970.0407–2, Access to and ownership of records, is added to read as follows:

970.0407–2 Access to and ownership of records.

Contracting officers may agree to contractor ownership of the categories of records designated in the instruction in paragraph (b) of 48 CFR (DEAR) 970.5204–79, Access to and Ownership of Records, provided the Government's rights to inspect, copy, and audit these records are not limited. These rights must be retained by the Government in order to carry out the Department's legal responsibilities under the Atomic Energy Act and other statutes in overseeing its contractors, including compliance with the Department's health and safety and reporting requirements, and to protect the public interest.

19. New section 970.0407–3, Contract clause, is added to read as follows:

970.0407–3 Contract clause.

The contracting officer shall insert the clause at 48 CFR (DEAR) 970.5204–79, Access to and Ownership of Records, in management and operating contracts.

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

970.0470 Department of Energy directives.

970.0470–1 General.

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

(b) Where directives requirements are established using either the Standards/Requirements Identification Process or the Work Smart Standards Process, the applicable process should also be used to establish the environment, safety, and health portion of the list identified in paragraph (a) of this section.

970.0470–2 Contract clause.

The contracting officer shall insert the clause at DEAR 970.5204–78, Laws, Regulations, and DOE Directives, in management and operating contracts.

21. Section 970.1001 is revised to read as follows:

970.1001 Performance-based contracting.

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

(b) The use of performance-based statements of work, where feasible, is the preferred method for establishing

work requirements. Such statements of work and other documents used to establish work requirements (such as work authorization directives) should describe performance requirements and expectations in terms of outcome, results, or final work products, as opposed to methods, processes, or design.

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

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

970.1002 [Amended]

22. The Section heading for Section 970.1002 is revised to read, ''Additional considerations.''

23. Subpart 970.15 is amended by adding new Section 970.1507, Make-or-buy plans, consisting of 970.1507–1, 970.1507–2, and 970.1507–3, to read as follows:

970.1507 Make-or-buy plans
970.1507–1 Policy.
970.1507–2 Requirements.
970.1507–3 Contract clause.

970.1507 Make-or-buy plans.

970.1507–1 Policy.

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

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

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

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

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

970.1507–2 Requirements.

(a) *Development of program-specific make-or-buy criteria.* DOE program offices responsible for the work conducted at the facility or site shall develop program specific make-or-buy criteria. Program specific make-or-buy criteria are those factors that reflect specific mission or program objectives (including operational efficiency, contractor diversity, environment, safety and health, work force displacement and restructuring, and collective bargaining agreements) and that, upon their application to a specific work effort, would override a decision based on a purely economic rationale. These criteria are to be used to assess each work effort identified in a facility's or site's make-or-buy plan to determine the appropriateness of a contractor's make-or-buy decisions. Program specific make-or-buy criteria shall be provided to the contractor for use in developing a make-or-buy plan for the facility, site, or specific program, as appropriate.

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

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

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

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

(2) If the requirement for each offeror to submit a preliminary make-or-buy plan as part of its proposal is impractical or otherwise incompatible with the acquisition strategy, consideration should be given to structuring the evaluation criteria for the competitive solicitation in such a manner as to permit the evaluation of an offeror's approach to conducting its make-or-buy program within the context of the contractual requirements.

(3) The successful offeror's preliminary make-or-buy plan shall be submitted for final approval within 180 days after contract award, consistent with the requirements of 48 CFR (DEAR) 970.5204–76(c), Make-or-buy Plan.

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

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

accomplish mission-related program and projects;

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

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

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

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

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

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

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

(e) *Approval.* The contracting officer shall approve all plans and revisions thereto. Once approved, a make-or-buy plan shall remain effective for the term of the contract (up to a period of five years), unless circumstances warrant a change.

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

(1) The contractor is complying with the plan;

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

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

970.1507–3 Contract clause.

The contracting officer shall insert the clause at 48 CFR (DEAR) 970.5204–76, Make-or-Buy Plan, in management and operating contracts.

24. Section 970.1509–2, paragraph (a), is revised to read as follows:

970.1509–2 Special considerations—educational institutions.

(a) It is DOE policy to compensate educational institutions consistent with the level of financial and management risk they assume in connection with their work for the Department.

* * * * *

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

970.2275 Overtime management.

970.2275–1 General.

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

970.2275–2 Contract clause.

The contracting officer shall insert the clause at 48 CFR (DEAR) 970.5204–80, Overtime Management, in management and operating contracts.

970.2302–2 [Amended]

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

27. Subpart 970.26, Other Socioeconomic Programs, is amended by designating the existing paragraph in 970.2601, Implementation of Section 3021 of the Energy Policy Act of 1992, as paragraph (a), and adding a 970.2601(b), to read as follows:

970.2601 Implementation of Section 3021 of the Energy Policy Act of 1992.

(a) * * *

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

28. Subpart 970.26, Other Socioeconomic Programs, is amended by adding 970.2602–1, Implementation of Section 3161 of the National Defense Authorization Act for Fiscal Year 1993, and adding 970.2602–2, Contract Clause, to read as follows:

970.2602–1 Implementation of Section 3161 of the National Defense Authorization Act for Fiscal Year 1993.

(a) Consistent with the objectives of Section 3161 of the National Defense Authorization Act for Fiscal Year 1993, 42 U.S.C. 7474h, in instances where the Department of Energy has determined that a change in work force at a DOE Defense Nuclear Facility is necessary, DOE contractors and subcontractors at DOE Defense Nuclear Facilities shall accomplish work force restructuring or displacement so as to mitigate social and economic impacts and in a manner consistent with any DOE work force restructuring plan in effect for the facility or site. In all cases, mitigation shall include the requirement for hiring preferences for employees whose positions have been terminated (except for termination for cause) as a result of changes to the work force at the facility due to restructuring accomplished under the requirements of Section 3161. Where applicable, contractors may take additional actions to mitigate consistent with the Department's Workforce Restructuring Plan for the facility or site.

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

970.2602–2 Contract clause.

The contracting officer shall insert the clause at 48 CFR (DEAR) 970.5204–77, Workforce Restructuring Under Section 3161 of the National Defense Authorization Act for Fiscal Year 1993, in contracts for the management and operation of Department of Energy Defense Nuclear Facilities and, as appropriate, in other contracts that include site management responsibilities at a Department of Energy Defense Nuclear Facility.

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

970.2830 Contract clause.

The contracting officer shall insert the clause at 48 CFR (DEAR) 970.5204–31, Insurance—Litigation and Claims, in management and operating contracts. Paragraphs (h)(3) and (j)(2) apply to a nonprofit contractor only to the extent specifically provided in the individual contract.

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

970.3101–3 General basis for reimbursement of costs.

(a) * * *

(1) Allowability and reasonableness in accordance with FAR 31.201–2(d) and 31.201–3;

* * * * *

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

970.3102–21 Fines and penalties.

It is Department of Energy policy not to reimburse management and operating contractors for fines and penalties except as provided in 48 CFR (DEAR) 970.5204–13(e)(12), Allowable Costs and Fixed Fee (Management and Operating Contracts), 48 CFR (DEAR) 970.5204–14(e)(10), Allowable Costs and Fixed Fee (Support Contracts), and 48 CFR (DEAR) 970.5204–75, Preexisting Conditions.

970.3102–22 [Removed]

32. Subsection 970.3102–22 is removed.

33. Section 970.3103, Contract clauses, is amended to add new paragraph (d) to read as follows:

970.3103 Contract clauses.

* * * * *

(d) The clause at 970.5204–75, Preexisting Conditions, shall be included in management and operating contracts. Alternate I of the clause shall be inserted in management and operating contracts with incumbent contractors. Alternate II shall be inserted in contracts with contractors not previously working at that particular site or facility.

34. Subpart 970.45, Government Property, and section 970.4501, Contract clause, are added as follows:

Subpart 970.45—Government—Property

970.4501 Contract clause.

The contracting officer shall insert the clause at 970.5204–21, Property, in management and operating contracts. Paragraph (f)(1)(iii) applies to a non-profit contractor only to the extent specifically provided in the individual contract.

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

970.5204–2 Integration of environment, safety, and health into work planning and execution.

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

Integration of Environment, Safety, and Health Into Work Planning and Execution (June 1997)

(a) For the purposes of this clause,

(1) Safety encompasses environment, safety and health, including pollution prevention and waste minimization; and

(2) Employees include subcontractor employees.

(b) In performing work under this contract, the contractor shall perform work safely, in a manner that ensures adequate protection for employees, the public, and the environment, and shall be accountable for the safe performance of work. The contractor shall exercise a degree of care commensurate with the work and the associated hazards. The contractor shall ensure that management of environment, safety and health (ES&H) functions and activities becomes an integral but visible part of the contractor's work planning and execution processes. The contractor shall, in the performance of work, ensure that:

(1) Line management is responsible for the protection of employees, the public, and the environment. Line management includes those contractor and subcontractor employees managing or supervising employees performing work.

(2) Clear and unambiguous lines of authority and responsibility for ensuring ES&H are established and maintained at all organizational levels.

(3) Personnel possess the experience, knowledge, skills, and abilities that are necessary to discharge their responsibilities.

(4) Resources are effectively allocated to address ES&H, programmatic, and operational considerations. Protecting employees, the public, and the environment is a priority whenever activities are planned and performed.

(5) Before work is performed, the associated hazards are evaluated and an agreed-upon set of ES&H standards and requirements are established which, if properly implemented, provide adequate assurance that employees, the public, and the environment are protected from adverse consequences.

(6) Administrative and engineering controls to prevent and mitigate hazards are tailored to the work being performed and associated hazards. Emphasis should be on designing the work and/or controls to reduce or eliminate the hazards and to prevent accidents and unplanned releases and exposures.

(7) The conditions and requirements to be satisfied for operations to be initiated and conducted are established and agreed-upon by DOE and the contractor. These agreed-upon conditions and requirements are requirements of the contract and binding upon the contractor. The extent of documentation and level of authority for agreement shall be tailored to the complexity and hazards associated with the work and shall be established in a Safety Management System.

(c) The contractor shall manage and perform work in accordance with a documented Safety Management System (System) that fulfills all conditions in paragraph (b) of this clause at a minimum. Documentation of the System shall describe how the contractor will:

(1) Define the scope of work;

(2) Identify and analyze hazards associated with the work;

(3) Develop and implement hazard controls;

(4) Perform work within controls; and

(5) Provide feedback on adequacy of controls and continue to improve safety management.

(d) The System shall describe how the contractor will establish, document, and implement safety performance objectives, performance measures, and commitments in response to DOE program and budget execution guidance while maintaining the integrity of the System. The System shall also describe how the contractor will measure system effectiveness.

(e) The contractor shall submit to the contracting officer documentation of its System for review and approval. Dates for submittal, discussions, and revisions to the System will be established by the contracting officer. Guidance on the preparation, content, review, and approval of the System will be provided by the contracting officer. On an annual basis, the contractor shall review and update, for DOE approval, its safety performance objectives, performance measures, and commitments consistent with and in response to DOE's program and budget execution guidance and direction. Resources shall be identified and allocated to meet the safety objectives and performance commitments as well as maintain the integrity of the entire System. Accordingly, the System shall be integrated with the contractor's business processes for work planning, budgeting, authorization, execution, and change control.

(f) The contractor shall comply with, and assist the Department of Energy in complying with, ES&H requirements of all applicable laws and regulations, and applicable directives identified in the clause of this contract on Laws, Regulations, and DOE Directives. The contractor shall cooperate with Federal and non-Federal agencies having jurisdiction over ES&H matters under this contract.

(g) The contractor shall promptly evaluate and resolve any noncompliance with applicable ES&H requirements and the System. If the contractor fails to provide resolution or if, at any time, the contractor's acts or failure to act causes substantial harm or an imminent danger to the environment or health and safety of employees or the public, the contracting officer may issue an order stopping work in whole or in part. Any stop work order issued by a contracting officer under this clause (or issued by the contractor to a subcontractor in accordance with paragraph

(i) of this clause) shall be without prejudice to any other legal or contractual rights of the Government. In the event that the contracting officer issues a stop work order, an order authorizing the resumption of the work may be issued at the discretion of the contracting officer. The contractor shall not be entitled to an extension of time or additional fee or damages by reason of, or in connection with, any work stoppage ordered in accordance with this clause.

(h) The contractor is responsible for compliance with the ES&H requirements applicable to this contract regardless of the performer of the work.

(i) The contractor shall include a clause substantially the same as this clause in subcontracts involving complex or hazardous work on site at a DOE-owned or -leased facility. Such subcontracts shall provide for the right to stop work under the conditions described in paragraph (g) of this clause. Depending on the complexity and hazards associated with the work, the contractor may require that the subcontractor submit a Safety Management System for the contractor's review and approval.

36. Section 970.5204–13, Allowable costs and fixed-fee (management and operating contracts), is amended by revising the introductory text and clause heading, clause paragraph (c), clause paragraphs (d)(1), (d)(4), (d)(9), (e)(12), (e)(17), removing the note preceding (e)(36), and revising (e)(36) to read as follows:

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

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

Allowable Costs and Fixed-Fee (Management and Operating Contracts) (June 1997)

* * * * *

(c) Allowable costs. The allowable cost of performing the work under this contract shall be the costs and expenses that are actually incurred by the contractor in the performance of the contract work in accordance with its terms, that are necessary or incident thereto, and that are determined to be allowable as set forth in this paragraph. The determination of allowability of cost shall be based on:

(1) Allowability and reasonableness in accordance with FAR 31.201–2(d) and 31.201–3;

(2) Standards promulgated by the Cost Accounting Standards Board, if applicable; otherwise, generally accepted accounting principles and practices appropriate to the particular circumstances; and

(3) Recognition of all exclusions and limitations set forth in this clause or elsewhere in this contract as to types or amounts of items of cost. Allowable costs shall not include the cost of any item described as unallowable in paragraph (e) of this clause except as indicated therein. Failure to mention an item of cost specifically in paragraphs (d) or (e) of this clause shall not imply either that it is allowable or that it is unallowable.

(d) * * *

(1) Bonds and insurance, including self-insurance, as provided in the clause entitled, Insurance—Litigation and Claims.

* * * * *

(4) Reasonable litigation and other legal expenses, including counsel fees, if incurred in accordance with the clause of the contract entitled, Insurance—Litigation and Claims, and the DOE approved contractor litigation management procedures (including cost guidelines) as such procedures may be revised from time to time, and if not otherwise made unallowable in this contract.

* * * * *

(9) Repairs, maintenance, inspection, replacement, and disposal of Government-owned property and the restoration or clean-up of site and facilities to the extent approved by the contracting officer and as allowable under paragraph (f) of the clause of this contract entitled, Property.

* * * * *

(e) * * *

(12) Fines and penalties, except, with respect to civil fines and penalties only, if the contractor demonstrates to the contracting officer that—

(i) Such a civil fine or penalty was incurred as a result of compliance with specific terms and conditions of the contract or written instructions from the contracting officer; or

(ii) Such a civil fine or penalty was imposed without regard to fault and could not have been avoided by the exercise of due care.

* * * * *

(17) Losses or expenses:

(i) On, or arising from the sale, exchange, or abandonment of capital assets, including investments;

(ii) On other contracts, including the contractor's contributed portion under cost-sharing contracts;

(iii) In connection with price reductions to and discount purchases by employees and others from any source;

(iv) That are compensated for by insurance or otherwise or which would have been compensated for by insurance required by law or by written direction of the contracting officer but which the contractor failed to procure or maintain through its own fault or negligence;

(v) That result from willful misconduct or lack of good faith on the part of any of the contractor's managerial personnel (as that term is defined in the clause of this contract entitled, Property);

(vi) That represent liabilities to third persons that are not allowable under the clause of this contract entitled, Insurance—Litigation and Claims; or

(vii) That represent liabilities to third persons for which the contractor has expressly accepted responsibility under other terms of this contract.

* * * * *

(36) Notwithstanding any other provision of this contract, the costs of bonds and insurance are unallowable to the extent they are incurred to protect and indemnify the contractor and/or subcontractor against otherwise unallowable costs, unless such insurance or bond is required by law, the express terms of this contract, or is authorized in writing by the contracting officer. The cost of commercial insurance to protect the contractor against the costs of correcting its own defects in materials or workmanship is an unallowable cost.

37. Section 970.5204–14, Allowable costs and fixed-fee (support contracts), is amended by revising the introductory text and clause heading, clause paragraph (c), clause paragraphs (d)(1), (d)(4), (d)(10), (e)(10), (e)(15), removing the note preceding (e)(34), and revising (e)(34) to read as follows:

970.5204–14 Allowable costs and fixed-fee (support contracts). As prescribed in 48 CFR (DEAR) 970.3103(a), insert the following clause.

Allowable Costs and Fixed-Fee (Support Contracts) (June 1997)

* * * * *

(c) Allowable costs. The allowable cost of performing the work under this contract shall be the costs and expenses that are actually incurred by the contractor in the performance of the contract work in accordance with its terms, that are necessary or incident thereto, and are determined to be allowable as set forth in this paragraph. The determination of allowability of cost hereunder shall be based on:

(1) Allowability and reasonableness in accordance with FAR 31.201–2(d) and 31.201–3;

(2) Standards promulgated by the Cost Accounting Standards Board, if applicable; otherwise, generally accepted accounting principles and practices appropriate to the particular circumstances; and

(3) Recognition of all exclusions and limitations set forth in this clause or elsewhere in this contract as to types or amounts of items of cost. Allowable costs shall not include the cost of any item described as unallowable in paragraph (e) of this clause except as indicated therein. Failure to mention an item of cost specifically in paragraphs (d) or (e) of this clause shall not imply either that it is allowable or that it is unallowable.

(d) * * *

(1) Bonds and insurance, including self-insurance, as provided in the clause entitled Insurance—Litigation and Claims.

* * * * *

(4) Reasonable litigation and other legal expenses, including counsel fees, if incurred in accordance with the clause of the contract entitled, Insurance—Litigation and Claims, in accordance with DOE approved contractor litigation management procedures (including cost guidelines) as such procedures may be revised from time to time, and if not otherwise made unallowable in this contract.

* * * * *

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

* * * * *

(e) * * *

(10) Fines and penalties, except, with respect to civil fines and penalties only, if the contractor demonstrates to the contracting officer that—

(i) Such a civil fine or penalty was incurred as a result of compliance with specific terms and conditions of the contract or written instructions from the contracting officer; or

(ii) Such a civil fine or penalty was imposed without regard to fault and could not have been avoided by the exercise of due care.

* * * * *

(15) Losses or expenses:

(i) On, or arising from the sale, exchange, or abandonment of capital assets, including investments;

(ii) On other contracts, including the contractor's contributed portion under cost-sharing contracts;

(iii) In connection with price reductions to and discount purchases by employees and others from any source;

(iv) That are compensated for by insurance or otherwise or which would have been compensated for by insurance required by law or by written direction of the contracting officer but which the contractor failed to procure or maintain through its own fault or negligence;

(v) That result from willful misconduct or lack of good faith on the part of any of the contractor's managerial personnel (as that term is defined in the clause of this contract entitled, Property);

(vi) That represent liabilities to third persons that are not allowable under the clause of this contract entitled, Insurance—Litigation and Claims; or

(vii) That represent liabilities to third persons for which the contractor has expressly accepted responsibility under other terms of this contract.

* * * * *

(34) Notwithstanding any other provision of this contract, the costs of bonds and insurance are unallowable to the extent they are incurred to protect and indemnify the contractor and/or subcontractor against otherwise unallowable costs, unless such insurance or bond is required by law, the express terms of this contract, or is authorized in writing by the contracting officer. The cost of commercial insurance to protect the contractor against the costs of correcting its own defects in materials or workmanship is an unallowable cost.

38. Subsection 970.5204–16 is amended by revising the introductory text and the clause heading and by adding three sentences to the end of clause paragraph (a) and revising alternate clause paragraph (a) following NOTE 2 to read as follows:

970.5204–16 Payments and advances.

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

Payments and Advances (June 1997)

(a) * * * Fixed-fee payments shall be made by direct payment or withdrawn from funds advanced or available under this contract, as determined by the contracting officer. The contracting officer may offset against any such fee payment, the amounts owed to the Government by the contractor, including any amounts owed for disallowed costs under this contract. No fixed-fee payment may be withdrawn against the letter-of-credit without prior written approval of the contracting officer.

* * * * *

(a) *Payment of Base Fee and Award Fee.* The base fee, if any, is payable in equal monthly installments. Award fee pool amounts earned are payable following the issuance by the FDO of a Determination of Award Fee Pool Amount Earned, in accordance with the clause of this contract entitled, Award Fee: Base Fee and Award Fee. Base fee and award fee pool amount earned payments shall be made by direct payment or withdrawn from funds advanced or available under this contract, as determined by the contracting officer. The contracting officer may offset against any such fee payment, the amounts owed to the Government by the contractor, including any amounts owed for disallowed costs under this contract. No base fee or award fee pool amount earned payment may be withdrawn against the letter-of-credit without prior written approval of the contracting officer.

* * * * *

970.5204–18 [Removed and Reserved]

39. Section 970.5204–18 is removed and reserved.

40. Section 970.5204–21, Property, is amended by revising the introductory text, clause heading, and clause paragraphs (e), (f), (g), (i) and (j), and adding a new (k) to read as follows:

970.5204–21 Property.

As prescribed in 970.4501, insert the following clause.

Property (June 1997)

* * * * *

(e) Protection of government property—management of high-risk property and classified materials.

(1) The contractor shall take all reasonable precautions, and such other actions as may be directed by the contracting officer, or in the absence of such direction, in accordance with sound business practice, to safeguard and protect government property in the contractor's possession or custody.

(2) In addition, the contractor shall ensure that adequate safeguards are in place, and adhered to, for the handling, control and disposition of high-risk property and classified materials throughout the life cycle of the property and materials consistent with the policies, practices and procedures for property management contained in the Federal Property Management Regulations (41 CFR chapter 101), the Department of Energy Property Management Regulations (41 CFR chapter 109), and other applicable regulations.

(3) High-risk property is property, the loss, destruction, damage to, or the unintended or premature transfer of which could pose risks to the public, the environment, or the national security interests of the United States. High-risk property includes proliferation sensitive, nuclear related dual use, export controlled, chemically or radioactively contaminated, hazardous, and specially designed and prepared property, including property on the militarily critical technologies list.

(f) *Risk of loss of Government property.*

(1)(i) The contractor shall not be liable for the loss or destruction of, or damage to, Government property unless such loss, destruction, or damage was caused by any of the following:

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

(B) Failure of the contractor's managerial personnel to take all reasonable steps to comply with any appropriate written direction of the contracting officer to safeguard such property under paragraph (e) of this clause; or

(C) Failure of contractor managerial personnel to establish, administer, or properly maintain an approved property management system in accordance with paragraph (i)(1) of this clause.

(ii) If, after an initial review of the facts, the contracting officer informs the contractor that there is reason to believe that the loss, destruction of, or damage to the government property results from conduct falling within one of the categories set forth above, the burden of proof shall be upon the contractor to show that the contractor should not be required to compensate the government for the loss, destruction, or damage.

(2) In the event that the contractor is determined liable for the loss, destruction or damage to Government property in accordance with (f)(1) of this clause, the contractor's compensation to the Government shall be determined as follows:

(i) For damaged property, the compensation shall be the cost of repairing such damaged property, plus any costs incurred for temporary replacement of the damaged property. However, the value of repair costs shall not exceed the fair market value of the damaged property. If a fair market value of the property does not exist, the contracting officer shall determine the value of such property, consistent with all relevant facts and circumstances.

(ii) For destroyed or lost property, the compensation shall be the fair market value of such property at the time of such loss or destruction, plus any costs incurred for temporary replacement and costs associated with the disposition of destroyed property. If a fair market value of the property does not exist, the contracting officer shall determine the value of such property, consistent with all relevant facts and circumstances.

(3) The portion of the cost of insurance obtained by the contractor that is allocable to coverage of risks of loss referred to in paragraph (f)(1) of this clause is not allowable.

(g) *Steps to be taken in event of loss.* In the event of any damage, destruction, or loss to Government property in the possession or custody of the contractor with a value above the threshold set out in the contractor's approved property management system, the contractor:

(1) Shall immediately inform the contracting officer of the occasion and extent thereof,

(2) Shall take all reasonable steps to protect the property remaining, and

(3) Shall repair or replace the damaged, destroyed, or lost property in accordance with the written direction of the contracting officer. The contractor shall take no action prejudicial to the right of the Government to

recover therefore, and shall furnish to the Government, on request, all reasonable assistance in obtaining recovery.

* * * * *

(i) *Property Management.*

(1) *Property Management System.*

(i) The contractor shall establish, administer, and properly maintain an approved property management system of accounting for and control, utilization, maintenance, repair, protection, preservation, and disposition of Government property in its possession under the contract. The contractor's property management system shall be submitted to the contracting officer for approval and shall be maintained and administered in accordance with sound business practice, applicable Federal Property Management Regulations and Department of Energy Property Management Regulations, and such directives or instructions which the contracting officer may from time to time prescribe.

(ii) In order for a property management system to be approved, it must provide for:

(A) Comprehensive coverage of property from the requirement identification, through its life cycle, to final disposition;

(B) Employee personal responsibility and accountability for Government-owned property;

(C) Full integration with the contractor's other administrative and financial systems; and

(D) A method for continuously improving property management practices through the identification of best practices established by ''best in class'' performers.

(iii) Approval of the contractor's property management system shall be contingent upon the completion of the baseline inventory as provided in subparagraph (i)(2) of this clause.

(2) *Property Inventory.*

(i) Unless otherwise directed by the contracting officer, the contractor shall within six months after execution of the contract provide a baseline inventory covering all items of Government property.

(ii) If the contractor is succeeding another contractor in the performance of this contract, the contractor shall conduct a joint reconciliation of the property inventory with the predecessor contractor. The contractor agrees to participate in a joint reconciliation of the property inventory at the completion of this contract. This information will be used to provide a baseline for the succeeding contract as well as information for closeout of the predecessor contract.

(j) The term ''contractor's managerial personnel'' as used in this clause means the contractor's directors, officers and any of its managers, superintendents, or other equivalent representatives who have supervision or direction of:

(1) All or substantially all of the contractor's business; or

(2) All or substantially all of the contractor's operations at any one facility or separate location to which this contract is being performed; or

(3) A separate and complete major industrial operation in connection with the performance of this contract; or

(4) A separate and complete major construction, alteration, or repair operation in connection with performance of this contract; or

(5) A separate and discrete major task or operation in connection with the performance of this contract.

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

(j) The term ''contractor's managerial personnel'' as used in this clause means the contractor's directors, officers and any of its managers, superintendents, or other equivalent representatives who have supervision or direction of all or substantially all of:

(1) The contractor's business; or

(2) The contractor's operations at any one facility or separate location at which this contract is being performed; or

(3) The contractor's Government property system and/or a Major System Acquisition or Major Project as defined in DOE Order 4700.1 (Version in effect on effective date of contract).

(k) The contractor shall include this clause in cost reimbursable contracts.

970.5204–26 [Removed and Reserved]

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

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

970.5204–31 Insurance—litigation and claims.

As prescribed in 48 CFR (DEAR) 970.2830(a), insert the following clause.

Insurance—Litigation and Claims (June 1997)

(a) The contractor may, with the prior written authorization of the contracting officer, and shall, upon the request of the Government, initiate litigation against third parties, including proceedings before administrative agencies, in connection with this contract. The contractor shall proceed with such litigation in good faith and as directed from time to time by the contracting officer.

(b) The contractor shall give the contracting officer immediate notice in writing of any legal proceeding, including any proceeding before an administrative agency, filed against the contractor arising out of the performance of this contract. Except as otherwise directed by the contracting officer, in writing, the contractor shall furnish immediately to the contracting officer copies of all pertinent papers received by the contractor with respect to such action. The contractor, with the prior written authorization of the contracting officer, shall proceed with such litigation in good faith and as directed from time to time by the contracting officer.

(c)(1) Except as provided in paragraph (c)(2) of this clause, the contractor shall procure and maintain such bonds and insurance as required by law or approved in writing by the contracting officer.

(2) The contractor may, with the approval of the contracting officer, maintain a self-insurance program; provided that, with respect to workers' compensation, the contractor is qualified pursuant to statutory authority.

(3) All bonds and insurance required by this clause shall be in a form and amount and for those periods as the contracting officer may require or approve and with sureties and insurers approved by the contracting officer.

(d) The contractor agrees to submit for the contracting officer's approval, to the extent and in the manner required by the contracting officer, any other bonds and insurance that are maintained by the contractor in connection with the performance of this contract and for which the contractor seeks reimbursement. If an insurance cost (whether a premium for commercial insurance or related to self-insurance) includes a portion covering costs made unallowable elsewhere in the contract, and the share of the cost for coverage for the unallowable cost is determinable, the portion of the cost that is otherwise an allowable cost under this contract is reimbursable to the extent determined by the contracting officer.

(e) Except as provided in subparagraphs (g) and (h) of this clause, or specifically disallowed elsewhere in this contract, the contractor shall be reimbursed—

(1) For that portion of the reasonable cost of bonds and insurance allocable to this contract required in accordance with contract terms or approved under this clause, and

(2) For liabilities (and reasonable expenses incidental to such liabilities, including litigation costs) to third persons not compensated by insurance or otherwise without regard to and as an exception to the clause of this contract entitled, Obligation of Funds (48 CFR (DEAR) 970.5204–15).

(f) The Government's liability under paragraph (e) of this clause is subject to the availability of appropriated funds. Nothing in this contract shall be construed as implying that the Congress will, at a later date, appropriate funds sufficient to meet deficiencies.

(g) Notwithstanding any other provision of this contract, the contractor shall not be reimbursed for liabilities (and expenses incidental to such liabilities, including litigation costs, counsel fees, judgment and settlements)—

(1) Which are otherwise unallowable by law or the provisions of this contract; or

(2) For which the contractor has failed to insure or to maintain insurance as required by law, this contract, or by the written direction of the contracting officer.

(h) In addition to the cost reimbursement limitations contained in DEAR 970.3101–3, and notwithstanding any other provision of this contract, the contractor's liabilities to third persons, including employees but excluding costs incidental to workers' 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's

(1) Willful misconduct,

(2) Lack of good faith, or

(3) Failure to exercise prudent business judgment, which means failure to act in the same manner as a prudent person in the conduct of competitive business; or, in the case of a non-profit educational institution, failure to act in the manner that a prudent

person would under the circumstances prevailing at the time the decision to incur the cost is made.

(i) The burden of proof shall be upon the contractor to establish that costs covered by paragraph (h) of this clause are allowable and reasonable if, after an initial review of the facts, the contracting officer challenges a specific cost or informs the contractor that there is reason to believe that the cost results from willful misconduct, lack of good faith, or failure to exercise prudent business judgment by contractor managerial personnel.

(j)(1) All litigation costs, including counsel fees, judgments and settlements shall be differentiated and accounted for by the contractor so as to be separately identifiable. If the contracting officer provisionally disallows such costs, then the contractor may not use funds advanced by DOE under the contract to finance the litigation.

(2) Punitive damages are not allowable unless the act or failure to act which gave rise to the liability resulted from compliance with specific terms and conditions of the contract or written instructions from the contracting officer.

(3) The portion of the cost of insurance obtained by the contractor that is allocable to coverage of liabilities referred to in paragraph (g)(1) of this clause is not allowable.

(4) The term ''contractor's managerial personnel'' is defined in clause paragraph (j) of 48 CFR (DEAR) 970.5204–21.

(k) The contractor may at its own expense and not as an allowable cost procure for its own protection insurance to compensate the contractor for any unallowable or unreimbursable costs incurred in connection with contract performance.

(l) If any suit or action is filed or any claim is made against the contractor, the cost and expense of which may be reimbursable to the contractor under this contract, and the risk of which is then uninsured or is insured for less than the amount claimed, the contractor shall—

(1) Immediately notify the contracting officer and promptly furnish copies of all pertinent papers received;

(2) Authorize Department representatives to collaborate with: in-house or DOE-approved outside counsel in settling or defending the claim; or counsel for the insurance carrier in settling or defending the claim if the amount of the liability claimed exceeds the amount of coverage, unless precluded by the terms of the insurance contract; and

(3) Authorize Department representatives to settle the claim or to defend or represent the contractor in and/or to take charge of any litigation, if required by the Department, if the liability is not insured or covered by bond. In any action against more than one Department contractor, the Department may require the contractor to be represented by common counsel. Counsel for the contractor may, at the contractor's own expense, be associated with the Department representatives in any such claim or litigation.

970.5204–32 [Removed and Reserved]

43. Subsection 970.5204–32, Required bond and insurance-exclusive of Government property, is removed and reserved.

970.5204–41 [Removed and Reserved]

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

970.5204–55 and 970.5204–6 [Removed and Reserved]

45. Subsections 970.5204–55, Ceiling on certain liabilities for profit making contractors, and 970.5204–56, Determining avoidable costs, are removed and reserved.

46. Subsection 970–5204–61, Cost prohibitions related to legal and other proceedings, is amended by revising the introductory text, the clause heading, and the introductory text to paragraph (b), designating the existing paragraph (c) as paragraph (c)(1), adding paragraph (c)(2), and revising paragraph (e)(4) to read as follows:

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

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

Cost Prohibitions Related to Legal and Other Proceedings (June 1997)

* * * * *

(b) Except as otherwise described in this section, costs incurred in connection with any proceeding brought by a third party in the name of the United States under the False Claims Act, 31 U.S.C. 3730, or costs incurred in connection with any criminal, civil or administrative proceeding by the Federal Government, or a State, local or foreign government, are not allowable if the proceeding relates to a violation of, or failure to comply with a Federal, State, local or foreign statute or regulation by the contractor, and results in any of the following dispositions:

* * * * *

(c)(1) * * *

(2) In the event of a settlement of any proceeding brought by a third party under the False Claims Act in which the United States did not intervene, reasonable costs incurred by the contractor in connection with such a proceeding that are not otherwise unallowable by regulation or by separate agreement with the United States, may be allowed if the contracting officer, in consultation with his or her legal advisor, determines that there was very little likelihood that the third party would have been successful on the merits.

* * * * *

(e) * * *

(4) The amount of costs allowed does not exceed 80 percent of the total costs incurred and otherwise allowable under the contract. Such amount that may be allowed (up to the 80 percent limit) shall not exceed the percentage determined by the contracting officer to be appropriate, considering the complexity of procurement litigation, generally accepted principles governing the award of legal fees in civil actions involving the United States as a party, and such other factors as may be appropriate. The amount of reimbursement allowed for legal costs in connection with any proceeding described in subparagraph (c)(2) shall be the amount determined to be reasonable by the contracting officer but shall not exceed 80 percent of otherwise allowable costs incurred. Agreements reached under paragraph (c) of this subsection shall be subject to this limitation. If, however, an agreement explicitly states the amount of otherwise allowable incurred legal fees and limits the allowable recovery to 80 percent or less of the stated legal fees, no additional limitation need be applied.

* * * * *

970.5204–62 [Removed and Reserved]

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

48. Subpart 970.52, Contract Clauses for Management and Operating Contracts, is amended to add 970.5204–75, Preexisting Conditions; 970.5204–76, Make-or-Buy Plan; 970.5204–77, Workforce Restructuring Under Section 3161 of the National Defense Authorization Act for Fiscal Year 1993; 970.5204–78, Laws, Regulations, and DOE Directives; 970.5204–79, Access to and Ownership of Records; and 970.5204–80, Overtime Management, to read as follows:

970.5204–75 Preexisting conditions.
970.5204–76 Make-or-buy plan.
970.5204–77 Workforce restructuring under Section 3161 of the National Defense Authorization Act for Fiscal Year 1993.
970.5204–78 Laws, regulations, and DOE directives.
970.5204–79 Access to and ownership of records.
970.5204–80 Overtime management.

970.5204–75 Preexisting conditions.

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

Preexisting Conditions (June 1997)

(a) The Department of Energy agrees to reimburse the contractor, and the contractor shall not be held responsible, for any liability (including without limitation, a claim involving strict or absolute liability and any civil fine or penalty), expense, or remediation cost, but limited to those of a civil nature, which may be incurred by, imposed on, or asserted against the contractor arising out of any condition, act, or failure to act which occurred before the contractor assumed responsibility on [Insert date contract began]. To the extent the acts or omissions of the contractor cause or add to any liability, expense or remediation cost resulting from conditions in existence prior to [Insert date contract began], the contractor shall be responsible in accordance with the terms and conditions of this contract.

(b) The obligations of the Department of Energy under this clause are subject to the

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

(a) Any liability, obligation, loss, damage, claim (including without limitation, a claim involving strict or absolute liability), action, suit, civil fine or penalty, cost, expense or disbursement, which may be incurred or imposed, or asserted by any party and arising out of any condition, act or failure to act which occurred before [Insert date this clause was included in contract], in conjunction with the management and operation of [Insert name of facility], shall be deemed incurred under Contract No. [Insert number of prior contract].

Alternate II. As prescribed in 48 CFR (DEAR) 970.3103(d), include the following paragraph (c):

(c) The contractor has the duty to inspect the facilities and sites and timely identify to the contracting officer those conditions which it believes could give rise to a liability, obligation, loss, damage, penalty, fine, claim, action, suit, cost, expense, or disbursement or areas of actual or potential noncompliance with the terms and conditions of this contract or applicable law or regulation. The contractor has the responsibility to take corrective action, as directed by the contracting officer and as required elsewhere in this contract.

970.5204–76 Make-or-buy plan.

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

Make-or-Buy Plan (June 1997)

(a) *Definitions.*

Buy item means a work activity, supply, or service to be produced or performed by an outside source, including a subcontractor or an affiliate, subsidiary, or division of the contractor.

Make item means a work activity, supply, or service to be produced or performed by the contractor using its personnel and other resources at the Department of Energy facility or site.

Make-or-buy plan means a contractor's written program for the contract that identifies work efforts or requirements that either are ''make items'' or ''buy items.''

(b) *Make-or-buy plan.* The contractor shall develop and implement a make-or-buy plan that establishes a preference for providing supplies and services on a least-cost basis, subject to any specific make or buy criteria identified in the contract or otherwise provided by the contracting officer. In developing and implementing its make-or-buy plan, the contractor agrees to assess subcontracting opportunities and implement subcontracting decisions in accordance with the following:

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

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

(c) *Submission and approval.* For new contract awards, the contractor shall submit an initial make-or-buy plan, for approval, within 180 days after contract award. If the existing contract is to be extended, the contractor shall submit a make-or-buy plan for review and approval at least 90 days prior to the commencement of the negotiations for the extension. The following documentation shall be prepared and submitted:

(1) A description of the each work item, and if appropriate, the identification of the associated Work Authorization or Work Breakdown Structure element;

(2) The categorization of each work item as ''must make,'' ''must buy,'' or ''can make or buy,'' with the reasons for such categorization in consideration of the program specific make or buy criteria (including least cost considerations). For non-core capabilities categorized as ''must make,'' a cost/benefit analysis must be performed for each item if:

(i) The contractor is not the least-cost performer, and

(ii) A program specific make-or-buy criterion does not otherwise justify a ''must make'' categorization;

(3) A decision to either ''make'' or ''buy'' in consideration of the program specific make or buy criteria (including least cost considerations) for work effort categorized as ''can make or buy'';

(4) Identification of potential suppliers and subcontractors, if known, and their location and size status;

(5) A recommendation to defer a make or buy decision where categorization of an identifiable work effort is impracticable at the time of initial development of the plan and a schedule for future re-evaluation;

(6) A description of the impact of a change in current practice of making or buying on the existing work force; and

(7) Any additional information appropriate to support and explain the plan.

(d) *Conduct of operations.* Once a make-or-buy plan is approved, the contractor shall perform in accordance with the plan.

(e) *Changes to the make-or-buy plan.* The make-or-buy plan established in accordance with paragraph (b) of this clause shall remain in effect for the term of the contract, unless:

(1) A lesser period is provided either for the total plan or for individual items or work effort;

(2) The circumstances supporting the make-or-buy decisions change, or

(3) New work is identified.

At least annually, the contractor shall review its approved make-or-buy plan to ensure that it reflects current conditions. Changes to the approved make-or-buy plan shall be submitted in advance of the effective date of the proposed change in sufficient time to permit evaluation and review. Changes shall be submitted in accordance with the instructions provided by the contracting officer. Modification of the make-or-buy plan to incorporate proposed changes or additions shall be effective upon the contractor's receipt of the contracting officer's written approval.

970.5204–77 Workforce Restructuring Under Section 3161 of the National Defense Authorization Act for Fiscal Year 1993.

As prescribed in 48 CFR (DEAR) 970.2602–2, insert the following clause.

Workforce Restructuring Under Section 3161 of the National Defense Authorization Act for Fiscal Year 1993 (June 1997)

(a) Consistent with the objectives of Section 3161 of the National Defense Authorization Act for Fiscal Year 1993, 42 U.S.C. 7274h, in instances where the Department of Energy has determined that a change in workforce at a Department of Energy Defense Nuclear Facility is necessary, the contractor agrees to (1) comply with the Department of Energy Workforce Restructuring Plan for the facility, if applicable, and (2) use its best efforts to accomplish workforce restructuring or displacement so as to mitigate social and economic impacts.

(b) The requirements of this clause shall be included in subcontracts at any tier (except subcontracts for commercial items pursuant to 41 U.S.C. 403) expected to exceed $500,000.

970.5204–78 Laws, regulations, and DOE directives.

As prescribed in 48 CFR (DEAR) 970.0470–2, insert the following clause.

Laws, Regulations, and DOE Directives (June 1997)

(a) In performing work under this contract, the contractor shall comply with the requirements of applicable Federal, State, and local laws and regulations (including DOE regulations), unless relief has been granted in writing by the appropriate regulatory agency. A List of Applicable Laws and Regulations (List A) may be appended to this contract for information purposes. Omission of any applicable law or regulation from List A does not affect the obligation of the contractor to comply with such law or regulation pursuant to this paragraph.

(b) In performing work under this contract, the contractor shall comply with the requirements of those Department of Energy directives, or parts thereof, identified in the List of Applicable Directives (List B) appended to this contract. Except as otherwise provided for in paragraph (c) of this clause, the contracting officer may, from time to time and at any time, revise List B by unilateral modification to the contract to add, modify, or delete specific requirements. Prior to revising List B, the contracting officer shall notify the contractor in writing of the Department's intent to revise List B and provide the contractor with the opportunity to assess the effect of the contractor's compliance with the revised list on contract cost and funding, technical performance, and schedule; and identify any potential inconsistencies between the revised list and the other terms and conditions of the contract. Within 30 days after receipt of the contracting officer's notice, the contractor

shall advise the contracting officer in writing of the potential impact of the contractor's compliance with the revised list. Based on the information provided by the contractor and any other information available, the contracting officer shall decide whether to revise List B and so advise the contractor not later than 30 days prior to the effective date of the revision of List B. The contractor and the contracting officer shall identify and, if appropriate, agree to any changes to other contract terms and conditions, including cost and schedule, associated with the revision of List B pursuant to the clause entitled, Changes, of this contract.

(c) Environmental, safety, and health (ES&H) requirements appropriate for work conducted under this contract may be determined by a DOE approved process to evaluate the work and the associated hazards and identify an appropriately tailored set of standards, practices, and controls, such as a tailoring process included in a DOE approved Safety Management System implemented under 48 CFR (DEAR) 970.5204–2. When such a process is used, the set of tailored ES&H requirements, as approved by DOE pursuant to the process, shall be incorporated into List B as contract requirements with full force and effect. These requirements shall supersede, in whole or in part, the contractual environmental, safety, and health requirements previously made applicable to the contract by List B. If the tailored set of requirements identifies an alternative requirement varying from an ES&H requirement of an applicable law or regulation, the contractor shall request an exemption or other appropriate regulatory relief specified in the regulation.

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

970.5204–79 Access to and ownership of records.

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

Access to and Ownership of Records (June 1997)

(a) *Government-owned records.* Except as provided in paragraph (b) of this clause, all records acquired or generated by the contractor in its performance of this contract shall be the property of the Government and shall be delivered to the Government or otherwise disposed of by the contractor either as the contracting officer may from time to time direct during the process of the work or, in any event, as the contracting officer shall direct upon completion or termination of the contract.

(b) *Contractor-owned records.* The following records are considered the property of the contractor and are not within the scope of paragraph (a) of this clause. [The contracting officer shall identify which of the following categories of records will be included in the clause.]

(1) Employment-related records (such as workers' compensation files; employee relations records, records on salary and employee benefits; drug testing records, labor negotiation records; records on ethics, employee concerns, and other employee related investigations conducted under an expectation of confidentiality; employee assistance program records; and personnel and medical/health-related records and similar files), except for those records described by the contract as being maintained in Privacy Act systems of records.

(2) Confidential contractor financial information, and correspondence between the contractor and other segments of the contractor located away from the DOE facility (i.e., the contractor's corporate headquarters);

(3) Records relating to any procurement action by the contractor, except for records that under 48 CFR (DEAR) 970.5204-9, Accounts, Records, and Inspection, are described as the property of the Government; and

(4) Legal records, including legal opinions, litigation files, and documents covered by the attorney-client and attorney work product privileges; and

(5) The following categories of records maintained pursuant to the technology transfer clause of this contract:

(i) Executed license agreements, including exhibits or appendices containing information on royalties, royalty rates, other financial information, or commercialization plans, and all related documents, notes and correspondence.

(ii) The contractor's protected Cooperative Research and Development Agreement (CRADA) information and appendices to a CRADA that contain licensing terms and conditions, or royalty or royalty rate information.

(iii) Patent, copyright, mask work, and trademark application files and related contractor invention disclosures, documents and correspondence, where the contractor has elected rights or has permission to assert rights and has not relinquished such rights or turned such rights over to the Government.

(c) *Contract completion or termination.* In the event of completion or termination of this contract, copies of any of the contractor-owned records identified in paragraph (b) of this clause, upon the request of the Government, shall be delivered to DOE or its designees, including successor contractors. Upon delivery, title to such records shall vest in DOE or its designees, and such records shall be protected in accordance with applicable federal laws (including the Privacy Act), as appropriate.

(d) *Inspection, copying, and audit of records.* All records acquired or generated by the contractor under this contract in the possession of the contractor, including those described at paragraph (b) of this clause, shall be subject to inspection, copying, and audit by the Government or its designees at all reasonable times, and the contractor shall afford the Government or its designees reasonable facilities for such inspection, copying, and audit; provided, however, that upon request by the contracting officer, the contractor shall deliver such records to a location specified by the contracting officer for inspection, copying, and audit. The Government or its designees shall use such records in accordance with applicable federal laws (including the Privacy Act), as appropriate.

(e) *Applicability.* Paragraphs (b), (c), and (d) of this clause apply to all records without regard to the date or origination of such records.

(f) *Records retention standards.* Special records retention standards, described at DOE Order 1324.5B, Records Management Program and DOE Records Schedules (version in effect on effective date of contract), are applicable for the classes of records described therein, whether or not the records are owned by the Government or the contractor. In addition, the contractor shall retain individual radiation exposure records generated in the performance of work under this contract until DOE authorizes disposal. The Government may waive application of these record retention schedules, if, upon termination or completion of the contract, the Government exercises its right under paragraph (c) of this clause to obtain copies and delivery of records described in paragraphs (a) and (b) of this clause.

(g) *Flow down.* The contractor shall include the requirements of this clause in all subcontracts that are of a cost-reimbursement type if any of the following factors is present:

(1) The value of the subcontract is greater than $2 million (unless specifically waived by the contracting officer);

(2) The contracting officer determines that the subcontract is, or involves, a critical task related to the contract; or

(3) The subcontract includes 48 CFR (DEAR) 970.5204–2, Integration of Environment, Safety, and Health into Work Planning and Execution, or similar clause.

970.5204–80 Overtime management.

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

Overtime Management (June 1997)

(a) The contractor shall maintain adequate internal controls to ensure that employee overtime is authorized only if cost effective and necessary to ensure performance of work under this contract.

(b) The contractor shall notify the contracting officer when in any given year it is likely that overtime usage as a percentage of payroll may exceed 4%.

(c) The contracting officer may require the submission, for approval, of a formal annual overtime control plan whenever contractor overtime usage as a percentage of payroll has exceeded, or is likely to exceed, 4%, or if the contracting officer otherwise deems overtime expenditures excessive. The plan shall include, at a minimum:

(1) An overtime premium fund (maximum dollar amount);

(2) Specific controls for casual overtime for non-exempt employees;

(3) Specific parameters for allowability of exempt overtime;

(4) An evaluation of alternatives to the use of overtime; and

(5) Submission of a semi-annual report that includes for exempt and non-exempt employees:

(i) Total cost of overtime;

(ii) Total cost of straight time;
(iii) Overtime cost as a percentage of straight-time cost;
(iv) Total overtime hours;
(v) Total straight-time hours; and
(vi) Overtime hours as a percentage of straight-time hours.

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DEPARTMENT OF ENERGY

48 CFR Parts 917 and 970

[1991–AB–09]

Acquisition Regulation; Department of Energy Management and Operating Contracts

AGENCY: Department of Energy.

ACTION: Final rule.

SUMMARY: The Department of Energy (DOE) is adopting as final an interim rule amending its Acquisition Regulation to set forth its policy regarding the competition and extension of the Department's management and operating contracts. Under its policy, the Department affirms its commitment to provide for full and open competition in the award of its management and operating contracts, except where the Department determines that competitive procedures should not be used pursuant to one of the circumstances authorized by the Competition in Contracting Act of 1984 (41 U.S.C. 254), as implemented in Part 6 of the Federal Acquisition Regulation. This rulemaking implements one of the key recommendations of the Department's contract reform initiative to improve its acquisition system.

DATES: This final rule is effective June 27, 1997.

FOR FURTHER INFORMATION CONTACT: Connie P. Fournier, Office of Policy (HR–51), Department of Energy, 1000 Independence Avenue, SW, Washington, D.C. 20585; (202) 586–8245; (202) 586–0545 (facsimile); connie.fournier@hq.doe.gov (Internet).

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Energy published an interim final rule in the **Federal Register** on June 24, 1996 (61 FR 32584). The public comment period closed August 23, 1996. The Department received comments from three companies. Copies of all written comments are available for public inspection at the Department's Freedom of Information Reading Room, Room 1E–190, Forrestal Building, 1000 Independence Avenue, SW, Washington, DC 20585, (202) 586–6020.

Today's final rule adopts as final the amendments in the interim final rulemaking.

II. Disposition of Comments

The Department has considered and evaluated the comments received during the public comment period. The following discussion describes the comments received and provides the Department's responses to the comments.

A. *Comment:* One commenter believes that the policy statement in 917.602 is inconsistent with the remainder of DEAR 917 and FAR Part 17. The commenter believes that the concept of a noncompetitive ''extension'' apparently synonymous with a contract ''option'' and concludes that our policy goes beyond intent of CICA and FAR. Specific inconsistency is between 970.1702–1(b) and FAR 17.605.(b).

Response: As explained in the preamble of the interim rule, the Department's intent in adopting its new policy on competition for its management and operating contracts is to move away from past policies which established noncompetitive extensions as the preferential norm to a new policy which establishes competition as the preferential norm. The key component of this change in policy is to adopt the Government wide standards for competition as statutorily provided under the Competition in Contracting Act (CICA) and implemented in FAR Part 6. Accordingly, the Department will seek competition for its management and operating contracts unless a noncompetitive extension can be justified in accordance with one of the permissible authorities under CICA. The regulatory language of 917.602 and 970.1702 is consistent with both FAR Part 6 and Part 17.

Regarding the distinction between an ''option to extend'' and an ''noncompetitive extension'' under one of the seven authorities of CICA, DEAR 970.1702–1(a) provides clear language that distinguishes the two mechanisms. In addition, the clear language of this section directs that any extension, other than an option included in the basic contract, can only be accomplished when justified under CICA and when authorized by the Head of the Agency.

B. *Comment:* Two commenters believe that the Department's adoption of a policy that mandates competition after a 10 year contract term detracts from the Department's flexibility in making management decisions regarding retaining an incumbent contractor particularly where the contractor's performance has been excellent or the contractor operates a Federally Funded Research and Development Center. One of the commenters recommends that DOE, instead, rely on annual performance appraisal results and criteria for ''options'' to determine whether competition should be sought.

Response: The Department believes that the new policy provides adequate management flexibility in determining whether competing a management and operating contract is in the best interests of the Department. The Competition in Contracting Act provides 7 circumstances under which an agency may seek other than full and open competition in the award of a contract. The Department intends to rely on these Governmentwide authorities in cases where the Department intends to extend a contract with in incumbent contractor or otherwise intends to limit competition.

A detailed list of changes in this final rule follows.

1. 917.602, Policy. This section is added to prescribe the Department's policy to provide for full and open competition and the use of competitive procedures in the award of management and operating contracts, except as authorized by law and the Head of the Agency.

2. *917.605,* Award, renewal, and extension. This section is amended to remove the existing coverage at 917.605(b) that prescribes the Department's internal processing and documentation requirements for extend/compete decisions. This nonregulatory subject matter will be reflected in internal Department guidance. A new section 917.605(d) is added to provide for the conditional approval of any noncompetitive extension (other than an extension accomplished by the exercise of an option) subject to the successful achievement of the Government's negotiation objectives. This section also permits adequate time to compete the contract in the event that the negotiations cannot be successfully concluded.